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ASIA PACIFIC ECONOMIC LAW FORUM

The Third Asia Pacific Economic Law Forum was held in Christchurch from 5 to 7 December 1997. This forum gathers together academics, practitioners and employed lawyers from the Pacific Rim and South East Asia. The Forum was hosted by the University of Canterbury Law School with Gordon Walker as the lead organiser. The Forum itself is largely the brainchild of Professor Roman Tomasic of ANU. It is hoped that the 1998 forum will be in Hong Kong or in the PRC.

Two distinguished speakers from Hong Kong were Ms Cally Jordan, of Stikeman Elliot, and Professor Gao Xi-Qing, the head of the investment arm of the Bank of China in Hong Kong.

Ms Jordan spoke of her experience of examining company law for the Hong Kong government. Like New Zealand, Hong Kong's company law was based on the English, but was now effectively orphaned by developments of doubtful utility which had taken place in England but not been replicated in Hong Kong. Hong Kong had also decided some time ago that the old English model of company law, with its requirements for two shareholders and two directors, was harming its ability to compete internationally.

She took as her examples the Model Corporations Law in the US, the Canadian Business Corporations Law and New Zealand's company law reform package. The American Model Law could not be entirely followed since Hong Kong, like New Zealand, has a high proportion of publicly quoted companies controlled by one shareholder or by a small number of related shareholders. Canadian law could not be followed entirely as it only provides for business corporations and does not cover not-for-profit organisations.

The result is a recommendation close to the New Zealand Companies Acts. The handover of power in Hong Kong on 1 July has meant that no one knows whether the new government will pursue the recommendation, but if it is implemented there, the effects could be far-reaching.

Modern company law in the PRC is based on a German model, as is much of the PRC new codified commercial law. This extends even to the two Board structure and the presence of trade union representatives on one of them. But it was already the case that the PRC's German style civil law had become infected with common law concepts and Ms Jordan predicted that the vitality of the Hong Kong markets will mean that PRC law will tend to be altered to conform to Hong Kong law rather than vice versa.

Meanwhile, the British government has looked at the reforms in Canada, Australia and New Zealand and concluded that a fundamental rethink of English Company Law is now required.

Ms Jordan also pointed out that company law reform could not be regarded as having been completed by a package such as the New Zealand companies legislation of 1993. To maintain its position as a regional investment and commercial centre Hong Kong needed continually to improve its business environment, including methods of corporate governance. The same applies to New Zealand. Company law does not offer optimum solutions in even the medium term. Today governments effectively compete for corporate registrations and competitive business has constantly to be moving forwards.

Ms Jordan also spoke about the law reform process. Her exercise had had all the advantages and disadvantages of being done by one person, rather than by a committee. The advantages of this approach seemed to the listener substantially to outweigh the disadvantages. Like all such exercises, however, the product of all the hard work now lay in limbo awaiting a political decision whether to proceed with legislation.

Professor Gao Xi-Qing discussed investment in the PRC and explained the mysteries of "A", "B" and "H" shares and "red chips", not to mention companies which were "tinted red" or "painted red". Perhaps most interestingly of all, the concept of fiduciary duty had been grafted on to the PRC's Germanic company law. Since, however, the notion of fiduciary duty was unknown to Chinese lawyers, it had had to be codified into a structure of 14 rules. Doubtless they will become meat for dissection by equity lawyers in the common law world.

Other papers considered specific legal problems in the PRC such as patent rights and the reform of state-owned enterprises. A common thread was differing attitudes to matters such as negotiation of agreements and enforcement of contracts in the West and in China. Duncan Webb of Victoria University of Wellington, after a recent visit to Beijing, noted that in addition to cultural differences, anyone contracting in China had to be aware that informal decisions by local political leaders could effectively override not only contracts but what appeared by Western criteria to be the law.

Rule of law questions also arose in a paper explaining why practitioners in the PRC prefer arbitration to litigation. This poses problems for the development of the law, since arbitral decisions are private and do not create precedents. The privatisation of SOEs was also discussed by George Barker and Victoria Heine of the Law and Economics

Consulting Group. They discussed why governments might want to retain some sort of control over privatised firms and how that might be done. Every reason for doing so, revenue raising, control over assets or pricing, could be better achieved by applying the general law of property or contract than by ad hoc devices such as the "Kiwi share".

Another paper that generalised from New Zealand experience was by Adam Mikkelsen, of Russell McVeagh, on constitutionalism and control of the currency. Mikkelsen reviewed the basic tenets of the rule of law and showed that the manipulation by governments of the value of money was contrary to fundamental constitutional principles. The preferred option was private money, which meant that money ceased to be an aspect of the individual's relationship with the state. If the government insisted on maintaining a monopoly over the money supply, then a rule based system seemed to push one towards a money supply rule, rather than a price target. Money supply rules, however, posed insuperable economic problems. The only solution is that the value of money should be based on a basket of tradable items such as long term bonds.

A further stream of papers considered matters of specifically local interest. Andrew Caddie of Simpson Grierson, discussed his experience of dealing with forestry joint ventures involving Maori and overseas investors. The existence of two land registration systems could pose problems but in the case of land controlled by Maori Trusts or Incorporations, the Forestry Rights Registration Act 1983 simplified matters considerably. Graham Scott reviewed the lessons of New Zealand's experience with light-handed competition law. Almost every legislated solution was, he argued, less efficient than the simple common law rule that anti-competitive contracts were just not enforceable. Peter Fitzsimons of Buddle Findlay looked back at the takeover code controversy. He took up Cally Jordan's point that the majority of New Zealand companies are controlled by majority or large minority shareholders, whereas this is not the case in the USA. The result is that some 70 per cent of New Zealand companies are effectively immune from hostile takeover, but minority shareholders can suddenly find themselves under new management without being offered the opportunity to sell out. Fitzsimons did not argue from this that a takeover code was necessarily required, but that the debate of a few years ago had been conducted on the basis of a largely irrelevant model of shareholding and that the subject should be reviewed.

Discussion was requested by Paul Heath, consultant to the Law Commission. The Law Commission is to examine electronic commerce and to consider whether law reform is required to meet its requirements. Many of the problems posed by electronic commerce actually arose from specific legislative requirements, such as the Contracts Enforcement Act, the Sale of Goods (UN Convention) Act and the Evidence Amendment Act. It might be that further legislation was required or it might be that electronic commerce will force the repeal of much of this legislation, as the Law Commission has already proposed for the Contracts Enforcement Act. So the Internet, the archetype of a spontaneously evolving system, may drive us back to the common law. Perhaps events such as this forum can save some of the emerging jurisdictions from going through this cycle. ❑

LETTERS

FROM THE CHIEF JUSTICE AND THE CHIEF DISTRICT COURT JUDGE

Catherine Cull, in her article on criminal case management (NZLJ) Nov 1997 pp 385-388, asks whether the pursuit of efficiency has compromised fundamental principles of the adversary system and whether the rights of the criminally accused have been whittled away by the question for speedy trials (what rights are not identified). Further, Ms Cull asks what we are trying to achieve by case management procedures, what the mischief is and whether Judges should be involved in case management.

Judicial case management is not a New Zealand invention. There is worldwide recognition that Court time is an expensive public resource which, in the interests of litigants and the general public, needs to be effectively managed. Speedy trials consistent with adequate time to prepare are in the interests of the Crown, the defence and the public. Effective criminal case management techniques allow the early identification of issues for trial, ensure that once trials commence they are completed without delay and are considerate of ever reluctant jurors and their daily lives. They also ensure the information that needs to be exchanged between the parties is exchanged early, and that the administrative procedures associated with the trial are efficient and are not in themselves a cause for delay. The mischief to be met is the injustice of delayed trials for all – the remedy has been application of well tried and established case management techniques. The reduction in the number of successful Bill of Rights applications based on delay and the reduction overall in the number of outstanding criminal jury trials in New Zealand is the evidence which supports the solution. Surely the era where counsel could obtain adjournments at will, primarily to suit their convenience, is now well over (and rightly so) in whatever jurisdiction counsel appear.

Finally, at p 388 Ms Cull asks whether what needs to be done must be done by a Judge. It has to be done by someone with the skill to manage the competing interests of Crown and defence and strike a fair balance between them. The presiding officer must also carry the necessary degree of authority. In an ideal world the task might be carried out by Masters, or qualified Registrars. It does not necessarily have to be a Judge but at the moment in this country, Judges are the only available resource.

Thomas Eichelbaum
Chief Justice

R L Young
Chief District Court Judge

SPECIAL LEAVE TO APPEAL

Professor Peter Spiller, The University of Waikato

saw the Privy Council hear a case crucial to its own jurisdiction

INTRODUCTION

In July 1997 the Judicial Committee of the Privy Council considered two applications for special leave to appeal from New Zealand. These were in the cases *De Morgan v Director-General of Social Welfare* and *Sears v Attorney-General* [1997] 3 NZLR 385. I was privileged to be a spectator at the hearing and an early recipient of the judgment.

The chances of special leave being granted by the Privy Council were limited: over the last ten years, of the 28 special leave applications filed from New Zealand, only four have been granted. However, in the *De Morgan* case, hopes had been raised by a ruling of the Privy Council on 5 December 1996, following argument on an application for special leave to appeal. The Bench of three Law Lords made "the rather unusual order" that the application "should be adjourned to the Full Board so that the question of jurisdiction to grant special leave and the entitlement to come here as of right can be considered by the Full Board". Their Lordships ruled that the "adjourned matter will be dealt with at the same time as the appeal on the merits, if the Board concludes that an appeal on either ground is competent". They added that "but for the argument that the Board has no jurisdiction to grant special leave they would have been disposed to grant such leave".

FINALITY OF PROCEEDINGS IN TERMS OF STATUTE

The Judicial Committee comprised five Law Lords, none of whom had sat in the December hearing. The Committee decided to hear argument of the two cases together as they raised similar issues. The first ground for special leave to appeal, in both cases, was that, contrary to the finding of the Court of Appeal, relevant legislation did not preclude a further right of appeal to the Judicial Committee. In this regard, the argument in the *De Morgan* case was far stronger than that in the *Sears* case (and had the added benefit of a top-class performance by Peter Napier, counsel for the De Morgans). The right of appeal in cases like the *De Morgan* case, which started in the District Court and proceeded to the High Court and the Court of Appeal, is regulated by s 67 of the Judicature Act 1908, which reads:

> The determination of the High Court on appeals from inferior Courts shall be final unless leave to appeal from the same to the Court of Appeal is given by the High Court or, where such leave is refused by that Court, then by the Court of Appeal.

This section contrasts with that which provides for cases involving a question of law of considerable difficulty or great importance, which "leap-frog" direct from the District Court to the Court of Appeal. Section 68 of the Judicature Act expressly provides that in these cases "the judgment of the Court of Appeal shall be final". Counsel for the petitioners emphasised that there were no words in s 67 which made final the decision of the Court of Appeal, and that where (unlike s 68) the statute did not so provide, there was no finality.

The Privy Council accepted "the grammatical force" of this submission. However, Their Lordships rejected it "as a matter of common sense". Their Lordships did not see the logic in there being a right of appeal to the Privy Council in cases which proceeded from the District Court through the High Court to the Court of Appeal, but not where cases of exceptional difficulty or importance went directly from the District Court to the Court of Appeal. Their Lordships therefore offered the following construction of s 67, precluding appeal to the Privy Council:

> Under s 67 the decision of the High Court is "final". To this finality there is one limited exception ie an appeal with leave to the Court of Appeal. There is no further exception to the finality of the decision of the High Court which permits a further appeal to the Privy Council. If the Court of Appeal dismisses the appeal from the High Court, the decision of the High Court remains final. If the Court of Appeal allows the appeal from the High Court it substitutes the decision which the High Court should have given and that decision is final.

The argument in the *Sears* case on the issue of finality of proceedings caused Their Lordships "no hesitation". Section 135(5) of the Employment Contracts Act 1991 provides that "the determination of the Court of Appeal on any appeal under this section shall be final and conclusive". Although proceedings in this case had been brought in the Employment Court, counsel for the petitioner pointed out that relief had been sought under two Acts neither of which imposed any limit on rights of appeal from the Court of Appeal. However Their Lordships affirmed that proceedings were brought under the Employment Contracts Act "if they are brought in the Employment Court established by the Act". Their Lordships added that the fact that the Court can determine issues arising out of other Acts "cannot alter the nature of the proceedings themselves which can only have been brought before the Employment Court by reason of the statutory jurisdiction created by the Act".

THE NATURE OF SPECIAL LEAVE TO APPEAL

The second ground for leave to appeal, argued by both petitioners, was that statutory provisions making the decision of the Court of Appeal final were not sufficient to exclude the prerogative power of the Queen to entertain appeals to the Privy Council without express words to this effect.

This argument went to the heart of the right to apply for special leave to appeal. Outside the limits fixed by colonial law on appeals to the Sovereign in Council there had always

been reserved a discretion to the Sovereign in Council to grant special leave to appeal from a colonial Court. This discretion to grant special leave was described as the prerogative right, and was a residue of the notion of the Sovereign as the fountain of justice. However, with the growth in powers of colonial parliaments, there came to be accepted the right of these legislatures to restrict this prerogative by express words.

The petitioners' argument was supported by a line of authority in the Privy Council itself during the 19th and early 20th centuries. In *Theberge v Laudry* (1876) 2 App Cas 102, Lord Cairns LC stated (at 106):

> Their Lordships wish to state distinctly, that they do not desire to imply any doubt whatever as to the general principle, that the prerogative of the Crown cannot be taken away except by express words; and they would be prepared to hold, as often has been held before, that in any case where the prerogative of the Crown has existed, precise words must be shown to take away that prerogative.

This principle was applied in *Cushing v Dupuy* (1880) 5 App Cas 409. Here a Canadian statute provided that the judgment of the Quebec Court of Queen's Bench was "final". Nonetheless Their Lordships were of the opinion that, as the statute contained "no words which purport to derogate from the prerogative of the Queen to allow, as an act of grace, appeals from the Court of Queen Bench in matters of insolvency, her authority in that respect is unaffected by it" (at 420). The principle was re-affirmed in *Re The Will of Wi Matua* [1906] AC 448. Here a New Zealand statute had declared the decisions of the Native Appellate Court to be "final and conclusive". Their Lordships noted that "the exclusion of the right of appeal to His Majesty would ... be a forfeiture of existing rights on the part of Sovereign and subject" (at 450).

However, later Privy Council judgments allowed the prerogative power of special leave to be removed not only by express words but also by "necessary intendment". It is no coincidence that these judgments were delivered after the passing of the Statute of Westminster 1931 which greatly enlarged the powers of the colonial parliaments to legislate. In *British Coal Corporation v The King* [1935] AC 500, Viscount Sankey LC noted that the appeals in question were "essentially matters of Canadian concern, and the regulation and control of such appeals would thus seem to be a prime element in Canadian sovereignty as appertaining to matters of justice" (at 521). His judgment stressed that, while in form appeal by special leave was to the King in Council exercising a prerogative right outside and apart from any statute, in substance it was to the Judicial Committee as a Court of Law governed by statute. This restrictive approach to special leave to appeal was followed by the Privy Council in *Attorney-General for Ontario v Attorney-General for Canada* [1947] AC 127 and *Walker v The Queen* [1994] 2 AC 36.

Not surprisingly, in the *De Morgan* and *Sears* petitions, Their Lordships declared that "the reasoning of the decisions in *Cushing* and *Wi Matua* can no longer be regarded as sound". Their Lordships stated that:

> Express words are not required to limit or abolish the right to entertain [special leave to appeal]. It is enough if the statute excluding or limiting the right of appeal to the Privy Council shows either expressly or by necessary intendment that the power to entertain such appeals is to be limited or abolished.

In conclusion, Their Lordships stated that:

> the New Zealand legislature has, on the true construction of the statutes, provided that the decision of the Court of Appeal shall be final. ... the only possible intendment of such words is to exclude the only remaining right of appeal ie appeal by special leave to the Privy Council. That being so, ... the statutes effectively exclude any appeal to the Privy Council.

EVALUATION OF THE PRIVY COUNCIL'S JUDGMENT

The judgment in the *De Morgan* and *Sears* petitions provides a lucid and authoritative construction of the Judicature Act and the nature of special leave to appeal. The judgment emphasises the finality of the Judicature Act and Employment Contracts Act provisions and the heavily-circumscribed nature of the right to special leave to appeal.

The Privy Council's decision on the *Sears* case is entirely in line with current trends. There appears to be little doubt that the Employment Contracts Act made the decision of the Court of Appeal in *Sears* final and conclusive; and that the Queen's prerogative of special leave to appeal was excluded by necessary intendment of this statute.

However, it is far harder to justify the approach of the Privy Council in the *De Morgan* case. Section 67 of the Judicature Act contains no words which make final the decision of the Court of Appeal in such a case. The Privy Council was obliged to construct the meaning of finality in the light of Their Lordships' common sense and the relevant section of the Act. To claim that s 67 excluded special leave to appeal by necessary intendment appears to be importing judicial intent which may not be present in the statute. One can speculate that, had the *De Morgan* case been argued on its own or before a different combination of Judges (as it had been in the previous December hearing), the outcome might have been different. ❑

ACCIDENT COMPENSATION AND COSMETIC SURGERY

Kate Tokeley, Victoria University of Wellington

explores the definitions of injury and medical mishap

This article examines the District Court decision of *W v L and ARCIC* (8 April 1997, Auckland District Court, NP 1381/95, leave to appeal applied for). The plaintiff in this case had a breast implant operation performed on her in 1994 by the defendant, a surgeon specialising in plastic and reconstructive surgery. The plaintiff alleged that the defendant represented to her that the operation would enhance her breasts to approximately a size "C" cup brassiere size. After the operation the plaintiff was dissatisfied with the results. She later had another operation to replace the implants, and it was then discovered that the original implants were smaller than the size she had asked for. The plaintiff subsequently sued the doctor for breach of the Consumer Guarantees Act 1993 ss 28 and 29. Section 28 provides consumers with a guarantee that suppliers of services will perform such services with reasonable care and skill, and s 29 guarantees that services will be reasonably fit for any particular purpose made known to the supplier, and of such nature and quality that it could reasonably be expected to achieve a particular result made known to the supplier as the desired result. The plaintiff claimed compensatory damages of $5,568.75 for breach of the Act, being the cost of repeat surgery together with legal fees and consultation fees. She also claimed exemplary damages in the amount of $30,000.

The issue in *W v L and ARCIC* was simply whether these claims should be struck out upon the grounds that they disclose no reasonable cause of action, are frivolous and are barred by s 14 of the Accident Rehabilitation and Compensation Insurance Act 1992 (ARCIA). Exemplary damages are not barred by ARCIA (*Donselaar v Donselaar* [1982] 1 NZLR 97) and the Court quite rightly decided that since the substantive claim had yet to be heard, it would be more appropriate for the Court hearing the evidence to determine whether the threshold for exemplary damages had been reached (*W v L and ARCIC*, 17). The main focus of the case was, therefore, whether the claims for compensatory damages were barred by ARCIA. The Court decided that the claims were not barred by ARCIA for reasons which will be discussed below. The writer agrees with the Court's conclusion, but disagrees with its reasoning.

ARCIA 1992

Section 14(1) of ARCIA bars claims for damages arising directly or indirectly out of personal injury covered by the Act, or personal injury by accident covered by the 1972 and 1982 Accident Compensation Acts. Section 8(2)(a) provides that cover extends to personal injury which is caused by accident. However, because s 3 specifically excludes "treatment from or by the direction of a registered health professional" from the definition of accident, the present case cannot fit within s 8(2)(a). Section 8(2)(c) of the Act is the relevant section. It provides that cover under the Act extends to personal injury which is medical misadventure as defined by s 5. Medical misadventure is defined in s 5 as personal injury resulting from medical error, or medical mishap. The Court concluded that ARCIA did not bar the plaintiff's claims because although there was a personal injury (*W v L and ARCIC*, 15) there was no medical mishap or medical error (*W v L and ARCIC*, 16). The writer, on the other hand, is of the view that ARCIA did not bar the plaintiff's claims because although there was medical error, there was no personal injury.

PERSONAL INJURY

In deciding the issue of whether the actual surgical procedure of inserting the breast implant comes within the definition of personal injury, the Court considered the High Court decision of *Childs v Hillock* [1993] NZAR 249. The High Court in that case took the view that the insertion of an inter-uterine contraceptive device (IUCD) and the subsequent pelvic inflammatory disease suffered by Ms Childs and the consequences of this disease *all* amounted to personal injuries under the Act (*Childs*, 275). The Court in *W v L and ARCIC* concluded that the insertion of breast implants is analogous to the insertion of an IUCD, and therefore the insertion of breast implants is also a personal injury (*W v L and ARCIC*, 15).

In fact, the Court in *W v L and ARCIC* failed to mention that the *Childs* case was subsequently appealed to the Court of Appeal which affirmed the decision of the High Court to strike out Ms Childs' claim and referred in its judgment to the contraction of the pelvic inflammatory disease as being the injury sustained (*Childs v Hillock* [1994] 2 NZLR 65, 72). The present case is distinguishable on its facts from the *Childs* case. In *Childs* the plaintiff suffered an injury resulting from her medical procedure in that she suffered pelvic inflammatory disease from the insertion of the IUCD. This disease could possibly come within the everyday meaning of the word injury. Moreover, s 10(1) of ARCIA provides that personal injury caused wholly or substantially by disease is covered by the Act if it is medical misadventure. In contrast, the plaintiff in *W v L and ARCIC* did not suffer any mental or physical health problems as a consequence of her operation. In this respect the operation was a success and it is unlikely that the operation itself can be said to be an "injury".

Personal injury is defined by s 4(1) simply as meaning:

> the death of or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries, and has the extended meaning assigned to it by s 8(3) of this Act.

(Section 8(3) extends the definition of personal injury to mental or nervous shock suffered as a consequence of one of the specified sexual offences covered by the Act.)

This is not a particularly extensive definition. It tells us that personal injury includes, among other things, physical injuries, but does not go on to define "physical injuries". As is pointed out by the Court in *Childs* at 275, the words must therefore be given their ordinary meaning.

The OED meaning of the word injury is "hurt or loss caused to or sustained by a person or thing, harm, detriment, damage ... a bodily wound or sore". In order to perform surgery, a certain degree of hurt will be caused to the patient, and the patient's skin and tissues will be harmed or damaged, albeit temporarily, by the incision of the surgeon's knife. According to the dictionary definition of injury, one could well class the breast implant insertion as an injury. The dictionary, however, is not the final answer on the ordinary meaning of a word. One must also consider how the word is used in everyday English. It is highly improbable that someone would refer to a surgical operation as an injury. In everyday English the incisions which are part of a surgical procedure are not called injuries.

Perhaps the reason that surgical operations are not considered to be injuries is the fact that the patient will ordinarily have *consented* to the performance of the operation. If a surgeon operates on someone without there consent then it is more likely that the surgery itself will be termed an injury. So, for example, if a patient goes in to hospital for a sinus operation and the surgeon amputates their leg instead, then in ordinary usage it might be said that the patient has suffered an injury. It could be argued that in the present case the plaintiff has only consented to surgery on the basis that the implants inserted would augment her breasts to a size "C" and that therefore the surgery she underwent was an injury. However, the patient in *W v L* is distinguishable from the patient in the sinus operation example. The patient in *W v L* did not get a different *type* of surgery to the type that she consented to. She consented to a breast implant operation and that is what she underwent, despite the fact that the results were less than she desired. This is different from the sinus patient who never consented to an amputation operation. In ordinary usage the breast implant operation which the plaintiff underwent would not be called an injury.

Even if the Courts were to hold that the surgical procedure of inserting a breast implant can be said to be a personal injury, it can be argued that the plaintiff is not actually claiming damages for this injury. She is not claiming damages to compensate her for the incisions into her skin, rather she is claiming damages for the fact that the wrong size of implant was inserted. In other words, she is claiming for the failure of the mechanics of the operation to achieve the desired results.

MEDICAL MISHAP OR MEDICAL ERROR

For the breast implant procedure to constitute medical misadventure, it must not only be a personal injury, it must also be the result of medical error or medical mishap (s 5 ARCIA). For there to have been a medical mishap, the adverse consequences of treatment must be rare and severe (s 5). The Court could not find that there was any medical mishap because the pleadings did not show that any adverse consequences of the treatment were either rare or severe (*W v L and ARCIC*, 16).

The Court also found that there was no medical error. Section 5(1) defines medical error as "the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances". The plaintiff's claim is based on negligence and breach of the statutory guarantee to perform the service with reasonable care and skill (s 28 Consumer Guarantees Act 1993). Therefore, the Court is required to assume that the defendant was negligent for the purposes of determining whether there has been a medical error. The Court in *W v L and ARCIC* correctly made this assumption, and therefore found that the defendant "failed to observe a standard of care and skill reasonably to be expected under the circumstances" (s 5(1) ARCIA). Section 5, however, also contains a proviso. It states that:

> ... it is not medical error solely because desired results are not achieved, or because subsequent events show that different decisions might have produced better results.

The Court interprets this as meaning that because the plaintiff did not achieve the desired result of a certain breast size there can be no medical error (*W v L and ARCIC*, 17).

The writer respectfully disagrees with this conclusion. The word "solely" in the proviso to the medical error definition needs to be emphasised. In other words, it will not be medical error *only* because of the fact that desired results were not achieved. So if all the defendant can show is that treatment did not lead to desired results, this alone will not be enough to show that there was medical error. However, if in addition it can also be shown that the reason for the failure to achieve desired results was a failure on the part of the doctor to exercise reasonable skill and care, then this would be medical error. In the present case, the doctor failed to put in the correct breast implant size and was fully aware of the result the plaintiff wished to achieve. The Court has assumed that this action was negligent and therefore it should have found that there was a medical error.

CONCLUSION

It is the writer's opinion that in a case where surgery leads to no physical or mental health problems but does not produce the desired results due to the doctor's negligence, a claim for compensatory damages is not barred by ARCIA. This is because although there is a medical error there is no personal injury and therefore no medical misadventure under the Act. In *W v L and ARCIC* the District Court found that such a claim was not barred by ARCIA for different reasons. It held that there was a personal injury but no medical error.

The issue of whether such claims are barred by ARCIA, and why, is an important one. As the health system continues to be privatised the possibility for compensation claims based on contract and the Consumer Guarantees Act 1993 increases. When patients pay for their health care needs, then as consumers they are entitled to expect a certain standard of service. The High Court decision in *W v L and ARCIC* will be a significant decision for health consumers and should help to clarify the interface between ARCIA and compensatory claims made by dissatisfied health consumers. ❑

TRANSNATIONAL LITIGATION AND ARBITRATION

Master Tómas Kennedy-Grant

gave an address to the National Law School of India University at Bangalore

A PRODUCT OF INTERNATIONAL TRADE

Transnational litigation and arbitration is a product of international trade. Obviously it is not limited to it; but it is substantially a result of it and an aspect of it.

It is not surprising, therefore, that the forms of transnational litigation and arbitration – its rules, its mechanisms – are a product of private initiative, governmental action and inter-governmental cooperation. I give you a single example of each at this stage:

- private initiative: the whole system of administration of international arbitrations by the International Court of Arbitration of the International Chambers of Commence in Paris is a private initiative;
- government action: the rules of Court relating to the circumstances in which litigation may be commenced against a party out of the jurisdiction are an example of governmental action (in this case the judicial arm of government);
- inter-governmental cooperation: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 is an example of inter-governmental cooperation.

AN EVOLVING FIELD

It is not surprising also that transnational litigation and arbitration is not a static field but an evolving one.

In "A South Pacific Perspective on International Arbitration and Dispute Resolution since 1961" (1995) 1 NZBLQ 195-243, I traced the history of arbitration and dispute resolution internationally over that period and identified a number of developments of major importance both directly, because of their impact on trade and traders, and indirectly, because of their potential as models for the development of dispute resolution systems in other countries or regional groupings. They are, for instance, models which might be adopted in the context of the South Asia Association of Regional Cooperation (SAARC) or the newly established Indian Ocean Rim Association for Regional Cooperation (IORARC). The recent developments I referred to were the UNCITRAL Model Law on International Commercial Arbitration of 1985, the institutional arrangements and general dispute settlement procedures forming part of the North American Free Trade Agreement of 1993 (NAFTA) and the Understanding on Rules and Procedures Governing the Settlement of Disputes forming part of the World Trade Organisation Agreement of 1994 (WTO).

Evolution is not limited to international or transnational arbitration but is occurring in litigation as well. Examples of evolution in the field of transnational litigation are the Brussels and Lugano Conventions of 1968 and 1988 respectively, entered into by the members of the European Community (now the European Union) on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and the introduction into Australian and New Zealand law in 1990 of provisions for the Federal Court of Australia to sit in New Zealand and the High Court of New Zealand to sit in Australia in relation to certain proceedings under the anti-trust legislation of the two countries.

I propose to deal separately from this point with transnational litigation and transnational arbitration.

TRANSNATIONAL LITIGATION

The law relating to transnational litigation was formed by the doctrine of territorial sovereignty and is marked by the progressive accommodation by States of foreign litigation and foreign litigants. The change came about because of the growth in trade. With the growth in trade it came to be in the interest of a State to permit the institution within its territory of proceedings against foreigners and to recognise, and to permit the enforcement of, foreign judgments within its territory. In the case of the former, it was simply an act of the State (in its judicial arm) that was required: The Judges decided to permit the institution of proceedings against foreigners (by which I mean persons outside the jurisdiction) in certain circumstances, all of which, at least initially, required that there be a close connection one way or another with the territory of the State in question. In the case of the recognition and enforcement of foreign judgments, while again it was a sovereign act of the judicial arm of the State, there needed to be some rationale for it because it favoured foreigners. Initially, the rationale was what was called comity, the principle that it behoved princes to act in a friendly manner one towards another. In the 19th Century this doctrine was displaced in the common law jurisdictions by a doctrine of obligation, namely that the foreign judgment gave rise to an obligation to abide by the judgment on the part of the party against whom the judgment was granted: *Schibsby v Westenholz* (1870) LR 6 QB 155. That the doctrine of comity is not entirely spent as a basis for the recognition of foreign judgments, however, is clear from the recent decision of the English Court of Appeal in *Adams v Cape Industries plc* [1990] Ch 433.

The distinguishing feature of this first stage of development was that the rules relating to foreign litigation (including in that expression both of the aspects which I have just

discussed) were entirely the product of, and controlled by, individual States. Except as the result of similar judicial reasoning, there was neither consistency nor cohesion in the rules of different States.

The next stage of development, at least in the English system from which we substantially derive our law, occurred as a result of, and in order to facilitate, Imperial trade. I refer to the provisions of the UK Administration of Justice Act 1920 and the equivalent Acts in various Dominions and dependent territories providing for the reciprocal enforcement of money judgments of superior Courts within the United Kingdom, on the one hand, and the corresponding Courts of the other territories, on the other hand. This Act made no provision in regard to jurisdiction and, even in regard to enforcement, did not make it mandatory but only discretionary.

Thirteen years later the UK Foreign Judgments (Reciprocal Enforcements) Act 1933 was passed and was followed by similar legislation elsewhere in the Commonwealth and Empire. The English Act (and its equivalents) was similar in purpose to the earlier legislation but differed in two important respects:

(a) the judgments which were subject to it were required to be enforced, not merely able, at the Court's discretion, to be enforced; and
(b) the provisions of the Act could be applied by Order in Council to foreign countries.

in fact, no doubt in part because of the situation in Europe and then because of the outbreak of the Second World War, the Act was not applied to many foreign countries. The New Zealand Act of 1934, for example, was only ever applied to two foreign countries, France and Belgium.

I want to conclude this part of my paper by referring to two post-Second World War developments, the first as an example of international cooperation and the second as an example of inter-governmental cooperation. Both are examples of the response of governments to the continued and developing demands of trade, either wholly or in part.

The first was the conclusion of the Brussels and Lugano Conventions of 1968 and 1988 respectively and their incorporations into the municipal law of the European Community countries. The Conventions and the incorporating Acts differ from earlier developments:

(a) as already indicated, they are not the product of the legislature or judiciary of a single country (nor, indeed, as is the case in the second example I will quote in a moment, the product of the cooperation of only two countries) but the product of international cooperation, albeit on a regional level;
(b) they deal with jurisdiction as well as with recognition and enforcement of judgments;
(c) they apply to a wider range of matters, Art 1 of each Convention reading as follows:

> This Convention shall apply in civil and commercial matters. ... It shall not extend, in particular, to revenue, customs or administrative matters.
>
> The Convention shall not apply to:
>
> (1) the status or legal capacity of natural persons, rights and property relating to a matrimonial relationship, wills and succession;
> (2) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
> (3) social security;
> (4) arbitration.

The second development to which I wish to refer is subject-specific and limited to two countries. Australia and New Zealand have since 1983 been parties to a Closer Economic Relations Agreement (CER). In terms of this Agreement there has been considerable, and there is continuing, liberalisation of trade between the two countries. One of the results of this is that, in competition or anti-trust terms, it is now possible to have trans-Tasman markets. In order to avoid a lacuna in competition law, the two countries in 1990 passed legislation prohibiting the use of a dominant position in a trans-Tasman market and providing for the High Court of New Zealand and the Federal Court of Australia to sit in each other's countries in relation to cases instituted before those Courts under that legislation.

TRANSNATIONAL ARBITRATION

The modern system of transnational arbitration in respect of commercial disputes is essentially the product of the last 50 years.

Prior to the Second World War there had only been limited development of the law and practice of international commercial arbitration. The London Court of International Arbitration ("LCIA") had been established in 1892 as the London Chamber of Arbitration (it is the oldest of the extant institutions) but handled very few cases. The International Court of Arbitration of the ICC had been established in 1923; but it handled far more conciliations than arbitrations. There were only two international instruments in the field: the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927.

The development of transnational arbitration in the 50 years since 1947 has been marked by five principal features:

(a) the contribution of the United Nations;
(b) the contribution of the World Bank and the World Intellectual Property Organisation;
(c) the development of international and regional trade dispute settlement systems, such as those under WTO and NAFTA;
(d) the growth in the number of arbitrations administered by international arbitral bodies such as the ICC;
(e) the establishment of regional and national arbitration centres.

The United Nations

When one reviews the development of international commercial arbitration since 1947 one is immediately struck by the far reaching and fundamental contribution of the United Nations. No other single body has had anything like the same effect on the field.

The contribution of the United Nations to modern international arbitration law has taken three forms:

(a) the New York Convention of 1958;
(b) the UNCITRAL Arbitration Rules of 1976; and
(c) the UNCITRAL Model Law of 1985.

The New York Convention of 1958 marks the beginning of a period of immense change in the field of international arbitration. The primary thrust of the Convention, as its name suggests, is to ensure the recognition and enforcement of foreign arbitral awards; but it also provides for the recognition and enforcement of arbitration agreements. The

Convention is important because of the number of arbitrations to which it potentially applies and the number of countries which have ratified it.

To give some figures of the number of arbitrations to which the Convention potentially applies:

- there were over 2000 requests to the ICC for arbitration in the six-year period between 1 January 1988 and 31 December 1993;
- in 1992 there was a total (on available figures) of 1,124 new requests for arbitration internationally, made up as follows: ICC, 337; American Arbitration Association, 252; LCIA, 75; Hong Kong International Arbitration Centre, 185; China International Economic and Trade Arbitration Commission/China Maritime Arbitration Commission, 275;
- in 1993 the total of new CIETAC cases alone was 504 and in 1994 829.

In addition there are countless ad hoc arbitrations each year.

The Convention has been ratified, acceded to or accepted by 105 states, as opposed to the 29 countries (plus Great Britain and its former dependencies) which have ratified the Geneva Protocol and the 26 countries (plus Great Britain and its former dependencies) which have ratified the Geneva Convention.

The New York Convention comprises sixteen articles. They may be grouped as follows:

(a) articles relating to the recognition and enforcement of arbitration agreements (Art II);
(b) articles relating to the recognition and enforcement of arbitral awards (Arts I and III-VI);
(c) articles defining the relationship of the Convention to other treaties and to domestic laws (Art VII);
(d) machinery articles (Arts VIII-XIII, XV and XVI);
(e) Article XIV (which provides that a Contracting State shall not be entitled to avail itself of the Convention against other Contracting States except to the extent that it is itself bound to apply the Convention).

The UNCITRAL Arbitration Rules, adopted by UNCITRAL and recommended for use by the General Assembly in 1976, were adopted in the belief:

> that the establishment of rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations.

The rules are important for two reasons:

(a) they provide a set of rules able to be adopted by parties entering independently into an arbitration agreement and by national and international arbitration centres;
(b) they provide a model for other rules.

The most significant example of the adoption of the UNCITRAL Rules by another institution is the Final Tribunal Rules of Procedure adopted by the Iran-United States Claims Tribunal in 1983. Other institutions which have adopted the UNCITRAL Rules as such for use in disputes referred to them are the Hong Kong International Arbitration Centre and the Regional Arbitration Centre in Kuala Lumpur. Other institutions again, such as the AAA, the Indian Council of Arbitration, and the LCIA permit the UNCITRAL Rules to be used in lieu of their own Rules in arbitrations under their auspices.

Examples of the use of the Rules as a model for drafting another institution's Rules, either totally or partially, are the 1978 and 1988 Rules of Procedure of the Inter-American Commercial Arbitration Association, the 1986 Rules for International Commercial Arbitration and Conciliation Proceedings in the British Columbia International Commercial Arbitration Centre, the 1988 Rules of the Arbitration Institute of the Stockholm Chamber of Commerce, the 1992 Optional Rules for Arbitral Disputes between Two States of the Permanent Court of Arbitration and the 1993 adaptation of those Rules to embrace disputes between a State, or State corporation, and a non-state party.

The UNCITRAL Arbitration Rules comprise 41 articles, which are arranged in four sections:

(a) Section I. Introductory Rules (Arts 1-4);
(b) Section II. Composition of the Arbitral Tribunal (Arts 5-14);
(c) Section III. Arbitral Proceedings (Arts 15-30);
(d) Section IV. The Award (Arts 31-41).

The UNCITRAL Model Law on International Commercial Arbitration, which was adopted in 1985, was designed to provide a model law for adoption, preferably without amendment, by countries which did not have established arbitral systems. From the outset, however, it attracted attention from developed countries also. It has been adopted to date by 20 States: Australia, Bahrain, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Hong Kong, Hungary, India, Mexico, New Zealand, Nigeria, Peru, the Russian Federation, Scotland, Singapore, Tunisia, Ukraine and Zimbabwe. It has also been adopted by each of the Provinces of Canada and by eight of the States of the United States of America. In addition Germany and Malta are considering its adoption.

The Model Law is based substantially on the New York Convention and the UNCITRAL Arbitration Rules. It contains a number of refinements on the latter. It also, of course, given its wider scope, contains provisions that are not contained in either of the two previous UN documents. It comprises 36 Articles divided in eight Chapters:

(a) Chapter I. General Provisions (Arts 1-6);
(b) Chapter II. Arbitration Agreement (Arts 7-9);
(c) Chapter III. Composition of Arbitral Tribunal (Arts 10-15);
(d) Chapter IV. Jurisdiction of Arbitral Tribunal (Arts 16-17);
(e) Chapter V. Conduct of Arbitral Proceedings (Arts 18-27);
(f) Chapter VI. Making of Award and Termination of Proceedings (Arts 28-33);
(g) Chapter VII. Recourse Against Award (Art 34);
(h) Chapter VIII. Recognition and Enforcement of Awards (Arts 35-36).

The UNCITRAL Model Law is important both because it has been adopted by an increasing number of States (a trend which I believe will continue) and because, even if not adopted, it is a powerful influence on the development of national legislation.

The World Bank

The World Bank was responsible for securing the establishment, by the Washington Convention of 1965, of the International Centre for the Settlement of Investment Disputes between States and nationals of other States ("ICSID"). The Centre, which is located in Washington, has an Administra-

tive Council and a Secretariat. It has separate panels of arbitrators and conciliators, with each contracting State having the right to designate four persons to each panel and the Chairman of the Administrative Council (who is the President for the time being of the International Bank for Reconstruction and Development) having the right to designate ten persons to each panel, each of those persons having a different nationality. The jurisdiction of the Centre is made dependent on the consent of the parties to any dispute to the submission of the dispute to the Centre. The Convention provides separately for the procedure to be followed when the dispute is submitted to conciliation and that to be followed when the dispute is submitted to arbitration; and there are also additional rules applicable to each procedure. The facilities of ICSID are available to States and persons which are not, or whose national States are not, parties to the Convention under what is called the ICSID Additional Facility. The Convention had been ratified by 113 States by June 1994 (the latest figures available to me).

World Intellectual Property Organisation

The World Intellectual Property Organisation ("WIPO"), as its name suggests, is concerned with the protection of intellectual property throughout the world. In 1994 it established the WIPO International Center for the Resolution of Intellectual Property Disputes or, to use its short name, the WIPO Arbitration Center. Like ICSID, this Center offers both conciliation and arbitration (in addition to other procedures to which I will refer in the next section of this paper). The services of the Center are open to all persons regardless of their nationality and regardless of whether the country of which they are a national is a member of any of the treaties administered by WIPO. The services of the Center are also available to States, whether or not they are members of the Organisation. The rules of the Center are of great interest because they represent the latest thinking on the subject of international commercial arbitration procedure and attempt to deal with difficult issues such as that of confidentiality.

International and regional trade dispute procedures

I have included developments in this field in my paper because, although they are not in the strict sense part of the subject, they are very relevant for two reasons:

(a) they form part of the background against which transnational litigation, at least, is conducted and are in fact procedures which may be of use to a prospective litigant who can persuade his national government to take steps under them on his behalf, or on behalf of the industry of which he is a part;

(b) they may provide models for other dispute resolution systems.

Under the WTO scheme, the General Council of the WTO constitutes the Dispute Settlement Body ("DSB") provided for in the Understanding. The dispute settlement system operates against the background of a number of principles, including:

- the recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the basic agreements forming part of the world trade scheme and the dispute settlement system is intended to preserve the rights and obligations of members under those agreements and to clarify the provisions of those agreements;
- the prompt settlement of disputes is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of members;
- the aim of the dispute settlement mechanism is to secure a positive solution to a dispute;
- if a dispute arises all members will engage in the procedures in good faith in an effort to resolve the dispute.

There are three modes of dispute settlement: consultations, reference to the DSB and expeditious arbitration. There are timetables for each form of procedure. The articles governing reference to the DSB provide for the initial reference of the dispute to a panel, report by the panel to the DSB, appeal to a standing appellate body and final determination and recommendation by the DSB. There is provision for enforcement of the DSB's recommendations and of the award of an expeditious arbitration tribunal.

The general dispute settlement procedures of NAFTA parallel those of the WTO but there are specialised procedures for three classes of dispute: investment disputes; financial services disputes; and anti-dumping and countervailing duty matters.

Regional and national centres

In addition to the long established international arbitration institutions which predated the Second World War – the ICC, the LCIA and some of the other European Centres – and ICSID, there are now a number of regional and national centres, some of which are carrying increasing case loads.

Examples of regional centres are the United Nations Regional Centres for Arbitration in Kuala Lumpur and Cairo. Examples of national centres include the Indian Council of Arbitration and the Indian Centre for Alternative Dispute Resolution.

OTHER FORMS OF TRANSNATIONAL DISPUTE RESOLUTION

I have already mentioned conciliation in the context of ICSID and the WIPO Arbitration Center. It is also a procedure offered by the ICC. In addition UNCITRAL has adopted conciliation rules for ad hoc (ie as opposed to administered) conciliation.

I have also referred, in the context of the WTO, to expeditious arbitration. Provision is also made for expedited arbitration by WIPO. Finally, the ICC has adopted rules for a pre-arbitration referee procedure, designed to make possible directions as to urgent conservatory or restorative measures, the making of payments or carrying out of obligations under a contract, or measures necessary to preserve or establish evidence.

CONCLUSION

At the beginning of my 1995 paper and as the inspiration of it I put the following quotation from a 1961 paper on "The Rule of Law in World Affairs" by Justice William O Douglas of the United States Supreme Court:

> Clash and conflict are present in every community. We have in truth the sturdy roots of a rule of law, including a few of the procedures which human ingenuity has devised for resolving disputes, including conciliation and mediation, arbitration, administrative settlement, and judicial determination. The rule of law is versatile and creative. It can devise new remedies to fit international needs as they may arise. ❑

CENSORSHIP: *NEW TRUTH*

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considers the censorship of pornographic newspaper advertisements

On 1 October 1994 New Zealand became subject to a new censorship regime. A complicated previous system of separate classification of films, videos, and books and magazines was replaced by a comprehensive system administered from one office (the Office), under the Films, Videos and Publications Classification Act 1993 (the Act). A separate Board of Review (the Board) can reclassify material classified by the Office on application by interested parties. This year a full Court of the High Court (McGechan and Goddard JJ) delivered its first decision on the new regime (*News Media Ltd v Film and Literature Board of Review*, 11 June 1997, AP 197/96, HC Wellington). The Board had reviewed the Office's R18 classification of a 1994 edition of the weekly newspaper, *New Truth and TV Extra*, (Decision 3/96, 26 June 1996) and found the publication to be objectionable. It was banned outright because of 18 small advertisements within 11 pages of advertisements for sexual services. The High Court upheld that decision on appeal, though on different grounds. The decision contains important direction as to how the legislative test for objectionable material is to be interpreted and further, what impact the Bill of Rights is to have on the new censorship legislation.

BACKGROUND

A publication cannot be possessed, looked at, supplied, exhibited or sold if it is "objectionable". Section 3 of the Act provides in part:

> (2) A publication shall be deemed objectionable for the purposes of this Act if the publication promotes or supports, or tends to promote or support, –
>
> (a) The exploitation of children, or young persons, or both, for sexual purposes; or ...
>
> (d) The use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct ...

The Office can classify films, videos, magazines, newspapers, computer discs and hard drives, video games, CD-ROMS, T-shirts, posters and playing cards. It may prohibit or restrict publications, require material to be cut for restricted or unrestricted release, or classify the publication as unrestricted. It can impose conditions on public display of any publication using a "likely to cause offence" test. There is a right of review by the Film and Literature Board of Review, and a right of appeal to the High Court and the Court of Appeal on a point of law. Part VIII of the Act provides for offences of non-compliance, possession and supply, some of which are strict liability. Individuals may be fined or imprisoned and corporate bodies may be fined.

NEW TRUTH

The objectionable advertisements featured escorts, videos and personals, and contained words such as "schoolboy", "student", and "schoolgirl" which the Board considered referred to the exploitation of young persons for sexual purposes; and words such as "golden shower", "brown shower" and "water sports", which the Board considered indicated the use of urine or excrement in association with sexual conduct. The Board held that if the publication promoted, supported or tended to promote or support (the promotes or supports test) these activities as listed in s 3(2), it had no choice but to find it objectionable. In considering the links between the subsections in s 3 in the *New Truth* decision, it held that full effect must be given to subs (2) without any consideration of content and context criteria contained in subss (3) and (4), or the requirement of likelihood of injury to the public good in subs (1). Therefore the Board concluded a publication which falls within s 3(2) is deemed to be objectionable and its availability is deemed to injure the public good. The Board thought that to read the subss (3) and (4) criteria into subs (2) would destroy the two-tier classification system within the section, which it considered Parliament had intended should operate to ban some publications on the basis of specific content, while the rest are dealt with by way of an exercise of judgment by our censors guided by the criteria in subss (3) and (4). Thus s 3(2) should not be rendered the same as subss (3) and (4).

The Board did not consider different meanings which could be attributed to the words in question. It decided the test was not what the words "promote" or "support" meant in a theoretical dictionary sense, but simply "when does a publication promote or support an activity?" The newspaper was found to promote or tend to promote or support the activities advertised because the Board decided editors and publishers have a choice about what advertisements to accept and can actually prevent publication. In this case, the Board considered that by publishing, at the very least the newspaper tended to support the activities. This was in spite of the fact that the advertisements were part of a section of the newspaper which only took up a quarter of its pages, and did not in fact fill those pages. The Board thought it could not look for the dominant effect of the publication as a whole, as it could if s 3(3) applied, but only to whether the entire publication promoted or supported the activities. Clearly a few advertisements would hardly produce a dominant effect. However, because of the view the Board took of the function of newspaper editors, it held that a few small advertisements indicated that the entire publication promoted or supported the activities. The Board acknowledged that its decision was heavy-handed.

The High Court thought that the meaning of s 3(2) could be established without recourse to *Hansard* debates or extraneous material. The plain language and underlying policy could tell its own story. (at 12) It agreed with the Board that the general requirements under ss 3(1), (3) and (4) had no application if s 3(2) applied, but thought there could be a significant coincidental overlap. In other words, a sensible

inquiry as to whether a publication promoted or supported or tended to promote or support certain activities could not be made without taking context into account to some degree. This included extent, degree and manner of dealing with the activity (s 3(3)), and impact of the medium (s 3(4)). What coincidental common ground existed would depend on the particular circumstances, but the full range of factors in the two subsections would not be raised. (at 12) Therefore, s 3(2) was rendered coincidentally remarkably similar to, but not the same as, subss 3(3) and (4).

The High Court held that the promotes or supports test was objective. To meet it required more than a vague or tenuous possibility, or a mere scintilla of evidence. (at 12-13) This case raised a special difficulty because it concerned possibly objectionable material contained within an innocent whole, rather than a single depiction or work. The Court outlined a "words, facts and tendencies" approach. This involved looking at the advertisement, any directly explanatory context (such as column headings), and the method of distribution of the advertisement – in this case the newspaper. If an advertisement tended to promote the specified activities, it did not matter what proportion of the rest of the publication was innocent – one advertisement could taint the whole. But while the Court agreed with the Board in this aspect, it did not agree that the state of mind of editors or publishers had any relevance. The idea that newspaper editors have power to stop the publication of objectionable advertisements, which imputes knowledge and therefore support of the contents of those which are published, was strongly rejected. (at 14) All that mattered was the publication and its effect. The matters to be looked at were the words and pictures as printed, the context, the newspaper and any expert evidence as to impact. Promotion or support, or tendency to promote or support could be determined from the words, facts and tendencies. (at 15) However, although the finding of the Board as to imputed knowledge was irrelevant, it had caused no ultimate miscarriage in reasoning. (at 16) The Court concluded by applying its test to the facts. It thought that even on a wider interpretation of the promotes or supports test which would require reading in more of the content and context elements in ss 3(3) and (4), the advertisements in question were well capable of creating the impugned tendency to promote or support the activities in question. Furthermore, it would be a rare advertisement which did not attempt to promote or support its wares and have some potential for doing so.

The Court also considered s 14 of the Bill of Rights Act 1990 (the Bill), but concluded it did not assist the publisher. The Court held that despite the freedom of expression described in s 14, the censorship legislation prevailed because of s 4 (no implied repeal or invalidity of legislation which is inconsistent with the freedoms in the Bill), and s 6 (legislation is to be interpreted consistently with the Bill where possible) could have no effect on interpretation. Without acknowledging that interpretation of s 5 (the freedoms in the Bill are subject to reasonable limits) was then necessary as a matter of course to test whether limits to freedom of expression contained in the censorship legislation were reasonable because prescribed by law and demonstrably justified in a free and democratic society, the Court considered that these conditions were in any event clearly satisfied. It thought s 3(2) was prescribed by law and therefore adequately accessible to the public, its terms clearly formulated and precise, and the promotes or supports test was unambiguous and applicable in a commonsense way. The specified activities were listed and described with particularity. All but one were breaches of criminal law and therefore their categorisation as objectionable was appropriate and rationally connected to the statutory objective. (at 15-16) The appeal was dismissed.

COMMENT

Although the decision is somewhat perfunctory, the High Court was correct to focus on the need to interpret what it means to promote or support or tend to promote or support. As I argue elsewhere (Cheer, "A State's Increasing Role in Monitoring Expression: New Zealand's New Censorship Regime" (1996) 6 Canta LR 333, 345) the imputed knowledge test devised by the Board is entirely arbitrary and capable of over-broad application. That test also turned on an unrealistic view of editorial control, and of the nature of newspapers, which, as the Court noted, print many items which the editors and publishers do not support. (at 14)

The High Court was also correct to acknowledge that in some circumstances s 3(2) is unworkable without some contextual element being read in. (Cheer, 367) Because of the comprehensiveness of the legislation, the structure of s 3(2) places all of the weight of the censorship decision on the promotes or supports test. As the *New Truth* decision shows, where activities are depicted or described in conjunction with innocent material, context cannot be ignored. The direction given by the Court as to what else is to be taken into account is unsatisfactory however. All that is certain is that there may be significant coincidental overlap with the content and context factors set out in ss 3(3) and (4), that this does not cover the full range, and that the particular circumstances of each case will determine how much common ground is shared. This test is ambiguous, to say the least. It also makes rather a nonsense of the whole section as drafted. Publications which fall outside the categories specified in s 3(2) must be considered giving particular weight to the factors in subs 3(3) ("... particular weight shall be given to the extent and degree to which, and the manner in which, the publication ...."), and taking the contextual factors in s 3(4) ("... the following matters shall also be considered: ...") into account. In contrast, s 3(2) is silent, but in considering its categories of more serious behaviour, a number of factors revealed on a case by case basis, in character quite a lot like those factors in subss 3(3) and (4) but not the same, are taken into account instead. In the *New Truth* decision, the High Court appeared to state that a sensible inquiry could not be made unless extent, degree and manner in which the activity was dealt with, and impact of the medium, were *always* taken into account. (at 12) This means that a s 3(3) approach is always relevant, as is the impact of the medium. But the implication was that other factors may also arise in other cases. The Court behaved as if the factors it chose in relation to *New Truth* were self-evident. But it is unclear why it only chose the impact of the medium from s 3(4). The character of the medium might have been just as important (s 3(4)(c)), or the persons to whom the publication is intended to be made available (s 3(4)(d)). Further, it is does not appear from the *New Truth* decision that extent, degree and manner in which the activity was dealt with was given particular weight, yet for the lesser activities specified in s 3(3), particular weight *must* be given to those factors. These omissions render the application of the *New Truth* decision in the future somewhat unpredictable.

The manner in which the Bill of Rights was dealt with is also unsatisfactory. The growing body of Bill of Rights case law can be described as inconsistent and tentative. (see Cheer, above at 356) In particular, there is confusion about how the

operative ss 4, 5 and 6 of the Bill are to work together. The difficulty which arises is to give content to s 5 where legislation is being challenged as inconsistent with the Bill. If s 4 is to operate first, then legislation which imposes a limit on a right in the Bill can apparently simply be applied without reference to s 5. The majority in the leading Court of Appeal decision *MOT v Noort* [1992] 3 NZLR 260, Richardson, McKay and Hardie Boys JJ, took a different approach however. Richardson J (with whom McKay J agreed) appeared to accept that turning to s 5 first is logical, while Hardie Boys J read both ss 5 and 6 together to determine the limits of the relevant right and then considered whether the legislation could be interpreted consistently with the right as limited (see also *Adams on Criminal Law* (1992), Ch 10; Hastings, "The Right to Protest Against Monarchism: Has *O'Brien* Come to New Zealand?" (1996) Bill of Rights Bulletin 90). It seems that since *Noort* the Courts are taking the approach of the majority, which *does* give content to s 5, although some give closer attention to the various components which need to be satisfied to comply with the section than others. The *New Truth* decision is in this vein. The High Court considered that s 4 prevented s 6 from having any effect. It then gave reasons why the requirements of s 5 had been met even though it considered "... it may not be necessary to move to a consideration of s 5 ...". (at 15) In other words, the Court side-stepped the issue whether s 5 always has to be given content, but gave it content in this particular case.

If censorship is to be challenged by reference to ss 5 and 14 of the Bill of Rights, it would, if dealt with most rigorously, be subject to the following series of tests:

1. Is the relevant section prescribed by law? This depends on whether or not it is so vague it cannot be applied. It may be so vague so as not to prescribe a limit at all, or it may be so imprecise it is not a reasonable limit.
2. A reasonable limit may be demonstrably justified if the objectives of the legislation in question justify overriding the right in the Bill.
3. There must be proportionality. This requires:
   - the existence of a rational connection between the impugned measures and the objective;
   - minimal impairment of the right or freedom;
   - a proper balance between the effects of the limiting measures and the legislative objective. (Cheer, 360)

The High Court dealt with most of these issues. However, it only applied the tests to the question whether our censorship legislation breaches the Bill of Rights. Although it referred to categorising censorship *decisions* as being within s 5 (at 15), it proceeded to apply the tests only to s 3(2), the legislative provision. The same questions should be asked of the particular censorship decision in question – in this case, the classification of the *New Truth* edition as objectionable (see *Re "Penthouse US" Vol 19, No 5* [1991] NZAR 289, *Michael Brown v The Classification Review Board* [1997] 474 FCA (6 June 1997) "the Rabelais decision", and Hastings, above). A censorship decision made either by the Office or the Board of Review, faces challenge on the ground either that the Act breaches the Bill, or that a particular censorship decision breaches the Bill. In looking only at the former question, the High Court held that the terms of s 3(2) were formulated with clarity and precision and that the promotes or supports test is unambiguous and amenable to commonsense application. However, while it can be agreed the High Court took a commonsense approach, I have argued above that the Court's necessary interpretation of the section resulted in a test which is ambiguous and unpredictable, not clear and precise.

The Court also stated that the classification of the activities specified in s 3(2) as objectionable was appropriate and rationally connected to the statutory objective, which was to regulate material that promotes or supports or tends to promote or support those activities listed. (at 15-16) However, the reason given for appropriateness and rationality was stated to be because all but one of the activities involve a breach of the criminal law. This means that criminality makes classification as objectionable rationally connected to the government's purpose in making s 3(2) law, which is to ban the activities listed in the section. But one of the activities is not criminal (the use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct: s 3(2)(d). See also (1993) 537 NZPD 17491, at 17497). The Court skated over this. Because of its inclusion in the list of activities, arguably the objective of the section is not clear at all. Either that purpose is simply to ban the activities listed, (which is entirely arbitrary), in which case criminality is irrelevant, or it is to ban criminal activities, in which case the inclusion of s 3(2)(d) is wrong. Whichever view is taken, reference by the Court to the criminal law has not clarified this difficulty. Unfortunately, s 3(2)(d) activities were at the very heart of the *New Truth* decision. It is not clear, then, that the inclusion of s 3(2)(d) *is* rationally connected to the objective of the section.

If these arguments are accepted, the limits on freedom of expression contained in s 3 of the Act are not justified in a free and democratic society and offend s 5 of the Bill. Although the Court in the *New Truth* decision did not articulate clearly the relationship between ss 4, 5 and 6 of the Bill, it held that the provisions of the censorship legislation predominate over the s 14 freedom of expression (at 15) by virtue of s 4. Therefore the legislation cannot be invalidated because it breaches the Bill of Rights. But s 4 of the Bill has no relevance to the question whether the actual censorship decision in *New Truth* breaches freedom of expression in the Bill of Rights. If the decision fails the tests in s 5, it can be overturned. I argue elsewhere that the decision of the Board breaches the Bill of Rights because it is vague, unreasonable and does not minimally impair freedom of expression (Cheer, above at 366). However, similar criticism can be made of the decision of the High Court. The classification was upheld based on specific statutory criteria but also on an unsatisfactory direction given by the Court as to what contextual matters are to be taken into account. As already noted, all that is certain is that there may be significant coincidental overlap with the content and contextual factors set out in ss 3(3) and (4), that this does not cover the full range, and that the particular circumstances of each case will determine how much common ground is shared. That test is ambiguous, inaccessible and imprecise and resulted in a decision which is unclear because it contains no explanation about the context which was taken into account, or indication of its application in the future. The decision cannot be "prescribed by law". (Cf *Re "Penthouse (US)"*.) Therefore the decision should not stand. This is not to say, however, that the decision would not be the same if the case was reconsidered using an appropriate, precise and consistent test.

The *New Truth* decision can only have practical effect to deter future dissemination of objectionable material. It is

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HONEST OPINION AND PUBLIC INTEREST

Judith Ferguson, The University of Otago

queries views on the new defence of honest opinion

With respect to defamation, the statutory defence of honest opinion was previously, at common law, the defence of fair comment on a matter of public interest. Under ... the statutory defence of honest opinion, however, there is now no requirement that the opinion be on a matter of public interest. (*The Laws of New Zealand Defamation* para 133)

It was with surprise that I read this entry in Butterworth's *Laws of New Zealand*. The authority for the proposition was given simply as ss 9-12 Defamation Act 1992, but nothing in those sections or in my understanding of the reforms effected by the Act had led me to the same conclusions as those of the learned author, McKay J, either that a common law defence had been replaced by a statutory defence or that the public interest requirement had been abolished.

My reaction at the time was simply to disagree. *The Laws of New Zealand*, while an extremely useful summary of the law, was, after all, a commentary on the law and not a primary source of law. In this I was reassured by the second edition of *The Law of Torts in New Zealand*, edited by Stephen Todd (1996) and published after *The Laws*. John Burrows had not noted such a change in the law, nor had Hodge, Atkin, McLay and Pardy in the second edition of *Torts in New Zealand* (1997, at 603-614).

My confidence was ended by Tompkins J's endorsement of McKay J's view in *Shadbolt v Independent News Media (Auckland) Ltd* (HC Auckland, CP 207/95, 7 Feb 1997). Is the 1992 Act, after all, a complete code? Maybe much more than a label change had occurred. Maybe the scope of the defence had been significantly widened.

I wish to outline my reasons for standing by my initial reactions: that the "public interest" requirement of the defence has not been done away with and that the common law application of the defence is still the basis of the defence. And I must, with all due respect of course, challenge the reasoning of Tompkins J.

SHADBOLT v INL

In reaching his decision in the defamation action brought by Tim Shadbolt against the newspaper *Truth*, Tompkins J accepted that the three articles complained of bore the defamatory meanings that Shadbolt was a liar and that he was a mayor who had no interest in the environment. In its defence, the newspaper argued the defence of honest opinion, but the defence failed because it did not discharge the onus of proving that its opinion was a "genuine" one, the requirement laid down in s 10.

On the facts presented there was no doubt that a public interest requirement would have been satisfied, but Tompkins J took the opportunity to express his view that there was no longer such a requirement in the honest opinion defence. He gave two reasons for his view. First, he seemed to read s 10(1) as laying down the exhaustive requirements for the defence:

> [W]hat the defendant is required to prove is that "the opinion expressed was the defendant's genuine opinion". If the defendant proves that, the defence will not fail. There is no additional requirement on the defendant to prove that the opinion expressed was on a matter of public interest. (at 9-10)

Secondly, he specifically accepted the *Laws of New Zealand* statement of the law as authoritative, noting:

> It is of some significance that the author of that part of *The Laws of New Zealand* is McKay J who, as Mr I L McKay, was the Chairman of the Committee on Defamation whose report of December 1977 led to the enactment of the Act. (at 11)

Neither of Tompkins J's reasons is convincing.

First, s 10 does not lay down exhaustive requirements for the defence. Defamation remains a mixture of common law and statutory law. The 1992 Act – like the 1952 Act – provides clarification, modification and limited reform, but was not intended to codify the law. The long Title describes the Act as one intended to "amend the law relating to defamation and other malicious falsehoods", identical wording to that in the long Title of the 1954 Act. There is no suggestion it is a code. In *Lange v Atkinson* (HC Auckland, CP 484/95, 24 February 1997) Elias J comments at 12:

> While introducing significant reforms, the 1992 Act did not attempt to supplant much of the common law of defamation or to stifle its development.

And as Mr Caygill said during the second reading of the Bill in Parliament:

> One way of looking at what we are doing is to say we are restating a law that was last expressed in statutory form in 1954. In other words, we are updating a law that is now almost 40 years old; one that is not contained in its entirety in statute, but is expressed partly in statute and partly in the common law decisions of the Courts, as will continue to be the case.
>
> The legislation is not a code. (1992 PD 12332)

Up to the time of the 1992 Act, the requirement that the matter commented on be one of public interest was clearly one of the requirements for the defence. The Report of the

Committee on Defamation, of which McKay J was the chairman, described the then current law of fair comment as protecting "expressions of opinion on any matter of public interest" (p 37). This was the description at a time when the then current statute, the Defamation Act 1954, did not make specific mention of any public interest requirement, either substantively or in the label given to the defence. (See the Defamation Act 1954 s 8) The public interest requirement is one which has emerged through the common law cases. Indeed, reference to such New Zealand cases as *Truth v Avery* [1959] NZLR 274, 291 and *Wilson v Manawatu Daily Times Company* [1957] NZLR 735 would support such an understanding. An even fuller examination of the public interest requirement was made more recently in *Davies v Wellington Newspapers Ltd* (1995) 8 PRNZ 429 a High Court decision made under the 1954 Act, although handed down more than two years after the current Act was brought into force. The public interest requirement was alive and well in New Zealand under the 1954 Act, even though not referred to in the statute. For such a significant substantive change to have been made, one would have expected an express reference in the Committee Report, in the debates in Parliament during the passage of the Bill, and in the resulting legislation – or at least in one of these places. Yet nowhere was there any mention of a removal of the public interest requirement. Meanwhile, other substantive changes to the defence, such as the removal of the *Campbell v Spottiswoode* rule in s 12 and the shifting of the onus of proof in s 10, were clearly laid down. Nor has there been any suggestion that other common law requirements have been done away with – such as the requirement adverted to by the New Zealand Court of Appeal in *Templeton v Jones* [1984] 1 NZLR 448, 455 that a sufficient substratum of fact on which the opinion has been based be available to the reader for the defence to succeed.

Other decisions made under the 1992 Act appear to include an assumption that common law requirements not addressed in the new legislation remain unaffected. In particular, other judicial dicta support the conclusion that the public interest element is still part of the defence of honest opinion. For example, in the fully researched judgment of Elias J in *Lange v Atkinson*, delivered just after *Shadbolt*, the Judge stated that "The defence of honest opinion protects expression of opinion in matters of public interest". (p 13) This comment was made in the context of a decision which purported to extend the limits of the common law defence of qualified privilege, which espoused a need for expanding the protection given to freedom of speech, but which made no reference to any such widening of the scope of the honest opinion defence.

The second reason given by Tompkins J, in support of his conclusion that the public interest element had been done away with, was a straight appeal to authority (the authority being the *Laws*). That authority was persuasive particularly because the learned author was McKay J who had been "Chairman of the Committee on Defamation whose report of December 1977 led to the enactment of the Act". (at 11) But surely more is needed than this to turn upside down long-established common law, especially in the absence of any statutory crutch on which to base that new ruling. More specifically, the recommendations of the Committee were simply that – recommendations – and the ensuing legislation differed markedly in a number of areas from the recommendations of the Committee. For instance, the expansion of protection for the media through a specific defence was wholly rejected. Even if the public interest element had been considered and a recommendation made that it be done away with, one would have expected legislative effect to have been given to such a matter. However, the reality is that the Report of the Committee did not address the matter at all and in fact, a reading of its recommendations would indicate that there was no such intent. For instance, not only does it refer to the defence as "fair comment on a matter of public interest" (para 140) but later, in its consideration of the need to do away with the rule in *Campbell v Spottiswoode*, the following conclusion is arrived at:

> In all other cases of comment the only requirement is simply that the opinion is honestly held and that its subject-matter is of public interest.

So support from the Committee report itself is not evident.

If the persuasiveness of authority rests solely on the status of the author of the *Laws* there can be no dispute about the status and expertise of McKay J. However, extra-judicial comments on matters of statutory intent are not the final word. For a significant change to a common law or statutory requirement, one would expect a good deal more than the indeterminate appeal to authority that Tompkins J gives us.

The reliance Tompkins J placed on *The Laws* and on the analysis by McKay J raises a more general concern, particularly for those involved in legal education or for those concerned with the quality of legal reasoning. The authorities cited in New Zealand judgments ever less frequently refer to cases alone and ever more frequently refer to *The Laws* or to other academic comment in text books. No doubt such secondary sources are useful summaries, references and analyses of the law and have a place in legal research and understanding. However, surely first appeal must still be made directly to either statutory provisions or authoritative case law where possible. It was disappointing that in *Shadbolt*, before the public interest requirement was rejected out of hand, there was no consideration of the underlying reasons for that requirement and no examination of the cases in which it had been considered more fully. Even in an area in which the common law is still evolving and changing, there is still no justification for the change in the defence of honest opinion adverted to in *Shadbolt*.

Defamation is aimed at protecting the plaintiff's reputation, be it personal, professional or business. This protection is balanced against the defendant's right to free speech. While many of the more recent developments in the area have reflected a strengthening of the freedom of speech, these developments have generally occurred *within* the context of matters of public interest. Developments in the common law defence of qualified privilege such as those advocated for in *Lange v Atkinson*, in the use of parliamentary material to prove matters of fact as in *Hyams v Peterson* [1991] 3 NZLR 648, in the denial of protection for publicly elected bodies and protection of their governing reputation as in *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534, are all developments which have been justified as necessary recognition of freedom of speech, but they have been argued for on the basis that free exchange in a democratic society and open discussion of matters of public interest should be encouraged, not that the protection of private reputations should be weakened.

If the public interest requirement were abandoned in the defence of honest opinion, this would signal a significant erosion of the protection of one's personal reputation. The defence of honest opinion is based on the notion that free discussion of matters of legitimate public concern ought not to be stifled. It may be that defamatory statements are made

in the course of such discussion, but as long as they are recognisable as the honest opinion of their maker – and there is a sufficient substratum of fact to support them – the defendant's interest in freedom of speech will prevail over the plaintiff's right to have his or her reputation protected.

However, without the public interest requirement, damaging attacks on personal matters of no legitimate interest to the public could go unchecked. The scales would swing significantly in favour of freedom of speech at the expense of protection of personal reputations. As Lord Diplock eloquently stated in *Horrocks v Lowe* [1975] AC 135,149

> [A]s a general rule English law gives effect to the ninth commandment that a man shall not speak evil falsely of his neighbour.

and Cory J more recently noted in the Supreme Court of Canada in *Manning v Hill* (1995) 126 DLR (4th) 129

> Though the law of defamation no longer serves as a bulwark against the duel and blood feud, the protection of reputation remains of vital importance ... reputation is the "fundamental foundation on which people are able to interact with each other in social environments".

In *Lange v Atkinson* Elias J elaborated on freedom of speech and protection of reputation, noting "Both values are important. Both are public interests based on fundamental human rights". (p 8) Her Honour surveyed manifestations of these two values and the effect of the Bill of Rights Act 1990 on the balancing process, concluding at 31:

> The balancing of rights, critical to the law of defamation, is required by s 5 of the New Zealand Bill of Rights Act 1990 now to be guided by the underlying assumptions of democratic government.

In the current social and legislative climate, the value placed on freedom of speech may well receive greater recognition, but it is in the furtherance of a free and democratic society, in allowing free discussion of matters of legitimate concern, not matters of mere curiosity or titillation. As Elias J makes clear, it is only when justified that freedom of speech will prevail over protection of reputation:

> I do not consider that the [Bill of Rights] Act elevates for all purposes freedom of speech above the right to reputation which is inherent in the dignity of the individual. (31)

It is argued here that there is no justification for extending the right to freedom of speech in the defence of honest opinion so as to erode the protection of reputation further than is already done in the defence as it stands.

In *Davies v Wellington Newspapers Ltd*, in a striking out application, the line between matters of public interest and those of no legitimate concern was considered. (See also *Wilson v Manawatu Daily Times* for further discussion.) In matters of literary and artistic criticism, attacks on the work, even if severe and unjust, would be protected by the defence of fair comment, as long as they were restricted either to the work in question or to the artist in so far as he or she exhibited himself or herself in the work, but would not extend to criticisms of the private life and character of the artist unconnected with the work as presented to the public.

This illustrates the underlying principle behind the requirement. If one holds oneself out to the public, either in a public role, by way of production of a work of art or by some other public activity, free discussion by way of criticism and opinion is to be expected and encouraged. However, such encouragement cannot be justified if it is one's private life, of no legitimate concern to the public, which is under attack. In such circumstances one's right to individual dignity and to the protection of one's honour and reputation should be inviolable. The public interest requirement in the defence of honest opinion should remain. ❑

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too late to stop people looking at the October 1994 edition of the newspaper. That edition has been and gone and the people who looked at it have been harmed or not as the case may be. (Disturbingly, those who happen to have a yellowed copy lining a drawer or stacked in a garage may actually be committing a possession offence against s 131 of the Act.) The decision, however, can only be effective to encourage prior censorship of other publications which follow it. In that respect, the need for the decision to be accessible and precise – prescribed by law – is imperative. At present, distributors of overseas pornographic magazines examine the advertisements in each edition they import, and black out words like "schoolgirl" and "golden shower" with felt pen before distributing the material for sale. Any magazine or newspaper using words identical to those in the *New Truth* case can probably be safely dealt with in this manner. But different words describing activities listed in s 3(2) of the Act will present difficulties because it is unclear what context will be taken into account. The High Court has attempted to clarify the interpretation of the promotes and supports test. But it is not right yet. And it is not clear that it can ever be right.

Note: Since this was written, the Board of Review has applied the *New Truth* decision in an application for review by G A Moonen (Decision 4/97). This decision involved a large number of photographs of naked children, mostly boys, printed onto strips of paper and larger proof sheets. The Board noted that in making the s 3(2) inquiry, it might take advantage of coincidental overlap with s 3(3) and s 3(4) considerations. The Board considered each photograph in isolation from each other to determine whether exploitation existed. This, it noted, involved both content and manner in which content was depicted. "Manner" is lifted from s 3(3). Those photographs which emphasised the genital area were accordingly held to exploit nudity. The Board also rejected arguments based on the Bill of Rights, noting that the Act is inconsistent with it, and therefore predominates.

I have noted above that the *New Truth* decision is vague because we do not know what other considerations a Court or censorship body is now able to take into account in applying s 3(2). In *Moonen* the Board appeared to have no difficulty selecting only "manner" as relevant. But it could have just as easily also selected "impact" as well since photography depicts so realistically. There is no indication in the decision why only manner was chosen and what might be selected in the future. In fact, no other context could be relevant in this case because it involved isolated photographs. As to the Bill of Rights, *Moonen* again reflects a failure to apply its provisions to the censorship decision itself, rather than simply to the statutory provisions. We are no further ahead. ❑

TRANSACTIONS

LIFE INSURANCE LAW AND PRACTICE

edited by
Brian Keene

The Securities Commission has issued a discussion paper (8 December 1997) under its statutory obligation in s 10(c) Securities Act to keep under review practices relating to securities issued in New Zealand. The target in this case is the life insurance industry whose supervision (to the extent there is any) falls under the aegis of the Commission.

It must be remembered that the principal hallmarks of the Securities Act are a public disclosure regime and independent prudential supervision of investments in many cases. For the first the Act and Regulations control not only the details of prospectuses and advertisements issued to the public but also impose the wider obligation that no statement could be made in an advertisement or registered prospectus which was misleading in form or context or by omission. For the second the provisions call for the appointment of trustees and/or statutory supervisors for security holders with accompanying independent audit

The life insurance industry is however more complex. In recognition of this the Commission has exercised its surveillance over a number of years by granting exemptions on "good conduct" conditions to the industry. By so doing it has absolved the industry from both the public disclosure regime and the independent prudential supervision. To establish the "good conduct" rules it has relied upon the Code of Business Practices policed by the Life Offices' Association of New Zealand. In other words it has managed a policy of a light cover of surveillance coupled with industry self-regulation as a protection to the public.

Since the Life Offices have not individually had to make disclosure in prospectus form the exemption provision has deprived the public of forming its own view of the financial soundness of an "investment" in a policy issued by an individual company. Hence a major dilemma for the Commission. Instead of policing disclosure regimes permitting security holders themselves to evaluate the risk the Commission is in effect having to make a qualitative decision about the value of securities on behalf of the public. Making this sort of decision on behalf of the investing public is precisely where the Securities Commission does not wish to be. Hence the present discussion paper on the need (if any) for a separate public protection regime in this complex area.

Long past are the days when life insurance companies had as their principal product whole of life policies with accruing bonuses. Nowadays the forms of financial instruments issued by them are varied and are becoming more complex

Long past are the days when life insurance companies had as their principal product whole of life policies with accruing bonuses. Nowadays the forms of financial instruments issued by them are varied and are becoming more complex. Neither is there the old comfort that the past mutual companies will plough back their profits into policy holder benefits. Mutual companies are fast disappearing. So also are their activities broadening into all manner of financial and equity investor activities. These developments taken together with the increasing role of this industry in the high profile area of retirement savings and superannuation are no doubt triggers to this review of the industry.

The publication of the paper has excited comment from business journalists, a deal of it unfavourable to existing industry practices. The lack of approved Accounting Standards applying to the industry has gained public prominence. The Accounting Standards Review Board while recognising that accounting standards for the life insurance industry are only at the exposure draft stage has refused to be hurried into finalisation of this work without appropriate industry consultation.

The discussion paper makes interesting reading. The question is whether any disclosure regime in an area as complex as life insurance will be able to provide the prudent but non-expert investor with useful information on investment decisions. The actuarial complexity of life insurance does not admit of such easy explanations. Such disclosures as may be made are likely to give, at best, only present information and/or policies of the insurer. Given the long-term nature of the contract this may not be useful in the decision of whether to acquire or retain current policy.

There are also no clear industry guidelines for:

- financial reporting standards at least whilst the industry is itself undergoing a major review of accounting based standards to be applied;
- which establish whether policy holders should have a greater claim

to the assets of an insurer than its other creditors;

- which establish the amount of profits to be applied to policy holder benefits compared to those retained by the company in reserves or available for shareholders' dividends;
- which establish the basis for payment out of a policy holder in the event that he/she determines the policy before maturity.

There are no special obligations on directors:

- to take account of policy of insurers;
- which constrain them from making a decision in favour of a subsidiary or related company of the insurer which may have adverse financial consequences to policy holders.

The paper asks whether we need to regulate the industry, and if so how. It exposes differences between New Zealand practices for the industry and those in arguably more sophisticated financial markets overseas. It cautions against blind adoption of overseas policies in a distinctive New Zealand market. It raises the issue of a public rating system for insurance companies and the need for there to be defined and disclosed rules and guidelines applicable to achieving the balance between policy holders' interests and those of shareholders and other creditors.

A copy of the discussion paper is available from the Securities Commission and is likely to be a forerunner to rapid and significant change in the relationship between the industry and its public, bearing in mind that the exemption regime under which the industry has now operated for some years expires 31 March 1998.

INTEREST AND LIABILITY

NYKREDIT MORTGAGE BANK PLC v EDWARD ERDMAN GROUP LTD

House of Lords, 27 November 1997

The need to deliver decisions which provide certainty and predictability in commercial affairs should be a paramount goal of the commercial Courts. The more so, the more senior that Court is placed in the appellate structure. Therefore decisions from what is counted as the highest appeal authority in the common law jurisdiction – the House of Lords – should be exemplary in this respect. However in its most recent judgment of interest on damages the House of Lords has introduced a spin of unpredictability both into that area and, by association, the difficult issue of the proper date for time to begin to run under the Limitation Act.

Interest on damages

The immediate question in *Nykredit* was what interest should be awarded upon damages. It was the second instalment from *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1996] 2 All ER 365 (HL). In that case damages against a valuer were limited to the amount of the over-valuation of the security, not the ultimate loss sustained by the lender. Thus a property which was incorrectly valued for the bank at £3.5m was found to have a true value at the date of valuation of £2.1m. Damages were awarded at £1.4m even although the lenders lost considerably more through a subsequent fall in the general value of properties. The lending bank argued that "but for" the incorrect valuation it would never have lent at all and therefore would never have sustained its loss. However the House of Lords limited damages to the extent of the error in the original valuation. In doing so the Law Lords provided concise, clear and workable rules relating to financial responsibility for the incorrect supply of information.

When cause of action arose

At issue in *Nykredit* was the interpretation of s 35A Supreme Court Act 1981 which empowered a Court to award simple interest on debt or damages for any part of the period between the date when the cause of action arose and the date of judgment. The power of New Zealand Courts to award interest under s 87 Judicature Act 1908 is in similar terms. The knotty problem was on what date did the cause of action arise? The appellant bank claimed that its losses arose from the date of the loan transaction in March 1990 although these did not reach £1.4m until approximately December 1990. The defendant valuers argued that the losses did not arise until the securities were sold in February 1993. There was thus nominally in issue three year's interest on £1.4m but as these were "test" cases much larger amounts were at stake.

The House of Lords approached the issue step by step. The first step was to identify the nature of the relevant loss. In this case loss fell to be assessed by comparing the plaintiff's position had the defendants fulfilled their duty of care with the actual position. In the case of a negligent valuation supporting a secured loan the basic comparison called for is between the amount of money lent by the plaintiff plus interest at a proper rate and the value of all other rights acquired. These other rights include the true value of the security as well as the financial strength of the borrower's covenant. In *Nykredit* there was no reference to guarantees but if such had existed then those rights acquired as an incidence of the loan transaction would also have had to be put in the balance. Again fortunately on the facts of *Nykredit* this comparison exercise was simplified because, as a matter of fact, the borrower's covenant was worthless and the amount lent at all times exceeded the true value of the property.

Accordingly the House concluded that the cause of action arose in March 1990 and that the appellant bank had by December 1990 sustained the full amount of its losses of £1.4m. Interest was awarded from 12 December 1990 until judgment. In moving from the March to December date to start interest running the House of Lords exercised its discretion under s 35A Supreme Court Act 1981 and awarded interest from the date on which the lender's actual losses exceeded its maximum recoverable losses. This was to avoid a duplication between Court-ordered interest and interest accruing at the contractual rate under the loan. To fail to make that adjustment would have been in effect to compound interest. This discretion however, had nothing to do with the date upon which the cause of action accrued.

The likely practical consequence of the decision will be that the comparison exercise endorsed by the House of

Lords will give rise to uncertainty and difficulties in all but the most clear-cut cases. A cause of action in contract arises at the date of the breach: few problems are likely to be encountered there. It is in the difficult area of breach of tortious duty which requires damage as part of the cause of action that *Nykredit* has its influence. Staying with the example of valuation, fine questions may arise on the values and at what point on a falling market the security coverage is exhausted so that loss or damage occurs. Further expert opinion evidence will now be needed to cover that. Similar difficulties are likely to arise in valuing the personal covenant (or associated rights of recovery from collateral guarantor parties) because one must ask at what stage the lender suffered loss. It will be obligatory for a plaintiff to prove that by some point in time the recovery from realisation of the security or securities, together with the probable value of the personal covenant means as at that date the plaintiff has sustained loss and therefore has a cause of action. These burdens upon the plaintiff presume information and knowledge about the financial affairs of persons who may not be parties to the litigation. It is fairly routine when the principal borrower is worthless that he or she is not joined. Yet he or she is the only effective source of information on when the personal covenant falls below the outstanding loan amount less the value of securities. In a technical sense these issues may become unprovable unless the Courts take a fairly robust attitude to standard of proof issues. The onus of course always remains on the plaintiff.

A corollary of the litigation uncertainty is the risk evaluation and protection uncertainties for the professionals and associated parties including indemnifiers. Inevitably that reflects increased professional indemnity insurance premiums adding a "risk" cost to all services provided. Indemnifiers will at least be relieved that this decision has put to rest the often used argument that a cause of action accrues for limitation purposes only when the security is sold. Such an argument fails to draw the distinction between the loss and its crystallisation.

The decision also prompts one to ponder at the contract/tort dichotomy throwing up yet again complexities between causes of actions arising from the different branches of law. Proponents of the sweeping "Law of Obligations" theory can point yet again to anomalies between the two branches of law as a rallying cry for simplification. As always complex problems rarely admit of simplified solutions unless they are well thought out and comprehensive.

The decision was delivered in the somewhat narrow area of interest on debt or damages awarded (not costs). Another section of the judgment affirms that interest runs on costs from the date of the Order overruling former English Court of Appeal authority to the contrary.

Limitations implications

However, the real difficulties exposed by the decision are much more likely to surface in the area of limitation of action with its need to demonstrate the date upon which a cause of action arises. The two principal judgments (Lords Nicholls and Hoffmann) acknowledged that the principles they enunciated were equally applicable to Limitation Act issues. In the UK there have been regular amendments to their Limitation Act and as well the passage of the Latent Damage Act 1986 which provided a plaintiff with an extended limitation period where facts relevant to the cause of action are not known at the date when the cause of action accrued. The New Zealand Law Commission has issued reports NZLCR 6 (*Limitation Defences and Civil Proceedings* (1988)) and NZLCR 28 (*Aspects of Damages: The Award of Interest on Monetary Policy Claims* (1994)) promoting change.

The need for certainty of commercial position applies with much more force to these limitation questions. Both commercial lawyers directly advising clients and barristers at the commercial Bar are frequently questioned about when the limitation period expires on commercial matters. Clients need to know when their past risks expire to be able to plan for the future. *Nykredit* will add complexity and confusion to answers in individual cases. The Law Lords in enunciating the principles of law in this area have in turn thrown up the complexities which lie behind these principles. Unfortunately the decision offers little useful practical guidance on how these principles are to be applied. One can confidently predict a growing body of judicial analysis, re-analysis and practical application of the *Nykredit* principles.

VOIDABLE PREFERENCES ON WINDING UP

Lawson v The Official Assignee (as liquidator of Tot Toys Ltd) Salmon J 11 August 1997, HC, Auckland M1217/95.

This case is an interesting practical application of void preferences provisions under s 309 of the Companies Act 1955. Its future significance studied having regard to the changes brought about by the enactment of the Companies Act 1993.

The plaintiffs were the substantial owners of Tot Toys Ltd ("Tot Toys") which owned the trademarks for, and goodwill associated with the "Buzzy Bee". In October 1988 the plaintiffs procured Tot Toys to sue a competitor for copyright infringement, passing off and breach of the Fair Trading Act relating to a competitive Buzzy Bee product. As part of these proceedings an undertaking for damages was given by Tot Toys and interlocutory injunction was obtained.

Thereafter the manufacturing group which included Tot Toys encountered financial difficulties. At the urging of its bankers the group was restructured with a view to retiring debt. Part of the restructure included a plan under which the Lawsons acquired the trademarks etc for the Buzzy Bee in part forgiveness of their current account. The restructure ultimately failed. Some months after the restructure attempt judgment was given against Tot Toys on the substantive claim against its competitor. Damages and costs against it were ordered of

some $460,000 based upon the undertaking for damages. On the petition of this creditor Tot Toys went into liquidation. Nearly two years later voidable preference notices were served on Mr and Mrs Lawson with a view to the liquidator gaining the value of the trademarks.

Salmon J held the tests to establish a s 309 liability to be:

- the transaction was a specified transaction;
- it was in favour of a creditor;
- the company was unable to pay its debts as they became due from its own money at the time of the transaction;
- the transaction occurred within two years before the commencement of the winding up of the company;
- the transaction was undertaken with a view to giving a creditor a preference over the other creditors.

In this case, one, two and four were conceded. That left three and five for determination.

Company unable to pay its debts

Tot Toys' only debts at the time of the trademark assignment (apart from those owed to the Lawsons) were to its solicitors for some $18,000. There was no direct indebtedness to the bank, nor any security given to it for the indebtedness of its associated company. Tot Toys' sole asset was the rights to Buzzy Bee; the manufacture and sale of the product occurred through other companies in the group who, by informal arrangement, would likely meet such costs as the legal expenses. Expressing a determination to take a "commercially realistic approach" Salmon J reviewed the evidence to the effect that an associated company CDL would pay such expenses. He proceeded to examine the financial position of CDL and formed the view that in a balance of probabilities CDL were not able to pay the legal costs. Accordingly he found the assignment was made at a time when Tot Toys was not able to pay its debts as they became due.

Two points may here be usefully made:

- No authority is cited for lifting the commercial veil in this way and it seems a dangerous precedent which should not be followed. If Tot Toys was unable itself to pay except by incurring a like current account debt from a related company then it should be considered insolvent unless its associate gives deferred payment terms. There is no need to go beyond Tot Toys' own position to determine that;
- It is noticeable that the unpaid solicitors remained the legal representatives for the Lawsons in the present proceedings so presumably had dealt with any grievance arising from the past transaction benefiting their client, and that the party at whose behest the current proceedings were brought was not at that time a creditor (judgment or otherwise) of Tot Toys.

Section 292(3) Companies Act 1993 incorporates a presumption that at the time of such a transaction the company was unable to pay its debts as they fell due. The existence of that presumption would presumably have made it unnecessary, had the new Act, applied for Salmon J to lift the corporate veil and inquire into the financial affairs of a related company to get evidence of inability to pay.

Intent to prefer

Here there were two principal issues:

- was there at law an intention or even an outcome to prefer the Lawsons over other Tot Toys creditors; and
- if so, was there a relevant level of "intention" of Tot Toys' to prefer the Lawsons.

As to the first Salmon. dismissed any intention to prefer the Lawsons over their solicitors. He paid particular regard to the fact that the solicitors potentially disadvantaged by the assignment actually acted for the Lawsons on the transactions. The liquidator's counsel conceded that he must rely upon an intention to defeat the claim of a disgruntled injunction creditor. His Honour had no difficulty in holding that a "creditor" is someone to whom a debt is at the time owing. That does not include someone who has a prospective damages claim which judgment had not at the time of assignment been given.

As to the second, the test was whether the evidence established that the dominant intention of Tot Toys in making the assignments was to prefer the Lawsons. Salmon J held the onus of this to be on the liquidator and he had failed to discharge it. Indeed the principal motivation of the assignment was to achieve a separation of the Buzzy Bee business from the trademarks and other potential merchandising rights. That was associated with a legitimate attempt to restructure the group consequent upon its earlier financial problems.

So factually this stood against any inference of the requisite intention. It is again worth noting that under s 292(2) 1993 Act the focus of the transaction is away from the concept of intention inherent in s 309 towards effect. The new test is whether the transaction "enabled another person to receive more towards satisfaction of a debt than the person would otherwise have received or be likely to receive in the liquidation".

Remedy

Finally Salmon J commented on the liquidator's claim to have the trademarks returned to Tot Toys. The liquidator had been given notice of the assignments and had not acted for nearly two years. In that time the Lawsons had put more work into the goodwill associated with the intellectual property to the extent that it would not be fair for the Official Assignee and the company's creditors to have benefited from that work. Salmon J accordingly held (obiter) that the greatest relief he would have been prepared to give was damages in the value of the trademarks as at the date of the liquidation assessed at some $48,000.

Again comparing the provisions of the Companies Act 1993 it is interesting to note that s 296(3) permits a Court to deny recovery when the property is received in good faith by someone who has altered position in the reasonably held belief that the transfer is valid, and it would be inequitable to order recovery. The application of that provision is likely to achieve the same result as Salmon J's indicative position.

The case also illustrates the need for advisers to consider carefully all the remedies sections relating to these types of transactions in the 1993 Act. The statutory presumptions that such transactions are not in the ordinary course of business and the companies are unable to pay their debts obliges those documenting them to have regard to the true financial position of the company and the effect of the transaction (as opposed to its intent) at the time. Advisers would be prudent to include a full record of the directors' investigations and decisions on the transactions bearing in mind the new and wider statutory framework under the 1993 Act. ❑

UNFAIRLY OBSERVED RIGHTS

Don Mathias, Barrister, Auckland

discusses R v Te Huia *and common law fairness*

Compliance with the Bill of Rights does not mean that admission of the accused's statement will necessarily be fair. The common law discretion to exclude evidence provides a more vigorous standard of fairness than does the prima facie exclusion rule developed for use in the context of the Bill of Rights. Although not usually acknowledged, the reason for this difference is the standard of proof of fairness. Under the prima facie exclusion rule the prosecution needs only to satisfy the Court that on the balance of probabilities there was no breach of the Bill of Rights, or, if there was, that on the balance of probabilities any such breach should be excused. In contrast, discretionary exclusion of evidence will occur where the Court has a reasonable doubt about the fairness of admission of the evidence in question. At least, that is the better statement of the discretionary exclusion rule, notwithstanding dicta to the effect that a judicial discretion of this kind is a matter of judgment not amenable to a standard of proof. Indeed, one doesn't have to think particularly deeply to realise that all judgments are necessarily made against a standard of proof. In law there are two recognised standards.

An interesting illustration of the interrelationship between challenges to admissibility under the Bill of Rights and under the common law discretion, and also of the need to deal sensibly with the matter of standard of proof, is *R v Te Huia*, HC Napier, 8-9-97, T17/97 Gendall J. The Crown sought, pursuant to s 344A of the Crimes Act 1961, a ruling that a videotaped interview with the accused and its transcript were admissible. The defence challenged admissibility on the grounds of (i) breach of s 23(1)(b) of the Bill of Rights, and (ii) unfairness.

The conclusion on the first ground was expressed as follows:

> As a matter of fact I am satisfied that the Crown has proved (to the degree required by *R v Te Kira* [1993] 3 NZLR 257 although I find further and beyond reasonable doubt) that there was no breach of the rights of the accused pursuant to the New Zealand Bill of Rights Act 1990. The videotaped evidence and transcript is not therefore inadmissible on that ground.

This properly reflects the position under the prima facie exclusion rule where the standard of proof is less than beyond reasonable doubt. In *Te Kira* Cooke P considered that the balance of probabilities was a sufficiently high standard.

The grounds advanced for exclusion pursuant to common law discretion were accepted in part although individually, and looked at in isolation, they were not sufficient to rule the evidence inadmissible. The conclusion was different, however, when they were considered together:

> However the cumulative effect leaves me with some anxiety .... It is largely because many of the incriminatory acknowledgements of the accused may be unreliable that I think overall fairness to him requires that the evidence not be led. *My instinctive reaction is one of general unease. This probably equates with reasonable doubt* ... [the Court must] decide whether overall unfairness *might* arise to the accused through the admission of his statements. [Emphases added.]

Then came the matter of the difficult dicta on the standard of proof. His Honour quoted one of these passages, from *R v Williams* (1970) 7 CRNZ 378, 383 (CA):

> ... the issue is not one to be determined by reference to the onus of proof but as one of judgment. The discretion to exclude only arises where the evidence is admissible. Whether what has been done is so unfair as to call for the exclusion of admissible evidence involves the ascertainment of the facts and the conclusion as to their quality. That conclusion is one which reflects the public interest. Such matters do not readily succumb to evidentiary rules about onus or standards of proof.

Adroitly, His Honour skipped around this, saying

> I think that those remarks also apply to a situation such as this where, when viewed in the round, *there would be possible unfairness to the accused* to allow admissible evidence, yet with the danger of it being unreliable, to go before the jury.
>
> Accordingly for the cumulative effect of these reasons I exercise my discretion and exclude the videotape and its transcript. [Emphasis added.]

Clearly the correct approach is to require proof of fairness to the standard of beyond reasonable doubt. If the prima facie exclusion rule is to continue under the Bill of Rights it should be reformulated to recognise this. If it is discarded the way will be clear to deal directly with the real issue of overall fairness. A helpful reminder of the appropriate perspective was given by Baragwanath J in the context of an allegation of official misconduct: *R v Moresi (No 2) [waiver: right to silence]* (1996) 14 CRNZ 322, 332: "The essential test is perhaps what a fair-minded member of the New Zealand community aware of the whole of the facts and the ramifications would make of the matter". Usually, as in that case, there will be no need to refer to a standard of proof, but in borderline cases, like *Te Huia*, the feeling of "general unease" or "reasonable doubt" will lead a fair-minded Judge to exclude challenged evidence in the interests of overall fairness. ❑

WHAT'S STRIKINGLY SIMILAR?

Janet November, Research Counsel, Wellington District Court

reviews recent Court of Appeal cases on similar fact evidence

Two recent Court of Appeal decisions have indicated that the approach to the admission of similar fact evidence (and applications for severance based on similar facts) should be stricter than perhaps suggested by some of the decisions since the widening of the "strikingly similar" *Boardman* test in such cases as *R v Huijser* [1988] 1 NZLR 577, *DPP v P* [1991] 2 AC 447 and *R v Accused* [1992] 2 NZLR 187.

O'REILLY

R v O'Reilly CA 151/97, 22 July 1997 was an appeal against convictions for sodomy and indecent assault on the accused's adopted son. The offences took place between July 1973 and September 1981 when the victim was aged 8–15 years. It was argued on appeal that similar fact evidence of four witnesses should not have been admitted. There was also a delay argument which did not succeed.

After the accused was arrested and charged nine other men and women came forward to say they had been subjected to sexual offending by the accused as children, between 1960 and 1987. The Crown applied for their evidence to be admitted and the DCJ ruled the evidence of four of these witnesses (D, J, S and B) admissible.

D had complained to the police in 1984 and the accused had pleaded guilty to two charges of sodomy on D, a boy aged nine and ten years. The acts took place in the accused's sound studio and began with tickling the boy. J was a cousin of the accused and his evidence was that in 1987 when he was 13 and alone at home the accused started tickling him and put his fingers under the boy's belt but J managed to wriggle away. Another time the accused took J to his radio room and blocked his exit but his mother then came. S lived next door to the accused in 1982 and one day when he was about 11 he went with the accused to his workshop at a railyard where S alleged the accused grabbed him from behind and tried to undo his fly. S panicked and the accused tried to calm him down. B was a niece of the accused and she said that the accused used to touch her for periods in the shed where he kept his music equipment, from when she was about seven. She alleged that in about 1965 when she was about seven or eight the accused raped her.

The Court of Appeal noted that:

> The Crown's approach to so-called similar fact evidence went a great deal further than is consonant even with the less restrictive attitude to admissibility which has developed in this country after *R v Hsi En Feng* [1985] 1 NZLR 222 and *R v Huijser* [1988] 1 NZLR 577 and in the UK after *DPP v P* [1991] 2 AC 447. It seems that Crown Counsel thought it appropriate as proof of charges of sodomy and indecent touching of a young boy to call evidence from both males and females and of a widely differing range of alleged sexual conduct of the appellant towards them ....We have to say that this was an approach by the Crown which was really inviting the jury to conclude that because the accused had a propensity for sexual offending generally, he must be guilty of the particular offences charged in relation to the complainant. (p 8)

The Court cited Lord Mackay LC in *DPP v P* who said that the Court must decide whether:

> there is material upon which the jury would be entitled to conclude that the evidence of one victim about what occurred to that victim is so related to the evidence given by another victim, about what happened to that victim, that the evidence of the first victim provides strong enough support for the evidence of the second victim to make it just to admit it notwithstanding the prejudicial effect of admitting the evidence.

The Court of Appeal thought it was clear that the evidence of B, as to being indecently assaulted and later raped by the accused as a little girl had no close relationship in time or circumstance with the complainant's evidence. Nor was the evidence of S and J (although of the same sex as the complainant) proximate in time, nor did it take place in the same venue [sed qu. – there are references to the accused's "radio room" (J) and his workshop (S) and to the accused's studio (D) – all venues belonging to the accused and where he had control]. And the evidence concerning S and J "at most amounted to attempts at some form of indecency". These three witnesses, the Court concluded gave inadmissible and plainly prejudicial evidence at trial. A new trial was ordered.

On the other hand the admitted sodomy on D was conduct of the very kind charged (although three years afterwards) and "it occurred at the appellant's own home where much of the charged offending took place ... when D was at a similar age to the complainant and ... Vaseline was used on both boys". So the Judge was clearly right to admit this evidence despite its prejudice.

COMMENT

It would seem that it is necessary to focus on the proximity in time and circumstance between the evidence of the charges brought by the complainant and that of any "similar facts". Proximity in time, however, seems less important where the alleged offending is of the same kind as that of the possible similar fact offending. Evidence of indecent touching of children by an accused without more, is not admissible where the charges are indecent assault and sodomy, even if the children are of the same sex and of a fairly similar age as the complainant. There needs to be something in the circumstances that is more particularly similar to the complainant's situation – either the offending itself or some other feature (almost but not necessarily as distinctive as a "signature"); perhaps that the accused always took the boys to his music studio and followed a similar (though not necessarily "strikingly similar") routine.

R v F

R v F CA 264/97 14 August 1997 was an appeal against a pre-trial order refusing severance of counts in an indictment. Counts 1 and 2 charged the accused with indecent assault and sexual violation of a male then aged 11 years between July 1991 and July 1992. Counts 3 and 4 charged him with indecent assault and sexual violation by digital penetration of a female aged 12 between 1 and 31 March 1991. Both complainants were children of the accused's wife. Complainant A said the accused would come into his bedroom late at night or early in the morning, undress and fondle the boy and sometimes had oral sex; sometimes this happened in the lounge of the house. Continuing physical violence was alleged and threats of a severe hiding if his mother was told. Complainant B said one evening when her mother was in hospital she came down from her bedroom to the lounge frightened by an earthquake and the accused rubbed his hand over her breasts. Later she went to bed in the marital bed, not wanting to be alone, and woke to find the accused touching her with his fingers in her vagina. She was told not to tell anyone.

The Court of Appeal cited *R v W* [1995] 1 NZLR 548, 555:

> The general principle is that counts arising from incidents unrelated in time or circumstance are not to be tried together unless evidence as to one is relevant to another to an extent that its probative value outweighs its prejudicial effect. That may be so in a variety of circumstances of which similar facts is one.

The Court said that it was clear that the allegations regarding complainant A were not in any significant way connected in time or circumstance to those regarding complainant B. They then went on to consider whether the similar fact principle justified joinder of counts. The first question was whether the evidence relating to counts 3 and 4 could be said to be sufficiently supportive of counts 1 and 2 to allow it to go to the jury notwithstanding the prejudicial effect. The Court did not find the similarities (siblings of similar ages, offending under the same roof, reasonable connection in time, threat or admonition not to complain) sufficient. They focused on the differences:

> There is a gender difference which in these circumstances is significant. The offending against complainant B, unlike that against complainant A, was not accompanied by physical abuse or threats of physical abuse. It consisted of a single incident as opposed to a continuing course of misconduct. *The type of offending did not have any characteristics in common with that alleged by complainant A.* [My italics.] The two sets of offences were not in any real sense inter-connected. In all the circumstances it is difficult to see how the evidence of B could realistically go to refute likely defences to counts 1 and 2 .... Complainant B's evidence therefore can really only go to an assessment of complainant A's credibility by disclosing a propensity to sexual abuse of a stepchild – which would be an illegitimate use of the evidence.

With respect this seems a rather stricter approach than that adopted in some earlier cases, for example *R v W*, where a ruling refusing severance was upheld for counts of rape, indecent assault and attempted sodomy on the accused's daughter C between 1965-1975 when she was 6-17 years, and counts of indecent assault and rape against J (granddaughter) in 1984-92 when J was 3-11 years and two specific charges of indecent assault against B (granddaughter) when she was 8.

In that case the Court of Appeal thought the evidence of C was of distinctive probative value to J and B as relevant to their credibility. They said that where the issue was credibility similar fact evidence may assist the jury if they believe the similar fact witness. However the Court did not agree that whenever members of the same family make allegations of sexual abuse against the same individual in the family the charges should always be heard together. "Nevertheless, where as here the allegations are interwoven or interconnected the desirability of presenting the case on a realistic rather than an artificial basis will usually point against severance". (555)

In *R v H* 11 CRNZ 342 the trial Judge ruled that the evidence of the complainant's sister (D) concerning the accused's attempt to have sexual intercourse with her when she and her sister (C) lived with the accused and his wife, was admissible as similar fact. The Judge said the issue was whether or not C was telling the truth and it was necessary to sum up so that the jury concentrated on this.

> In my view the nature of the events described by D, though clearly in no way as serious as those described by C, are evidence of a pattern ... the situation of a man who appeared to regard junior female members of his household as objects for his enjoyment.

On appeal (*R v Horne* CA 80/94, 18 July 1994) the Court of Appeal had noted that the present atmosphere towards the admission of similar fact evidence was more relaxed than before the mid-1980s. The Court found the evidence of the two sisters had some quite strong similarities. They were of similar ages and both living in the accused's household. As with the second incident concerning C, D's incident commenced when the appellant took the girl for a ride in a car ... In one case he succeeded; in the other he accepted D's strong rebuff. In each case there were admonitions not to complain.

> In our judgment the evidence of D went further than showing propensity. As in *R v Accused CA 247/91* in view of the appellant's complete denial of C's allegations the evidence of D was of probative value.

The trial Judge had focused on the jury attending to whether if they believed D it helped them assess C's credibility. He warned against drawing inferences of propensity. Limited in this way, said the Court of Appeal, the evidence was of sufficient probative value to justify its admission. (p 4)

COMMENT

Following *R v F* and *O'Reilly* evidence should not be admitted to assist the jury to assess credibility with warnings about not allowing inferences of propensity, unless the evidence clearly passes the similar fact test. It seems from these two cases that the "similar fact" evidence should involve sexual abuse of a similar type to that of the alleged offence (so that the gender of a victim will probably make a difference – in *R v W* and in *R v H* the complainants and the similar fact witnesses were all girls) unless there is some other clear "signature" (use of stupefying drugs, tying victims' hands for example). Time and location and family relationships have some importance but will not be decisive. Certainly these factors do not suffice to "interweave or interconnect" complaints for the purposes of refusal of a severance application (*R v F* – stepchildren of similar ages, same general time span, same place). While similarities need not be as "striking" as in the days of the *Boardman* test they should be obvious and related to the conduct of the offending. ❑

THE DOMESTIC VIOLENCE ACT

Bill Atkin, Victoria University of Wellington

reviews the use and abuse of the new legislation

The Domestic Violence Act 1995 was heralded as a major parliamentary attempt to tackle what is now perceived as a serious social problem. In fact, much the same had been said about its predecessor, the Domestic Protection Act 1982 which contains many ideas more fully developed in the 1995 Act. The 1995 Act may well be seen in ten years' time as but another step in the continual process of reforming family law.

The 1995 Act can be distinguished for defining "domestic violence" and in particular including explicitly the notion of "psychological abuse" (although this was implicit in the 1982 Act), extending the categories of relationships which might become the subject matter of proceedings under the Act (notably family members, same-sex partners and close personal relationships), incorporating the former non-violence and non-molestation orders into one new protection order (available where there is or has been a "domestic relationship", there is or has been "domestic violence", and where an order is necessary for the protection of the applicant or a child of the applicant's family: s 14), increasing penalties for breach, and making the attendance of abusers at anger management programmes and the like in effect mandatory. As I have said, most of these things were present in some form in the 1982 Act but perhaps one of the more novel reforms was parliamentary after-thought which divided the House – the standard condition that abusers surrender firearms and firearms licences. A large part of the Act also deals with property issues – matters relating to occupation of homes, tenancies, and furniture. Despite being in a "domestic violence" statute, these issues need have nothing to do with violence.

STATISTICS

There has been far greater use of the Domestic Violence Act than expected. This has placed strains on the Judges, the Court staff and the system generally. According to the Principal Family Court Judge's office, at the end of the life of the 1982 Act, applications for non-molestation orders were running at approximately 400 per month (5064 for the year July 95 to June 96). We should add an average 300 applications for non-violence orders but many of these would have been sought by the same party who had applied for a non-molestation order. Occupation and tenancy applications were approximately 100 per month and again will often have involved the same parties. The monthly average applications for protection orders have been approximately 600, with 7012 applications made during the year to June 1997. One explanation for this increase is the wider range of relationships now embraced by the legislation: 15 per cent of orders granted by the Courts have been in situations where the parties had not been living together married or de facto and ten per cent of orders were granted to people outside the family relationship (presumably most of these fell within the "close personal relationship" category).

One or two other statistics are worth mentioning. Ninety- six per cent of orders have been granted against men. Of these, 35 per cent have involved husbands and 50 per cent de facto partners. (I put aside the interesting question why so many more males in de facto relationships appear to be violent than males in marriages; when the much smaller number of de facto relationships is taken into account, the ratio between the two is vast.) The percentage of orders made on application by a child (as opposed to an adult application designed to protect children as well) was just over one. While this sounds small, it represents 70 plus applications and exposes an important issue.

THE LEGISLATION IN PRACTICE

I wish to focus on three issues which have emerged from some of the cases coming before the Courts:

- child applicants;
- the notion of "the family divorce"; and
- the important concept of the "close personal relationship". I shall suggest that there have been some questionable attempts to use the Act in ways which may detract from its primary purpose of protection against genuine violence.

There is a range of other issues which merit attention, but others are better placed to comment on them:

- Are the genuine victims of domestic violence better protected now than they were under the previous legislation?
- Is the police policy of greater intervention working? (There has been a drop in the number of domestic homicides (down 50 per cent) and a doubling in the number of criminal convictions for family violence: Parliamentary answer by the Minister of Police, *Hansard* 9-9-97; 20/40 *The Capital Letter* 3);
- Are the new anger management programmes operating throughout the country and are they proving effective?
- What is the effect of the amendments to the Guardianship Act 1968 which give the parties to custody disputes the opportunity to raise allegations of physical or sexual violence which if true make it hard for the violent party to obtain custody or unsupervised access? So far there has been no leading case on the important legal issues here.

CHILDREN

A major innovation of the 1995 Act was its extension to a far wider range of "domestic" relationships than hitherto covered by the law (s 4. The 1982 Act applied only to married and de facto couples). However, the opportunity for family members and children to bring proceedings against each other has the potential to distort other areas of the law. In particular, there is a real possibility that the policies and procedures of the Children, Young Persons, and Their Families Act 1989, which provides the principal statutory framework for dealing with child abuse and neglect, can be circumvented by an application under the 1995 Act. The hallmark of the 1989 Act is the family group conference, a concept totally absent from the 1995 Act. Some cases illustrate the point. In *Steyn v Brett* [1997] NZFLR 312, a 14-year-old girl claimed that her father had assaulted her during an access visit. She sought a protection order, refusing to cooperate with access unless such an order was made. The Court accepted that the father had slapped the girl on the cheek and on the legs but this was in response to defiant behaviour on the girl's part. The father's actions could thus be characterised as discipline (though inappropriate discipline) rather than abuse and no order was made. The case however shows two things: first, an allegation of child abuse could lead to the grant of a protection order without recourse to a family group conference, and secondly, a child can easily initiate proceedings under the Domestic Violence Act whereas a child must obtain the leave of the Court to do so under the 1989 CYPF Act (s 68).

However, the opportunity for family members and children to bring proceedings against each other has the potential to distort other areas of the law.

A significant case is *Arvidson v Croft* [1996] NZFLR 741. An application was brought by three children against their mother's new lover. Such an application must be made by a representative and in this instance the representative was the children's father. Judge Adams expressed some qualms about the capacity for this procedure to be abused. Can there be any doubt that the children were pawns in a battle between the parents and the mother's new partner? On the evidence, the Judge accepted that there had been domestic violence and that an order ought to be made to protect the children. Yet, these children had come to the attention of the Children and Young Persons Service, a family group conference had been held under the CYPFA, the children were in the interim custody of the Director-General of Social Welfare and had been placed in the day-to-day care of their maternal grandmother. Given this, why should the Court be interested in overlaying a protection order on a situation more appropriately kept within the primary regime for child abuse – the Children, Young Persons, and Their Familes Act?

Bragg v Hawea [1996] NZFLR 874 involved an application brought by the father of twins against the mother, who had had custody for most of the twins' lives. The father's ostensible concern was the violence of the mother's partner directed at both the mother and the children. The Court declined to make an order because it was the mother's partner and not the mother who had been violent. The real motivation for these proceedings may be questionable: the father was also seeking custody and the application for a protection order may have been a tactical device in the custody battle. If there were genuine concerns about the safety of the children, the matter could have been handed to the DSW for investigation under the 1989 Act.

A final reference illustrates the interplay of the two regimes and an outcome which may be sounder in policy terms. In *Kenyon v Hemi* (Nelson District Court, FP 042/204/96, 9 September 1997), the father made an application against the mother. He had earlier obtained interim custody of their child. Judge Ellis accepted on the evidence that each party had suffered violence at the hand of the other, although there had been no violence since the relationship ended. The Judge also accepted that there had been psychological abuse of the daughter by allowing her to see and hear their abusive behaviour. Given all this, should the Court have awarded protection orders to *both* parties? The Act however discourages such "mutual orders" (s 18) unless the case for both is clearly and independently made out. (It is interesting to note *Higgs v Higgs* (Otahuhu Family Court FP 048/503/97, 26 August 1997) where mutual orders were granted on the recommendation of counsel for the child, primarily so that both parents could be sent to anger management programmes.) The Judge's assessment was rather different. He thought that there were real issues of power and control in the relationship, centring on the child. In this sense it was not the parents who were victims but the child. Neither parent really needed a protection order but the child might need protection from the continuing conflict between them. He alluded to the possibility of invoking the CYPFA to deal with the situation if it was not addressed by the parties.

This decision shows how the Court needs to be alert to the wrongful attempts to invoke the protection powers in the Domestic Violence Act 1995 and how children can be pawns in a game played out by adults.

FAMILY DIVORCE

Commenting on the Domestic Protection Act 1982 from a Maori perspective, Durie-Hall and Metge were highly critical of the way in which that Act forced families apart, unlike the CYPFA which purports to bring them together (Henaghan and Atkin *Family Law Policy in New Zealand* (OUP, Auckland, 1992) 69-70). The 1995 Act follows in the footsteps of the 1982 Act, not the 1989 Act.

This point is graphically made in *Takiari v Colmer* [1997] NZFLR 538 which involved what came to be called a "family divorce". The applicant was a woman aged 27 who applied for an order against her mother and sister. The applicant had had a tough upbringing, including heavy disciplining from her mother. Poor relationships appear to have continued well into the applicant's adulthood and the sister, "a somewhat intense, aggressive person", was really used as an instrument of the mother's continuing control. On appeal, Hammond J upheld the award of a protection order (strictly speaking, the mother did not appeal against the protection order; the issue was whether the sister should be added to the order as an associated respondent: s 17). Given the wide breadth of the 1995 Act and the extensive discretion available to Judges in granting orders, the order here may well be legally justifiable. But in characterising this as a "family divorce", the Judge has surely moved away from the goal of providing protection from harm to questioning the integrity of familial relationships in the interests of the independence of the individual person. The family ideology of the CYPFA, while admittedly not extended to adult

relationships, is nevertheless given no currency in this treatment of the Domestic Violence Act.

A quite different result emerged from another "family" case, *Simon v Yates* (Kaitaia District Court FP 029/063/97, 25 June 1997). The applicant and respondent were cousins and therefore ostensibly within the scope of the legislation. Their differences arose over Muriwhenua land claims and at one meeting in particular there was a threatening incident. It is not really clear that this one event would be enough to constitute domestic violence but the interest in the case lies in the reason why Judge MacCormick refused an order. He held that the incident did not arise primarily out of the domestic relationship but out of a community situation. In other words, while this case had family overtones, it was not an appropriate one to be dealt with under domestic violence legislation. Family violence and local politics are to be distinguished.

CLOSE PERSONAL RELATIONSHIPS

The legal issue which has perhaps given the Courts greatest difficulty is the meaning of "close personal relationship". Where such a relationship exists, a victim of domestic violence may seek a protection order under the Act. Under s 4(3), employment relationships are generally excluded. Under s 4(4) the Court is required to take into account:

(a) The nature and intensity of the relationship, and in particular –

(i) The amount of time the persons spend together;

(ii) The place or places where that time is ordinarily spent;

(iii) The manner in which that time is ordinarily spent;

but it is not necessary for there to be a sexual relationship between the persons;

(b) The duration of the relationship.

This provision is entirely suitable for boyfriend/girlfriend relationships which have turned sour, exemplified by two student cases – *S v P* [1997] NZFLR 181 and *T v C* [1997] NZFLR 417. In both cases the parties had had intimate relations which amounted to close personal relationships. In the first, Judge Adams exercised his discretion not to grant an order because he thought that in the circumstances it was preferable for the parties to avail themselves, if necessary, of the university's grievance procedures. In the second case however the same Judge considered that the respondent had little insight into the effect on the applicant of his harassing behaviour and a protection order, with its concomitant attendance at an anger management programme, was necessary. A further interesting condition of the order was that the respondent had to withdraw from a second semester paper which the applicant had also enrolled for.

While former intimate relations may fall easily within the category of "close personal relationships", the concept has been invoked in a number of other situations which are rather less clear cut. The leading case is the appeal decision of Hammond J in *A v P* [1997] NZFLR 878. In discussing the phrase, the Judge said (880-881):

> The word "close" is surely a critical qualifier. Thus a man who keeps a mistress in a flat would likely qualify; and if there was a falling out between long-standing best friends, that might well qualify.
>
> It is not easy to draw a bright line. But the legislature has surely attempted to draw a line between making this statutory provision a general regulator of social relationships, and the perceived need to curb domestic violence. ... At the end of the day, whether a personal relationship is or was "close" can only be determined on the evidence. At some point, in the eyes of the legislature, a relationship does cross that line. The determination of that line is for the trier of fact. The Judge will necessarily look to the kind, duration, and incidents of a relationship, with the particular object of assessing its overall quality. Clearly mere acquaintanceship will not do. And the statutory terminology does not refer to "friendship", which is a different and more precious thing again .... Whatever the relationship is, and however it came about, it has to be "close" otherwise the legislation would subtract from the normal wear and tear of everyday human relationships. The Act is not a vehicle for infantile vendettas, or mindless tit for tat in the course of human affairs. And, to stop one person from having contact with another, is a serious thing in a human society: humanity does not repose in isolation.

Seemingly profound words. The distinction between domestic violence and the "normal wear and tear of everyday human relationships" is surely right. But what happened in *A v P*? The case concerned two women. The applicant, Mrs P, had separated from her husband. During the separation the respondent, Ms A, had an affair with Mr P which allegedly led to the birth of a child. Mr and Mrs P reconciled but the marriage again collapsed. Mrs P now claimed that she was being abused by Ms A. Hammond J upheld the protection order granted to Mrs P. What was the basis for saying that there was a close personal relationship? They knew each other prior to the affair. It appears that they had long talks on the phone and indeed had a contest to see how often they were in touch with each other. On more than one occasion they shared child care. Ms A put on a Tupperware party for Mrs P. Now, is this really the stuff that Parliament had in mind when enacting the Domestic Violence Act? Does the Tupperware test really distinguish between genuine cases of domestic abuse and the broader regulation of social intercourse? I suggest that this case has more the marks of an "infantile vendetta" or "mindless tit for tat" than domestic violence. This is somewhat confirmed by one of the main incidents of abuse relied on by the applicant which occurred in a supermarket when Mrs P claimed that Ms A hit her with a shopping bag. If that incident was really serious enough, it could have been taken up by the police using the ordinary criminal law. Alternatively, if there was real evidence of harassment, the fortuitous existence of Tupperware parties should not be crucial. The proper course is for Parliament to pass appropriate legislation dealing with stalking and harassment. Such legislation, the Harassment and Criminal Associations Bill, is indeed before Parliament at present.

Let me mention three other "close personal relationship" cases which are a little troubling. An order was declined in *D v B* [1996] NZFLR 812. Two mothers of young children had been close friends, in almost daily contact for eight years. However when the children fell out, so did the mothers. Quarrels and threats ensued. I am inclined to think that Judge Inglis QC was right in not treating this as a case for the Domestic Violence Act, but surely on the Tupperware test there can be little doubt that the parties had had a "close personal relationship". If an order was justified in *A v P*, it appears all the more justified in *D v B*.

In the "stalking" case *T v H* [1996] NZFLR 865, followed up in *T v H (No 2)* (New Plymouth Family Court, FP 043/66/97, 15 May 1997, Judge Inglis QC), a happily

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TE TURE WHENUA MAORI: RETENTION AND DEVELOPMENT

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ask hard questions about Maori land and mortgages

Characteristic of almost all discussion of Maori land is the absence of any rigorous attempt to reconcile, or at least clarify the difference between, the Maori view of land, expressed in the *whakatauaki* (proverb) – *Ko te whenua te wai-u mo nga uri whakatipu* (Mother Earth through her placenta provides nourishment and sustenance for her offspring), with the economic view of land as a resource to be used efficiently.

This is, to say the least, odd, when out of some 1.5 million hectares of Maori freehold and customary land, at least 0.9 million hectares are farmed and 0.2 million hectares are in commercial forestry; when this area is being increased by Treaty settlements; and when Te Ture Whenua Maori Act 1993, the main Act dealing with Maori land, requires the difference to be recognised, and presumably reconciled, by referring in its long title to the need to retain Maori land as a "*taonga tuku iho* of special significance to the Maori people" as well as to the need to develop that land "for the benefit of its owners, their *whanau*, and their *hapu*".

if one of the desired goals for Maori land is economic development, then, to the extent that economic development requires economic efficiency, development will also require the particular systems of property rights and the particular economic system which lead to economic efficiency

This article tries to fill this gap by comparing and contrasting the systems of real property rights which underpin the two viewpoints, and by establishing where these systems and their attendant rules converge and diverge. In the course of the analysis we give a brief overview of the part that statute law has played in trying to integrate the two systems, and of the further difficulties which have been created by this legal intervention. We emphasise, however, that we are economists not legal scholars, and that we have neither the skills nor the time to provide a full review of the more than 270 enactments specific to Maori land.

We conclude that there are three major differences between the two systems, one of which, *fragmentation of title* to Maori land, stems partly from common ownership and partly from misplaced past legal intervention; the other two of which, *limited transferability* of Maori land and iwi based property rights, stem from Maori customs. Limited transferability has now been enshrined in New Zealand statute law by Te Ture Whenua Maori Act.

We further argue that, although these differences create high transaction costs and impede the economic development of Maori land, they cannot simply be legislated away, wished away, or compensated for, since they are caused, not by a difference of opinion over rules governing a particular system, but by a difference in beliefs as to the desirability of one system in comparison with the other. Since beliefs about systems are less susceptible to change than opinions about rules, we argue that there are few gains to be made by attempting any further radical change to, or amalgamation of, the two systems. Rather, the constraints of the differences need to be recognised and accepted, so that economic efficiency can be enhanced within these constraints by making marginal changes to beliefs and systems where such changes are acceptable, and by improving the management systems on Maori land through education, management training, and greater accountability of management to owners. The part that the law has to play in this process is one of facilitating improvements to existing systems and rules, rather than one of imposing radical change.

We wish to emphasise that in this article we are comparing and contrasting the two systems, not with a view to deciding that one is in some way superior to the other, but to show that particular systems of property rights and particular economic systems lead to particular outcomes. Thus, if one of the desired goals for Maori land is economic development, then, to the extent that economic development requires economic efficiency, development will also require the particular systems of property rights and the particular economic system which lead to economic efficiency. It cannot be otherwise. Where goals other than efficiency are more important, for instance where the preservation of land for spritual reasons is paramount, other systems of property rights may be more appropriate, even though those systems

may act as a constraint on efficiency (and hence on economic development).

EFFICIENCY AND PROPERTY RIGHTS

Economic efficiency is an entirely abstract concept. It is the outcome of a theoretical model of resource allocation by voluntary exchange in competitive markets, in which undistorted prices act as signals to buyers and sellers. It derives originally from inductive observation of particular, largely European, economies, but it is now been generalised and extended, and despite its theoretical nature and its limited origin, it is now accepted widely as a normative welfare goal in much of the real world. (For a full discussion of economic efficiency see Maughan: "Meat Competition and Efficiency" (1996) 2 NZBLQ 216.) It may be thought of in simple terms as "avoidance of waste". It is, however, a complex concept dependent on a number of key assumptions about institutions and practices.

Prominent among these assumptions is that a set of property rights must exist prior to any exchange taking place. (For discussion of property rights see Maughan "The Economics of Property Rights"(1995) 1 NZBLQ 78.)

Ideally, if efficiency is the goal, these property rights need to have the following characteristics:

Exclusivity: Owners of property must be able to exclude others from using their property in order that they can enjoy the rewards (recover the costs) of maintaining and developing that property. If there is no right to exclude, then the resources will be treated as free (cost-less) and will be over-exploited. Alternatively, owners will anticipate free riding and not spend money on maintaining and developing their property. Both of these outcomes are inefficient. Exclusivity does not necessarily require ownership by an individual, even though individual ownership is often regarded as a keystone of the economic model. Groups can also own a resource provided that they can act as an entity and provided that they have the power to exclude others from using their resources. Companies, cooperatives, trusts, and the family are all examples of such group "entities". Note also that in terms of economic efficiency the ability to exclude cannot be so extreme that it leads to the creation of unchallengeable monopolies. Thus, the ability to exclude must be of *efficient scale* if there is to be economic efficiency.

Universality: Property rights are assumed to be assigned to all scarce resources. If they are not, then some resources will be over-utilised, or under-utilised in anticipation of free riding. Again, both outcomes would be inefficient. The presence of air pollution, and the extermination of wildlife usually occur because no one has the clear right (responsibility) of looking after the air or the wildlife.

Enforceability: Property rights must be enforceable, since there is no point to exclusivity unless it can be enforced.

Transferability: Property rights must be voluntarily transferable from one party to another – ie must be capable of being voluntarily alienated – so that resources and goods can move to their highest valued use. In the absence of transferability there can be no exchange and no benefits from exchange. Since efficiency is the outcome of a resource allocation based on exchange, lack of transferability is incompatible with economic efficiency.

Acceptability: Property rights are attributes of property created by enforceable rules of obligation. The creation and enforcement of rules presupposes some social contract, whether agreed or imposed, which is binding on the parties to the contract. While it can be empirically demonstrated that imposed contracts can coexist with some aspects of economic efficiency (eg economic growth), it is at least arguable that efficiency requires property rights which are agreed rather than imposed, mainly on the grounds that efficiency places great emphasis on the idea of voluntary exchange.

Most economic research into property rights would suggest that while property rights are found in virtually every society, the particular characteristics of those property rights will differ between societies, and within the same society through time. While most sets of property rights will have some of the above characteristics, few, if any, will have all of the characteristics. Even the set of property rights most closely associated with the market economies, and hence with "economic efficiency" does not have in full attributes of universality, efficient scale, or even acceptability. Property rights of Maori iwi (which for sake of simplicity we call Maori property rights) differ even more markedly.

MAORI CUSTOMARY RIGHTS

Before the establishment of a land title system derived from England (hereafter the "English" land title system), all land in New Zealand was held under the customary rights of the various Maori iwi. There was no national property rights system, and no single Maori culture, although in some broad sense there were many similarities between iwi.

Land was regarded by Maori as mother and foundation of identity, since the origin of mankind was thought in Maori tradition to stem from the union of *Ranginui* (sky father) and *Papatuanuku* (earth-mother). *Papatuanuku* provided sustenance, a foundation for history, a place to stand, and a well of spirituality: and *Papatuanuku* was literally "mother", so that the word for land was *whenua*, or placenta, symbolising the nurturing and life-giving force of land. Accordingly, Maori placed a high value on the non-alienation of land since alienation meant loss of mother and loss of identity.

The first Maori arrivals established their claims to chosen areas by right of discovery and by formal appropriation (*whenua kite*). Right of occupation (*ahi ka*) was recognised by all iwi as a legitimate right of ownership of land. Continuous occupation by successive generations gave owners the title of the "long burning fire" (*ahi ka roa*), but the claim became cold (*ahi mataotao*) and rights to occupation were lost, if the land was abandoned, and if the fires went out for three generations. These early claims were later transferred into *take tipuna* (ancestral rights).

The title to the land belonged to the group, not to an individual, since a fundamental notion of Maori society was "*no ke katoa te whenua*" (the land belongs to all of us). However, individual rights to use parts of the land did exist – but only with the consent of the group. These individual rights were carefully defined, and included rights not only to land but to the flora and fauna produced on the land. An individual, for instance, might share title to a tree (for the purpose of snaring birds) with others whose title was to the fruit (Firth, R *Economics of the New Zealand Maori*, Govt Printer, 1929). These individual rights, which carried attendant responsibilities, are most easily thought of as akin to revocable leasehold rights which were assigned and revoked by the *ariki* (paramount chief) in consultation with other people of *mana* within the group. It was a system somewhat similar to the feudal system in Europe.

Rights were clearly known and fiercely defended. Certification of title to the land came from knowing and being able to recite the minute detail and history of the land. Hence genealogists had much power and *mana*. Stone or wooden markers (*pou rahui*) protected by strict *tapu* (sacred ritual) were also used to define boundaries.

Land was generally not alienated outside the iwi, and land usually descended to male not female children, since females could marry outside the iwi. However it was not unknown for iwi to exchange land, or allow another iwi to use land, where such exchanges fostered a mutual need, such as a military alliance. Many of the initial "sales" of land by Maori to Europeans were probably based on this concept. Other types of property (fish, birds, greenstone) were exchanged between groups, again where the exchange was mutually beneficial, which indicates that there was some set of nationally respected property rights despite the iwi basis of these rights.

In short, customary Maori land rights had the characteristics of exclusivity, enforceability, and, within individual iwi and probably with some duress, acceptability. The rights were also as universal as most other sets of property rights in that they were applicable to a wide range but not to all resources (the moa is an example of an unassigned resource that was over-exploited). They were, however, radically different from the "English" system of rights imposed in the 19th century, in that they were not thought of as transferable. Moreover the emphasis on group ownership of rights was at variance with the English concept of several rights.

TRANSITION TO EUROPEAN SYSTEM

These customary rights were changed irrevocably with the arrival of the first settlers and the imposition of a national, individual based, system of property rights which provided for the almost complete transferability of real property rights. The customary rights with their emphasis on highly limited and conditional transferability, on group ownership, and on iwi ownership could not survive unchanged. As a result, over the next 160 years, attempt after attempt was made by iwi, and increasingly by Maori in general, to preserve customary rights or adapt them to the new system, while simultaneously the central government was usurping Maori rights by legislation, and when this failed or led to protest, trying to ameliorate the effects of the usurpation with yet more legislation.

Key issues at all times were the relationships between iwi and the Crown, the voluntary and legislative alienation of Maori land, and the group ownership of Maori land. We consider each of these briefly.

VOLUNTARY ALIENATION

Since the land and identity of iwi were intertwined, and since the group rather than the individual was owner of the land, the apparent willingness of some Maori, both before and after the Treaty of Waitangi, to sell land voluntarily to the early settlers seems paradoxical. Such sales are certainly contentious.

There are, however, several reasons why some land was "sold" so readily. One has already been mentioned – that neither the freehold nor the leasehold was knowingly alienated by Maori. Instead, the "sale" was considered as a gift, akin to a revocable lease, of a right to dwell on a piece of land, in exchange for a gift of assistance in the form of tools, weapons, or military alliances.

Other reasons advanced are, that the land sold was marginal in terms of cultural value, that many Maori simply did not believe that so much land could be expropriated and alienated for ever, that the land was "sold" by disaffected Maori who had no real right to sell the land, and that, paradoxically, land was sold to emphasise to other iwi that the seller was the true owner of the land. This latter procedure was particularly useful if it created a buffer zone between two warring iwi.

However, as more and more settlers arrived to take up the newly acquired lands, the full significance of a deed of sale became all too clear, and Maori opposition to further sales or gifts started to grow. It was at this stage that recourse was made to legislation both to facilitate further alienation, and to protect against demonstrably unfair exchanges. Later the legislation was aimed largely at preventing sales.

IWI AND THE CROWN

A full survey of all the legislation relevant to the alienation of Maori land and to the relationships between iwi and the Crown is beyond the scope of this paper. Such a survey would have to explain the English land tenure system, the development of transferability of land under the English tenure system, The Treaty of Waitangi, the Land Acts, the Maori Land Act, the Public Works Act, and legislation specific to Maori land (over 270 enactments: see Crown Forest Rental Trust, *Maori Land Legislation Database*, 1994). It must be stressed therefore that the following sections on relationships between iwi and the Crown, and on legislative alienation, are selective and condensed.

Under the English land tenure system, if land has no owners, then the land belongs to the Crown, which effectively means that the Crown is the ultimate "landlord", with power to issue and cancel title to all land. We see this process operating in New Zealand today when surplus Lands of the Crown (disused schools, land bought for farm settlement etc) are made available for sale to the public, subject to Treaty of Waitangi claims, or when the Public Works Act 1981 is used to cancel private title and return private lands to the status of Lands of the Crown.

In feudal times the Crown meant the King, and under the Treaty of Waitangi this interpretation of the Crown was still relevant to many of the 512 Maori chiefs who signed the Maori version of the Treaty, and of the 30 who signed the English version, since the concept of Queen Victoria as ariki was consistent with iwi concepts of government.

However, the effective powers of the King in relation to land had been eroded in England long before the Treaty of Waitangi (land was virtually fully transferable after 1290 following the Statute of *Quia Emptores*), and the nature of the Crown had become to be defined by the relevant nature of the jurisdiction concerned. Today, ownership of land by the Crown might variously mean ownership by the Queen (as was recognised in the Waikato settlements in 1996), by Parliament, or even by government departments.

This confusion over the nature of the Crown, which was to surface in the 1980s with increasing Maori anger at the proposed disposal of Crown land by departments and SOEs, and which led to the passing of the Treaty of Waitangi (State Enterprises) Act 1988, was further complicated by the ambiguous wording of the Treaty of Waitangi, which governed the relationships between iwi and the Crown. In the Treaty, the conflicting concepts of kawanatanga (governorship) which was to be the prerogative of the Crown, and rangatiratanga (chieftainship) which was to be the prerogative of the ariki, prevented any real understanding of who was to establish the rules for land ownership. Consequently the

relationship between iwi and the Crown was so ambiguous that even if there had been agreement on the nature of the Crown, there could have been little agreement on which system of real property rights was to prevail.

LEGISLATIVE ALIENATION

In the context of this confusion, and unquestionably deliberately aided by this confusion, the English real property rights system was imposed by legislation.

Today the main legislative framework for creating and cancelling title comprises the Land Act 1948 (amended 1988), Te Ture Whenua Maori Act 1993, and the Public Works Act 1981, but in the early stages of the development of this system, the main legislative framework was the Native Lands Act 1865 and its predecessors.

Royal instructions were issued in 1846 to Governor George Grey for the setting up of a special Court to deal with Maori land and bring it under the English system. In 1862 and 1865, under the Native Lands Act, the Land Court was established with the stated objective of "*encourag[ing] the extinction of (native) proprietary customs*". The Act primarily charged the Native Land Court (today the Maori Land Court) with the responsibilities of ascertaining Maori title, of defining rights of Maori in land held under customary title, of transforming the title into a form recognisable under English common law, and of facilitating dealings in Maori land and the settlement of the New Zealand colony.

Parallel with this Act, the government, frustrated by the reluctance of Maori to make land available for sale, brought in the New Zealand Settlements Act 1863, under which the raupatu (confiscations) policy was put into effect. Land was confiscated by declaring a district and all land within it Crown Land, then subsequently issuing title to the land and selling it to settlers. Approximately 12.5 million hectares were initially confiscated under this Act from both hostile and friendly iwi.

As the number of Maori opposing this Act increased, the Suppression of Rebellion Act 1863 was passed and used to make further confiscations by allowing the suspension of habeas corpus and the trial by courts-martial of those who resisted.

Thus land held under customary title was forced into an English system of ownership, with the predictable result that there was a continuous grievance and bitterness among Maori about the legislative alienation of land which surfaced in the land wars of the 1860s, and in the continuous protests over this century. The Treaty of Waitangi Act 1975, the Treaty of Waitangi (State Enterprises) Act 1988, and Te Ture Whenua Maori Act 1993 were all designed to try to redress these grievances by recognising past wrongs, by returning public lands to Maori ownership where possible, and by ensuring that there was no further unilateral alienation of Maori land.

Maori land now lacks the characteristic of transferability, not only because the iwi system of rights lacked individual transferability, but because history has taught Maori that transferability was a largely one-way process of alienation which needed to be resisted politically and legislatively. This view is most unlikely to change except marginally, even though lack of transferability acts as a constraint to efficiency by preventing the movement of land to economic agents who may value it more highly than owners, and by preventing the land from being used as security for mortgages. The latter is a severe constraint on the development of Maori land.

FRAGMENTATION OF TITLE

The land converted to English title was originally owned by a group. Since the idea of ownership by an undefined group of individuals was inconsistent with the English system, the Native Lands Act introduced the "ten owner" rule whereby a Certificate of Title was to be issued to no more than ten owners. Accordingly, yet another grievance arose because ten people, who were in Maori terms only trustees for the tribe, were given individual title to the land, while all others were disenfranchised.

It was possible for a Certificate of Title to be issued to an entire tribe, but only where the block exceeded 5000 acres. Again predictably, to prevent group ownership, large areas of land were parcelled into lots smaller than 5000 acres to which title was then issued under the ten owner rule. Thus customary land retained by Maori became fragmented – a process accelerated by a provision in the Act that stated that all living children of the certified owners (not just male children as under the iwi system) were entitled to succeed to the land equally. Today much Maori land is owned by the descendants of only a few of the original owners, and is divided into portions which are incapable of generating income. Again, this is a source of grievance, since fragmentation is an (exogenously imposed) constraint to efficient use of Maori land.

INCORPORATIONS AND TRUSTS

Attempts have been made to deal with the problem of fragmentation of title. The most important of these have been the creation of Maori Incorporations under the Native Land Amendment and Native Land Claims Adjustment Act 1929, and of the Maori Trusts under the Maori Affairs Act 1953.

Essentially, Incorporations and Trusts are devices to reduce the high transaction costs of managing fragmented lands with numerous owners, by amalgamating the land titles under a single holding company, and by delegating the management of the company to a committee of owner representatives. Thus Incorporations and Trusts are designed to perform much the same functions as joint stock companies and cooperatives.

Although all of these structures can help overcome the problems of high transaction cost, they create in their place principal-agent problems, whereby there may be a misalignment of objectives between the owners, the boards of directors, the managers, and the employees. In the absence of an effective system of monitoring and accountability these misalignments can lead to wasteful use of an organisation's resources, inefficient management practices, unnecessarily high costs, shirking, and even fraud.

Joint stock companies partially deal with these problems by the use of internal audits, contestable directors, and contestable management and employees. They also operate within a legislative framework that makes directors and management legally responsible for their actions, and which provides for the buying and selling of shares in the company on the open market. This last is probably the most important check on the actions of directors, management, and employees, in that it allows for the takeover of any corporation which has been managed inefficiently. It is yet another manifestation of the importance of the concept of transferability (in this case the transferability of shares) to economic efficiency.

In cooperatives and in Maori organisations this check is missing, precisely because owners are aware that open trade-

ability could lead to alienation of the company and its assets. Trading in shares in cooperatives and in Maori organisations, if it is permitted at all, is usually limited to trading within a preferred group of alienees. Since these preferred alienees (and the original shareholders and directors) often have mixed objectives, and therefore may not act in a profit maximising manner, there is no effective share-market check on poor management. Moreover directorships and management in Maori organisations may be only minimally contestable so that a second set of checks on accountability and on efficiency may also be missing.

MAORI LAND AND EFFICIENCY

Even the brief history of Maori property rights outlined above should serve to point out that the Maori system of real property rights differed and still differs from the English system despite the attempts that have been made to fuse the two. In particular, there is no real national system of Maori property rights; there is only limited transferability of Maori land; and there is greater fragmentation of title in comparison with land held on the general register.

The impact of these differences has been to create three major constraints to economic efficiency in the use of Maori land. First, Maori land cannot in general move to its highest valued use, unless the highest valuer is a preferred alienee. Second, it is difficult to borrow money on Maori land, except from preferred alienees, because the procedure for transferring land to a non-preferred mortgagee in the event of failure to repay the mortgage is complex and costly. Third, while the problem of fragmentation of title can be at least partly dealt with by incorporations and trusts, the limited transferability of the shares in the incorporations and the lack of contestability of directors and management, can often lead to poor management and lack of accountability. The iwi basis of the rights further impacts on efficiency by creating high transaction costs if there is a need for Maori as opposed to iwi actions.

DEVELOPMENT AND RETENTION

It is our belief that, while all these constraints may be modified or modifiable in time, the history of the alienation of Maori land, and the key role that the land plays in Maori identity, will preclude any radical change to the limits on transferability in the immediate future. After all it should be remembered that it was more than two hundred years after the establishment of the English feudal system before English land became fully transferable, and a further 350 years before feudal tenures were finally abolished. Even now, more than nine hundred years later, there are still vestiges of the Norman system.

As a consequence, although provision has been made within Te Ture Whenua Maori Act for alienating Maori land, and for bringing general land on to the Maori land register, such changes are likely to be marginal. For the bulk of Maori land, the constraint of non-transferability (a system constraint) and the related (rule) constraint of non-mortgageability will continue to hinder development. Moreover because the rule constraint stems from a system constraint it cannot be modified by some sleight of hand, or wished away by appeals for special conditions for loans. Such appeals amount to a request for unsecured loans for which there is no accountability. The lack of transferability therefore creates an impasse in which retention of the land is at odds with development.

If, however, the constraint is accepted fully – if for instance it is accepted that the land cannot be used as security for loans – then it becomes clear that there are a number of promising options for development, some of which are already being explored. Mortgage of produce and of cutting rights to timber, use of retained profits, of equity and of preferred alienee finance markets all suggest ways of raising development finance without breaking the system constraint of non-transferability. More importantly, improved management skills, improved education, the sharing of information and skills between iwi, and greater accountability for directors and management, are all areas in which improvements can be made to efficiency without radically changing the constraints.

If such avenues were pursued, then there is a chance that despite the conflict between retention and development of Maori land within Te Ture Whenua Maori Act, it may nevertheless be possible to enhance development within the constraint of retention. ❑

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married woman was being amorously pursued by the respondent. It happened that they had known each other for 38 years but in deciding that there was a close personal relationship the Judge appears to have been more swayed by the fact that the woman had no other practical ways of obtaining relief. This is surely not the right question to ask when deciding the quality of the relationship between two people. It is suggested that this is again the sort of case which should come under the Harassment and Criminal Associations Bill rather than the domestic violence legislation.

Finally, I note *Wyatt v Eldershaw* (New Plymouth Family Court, FP 043 222 97, 24 July 1997, Judge Inglis QC). The parties formed part of the same social circle. The female applicant sought an order against a close mate of her former de facto partner. Rightly, it is suggested, it was held that the threshold of "close personal relationship" had not been crossed. However, somewhat oddly the Judge said that "[a]ny further behaviour of the respondent which could be interpreted as harassment of the applicant could well take him over the threshold". Why, it must be asked, should more harassing behaviour suddenly transform this relationship into a "close personal" one? If it was not one before, why should negative actions now tip the balance? Such actions do not meet the Tupperware test nor do they appear to have much to do with, in Hammond J's terms, assessing the overall quality of the relationship.

CONCLUSION

The object of the Domestic Violence Act 1995 is to recognise that domestic violence in all its forms is unacceptable and that there should be effective remedies for its victims (s 5). The focus is on domestic violence and its victims. By dramatically widening the ambit of the legislation, Parliament has run the risk of diverting attention away from genuine cases of "domestic" violence towards cases that should be resolved in other ways. The above analysis of a handful of judgments shows that the Courts are well aware of the dilemma. I suggest, however, that the practical outcomes have not always been in accordance with the underlying policy of the Act. ❑

SUPER LEAGUE

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finds lessons to be learned from the Australian sports cases in a revised version of a paper for the 1997 Workshop of the Competition Law and Policy Institute, Christchurch

A review of competition law in the sporting arena must start with the Super League case *News Ltd v Australian Rugby Football League* (1996) ATPR 41-466, (1996) ATPR 42-521 (on appeal).

SUPER LEAGUE: BRIEF FACTS

News Ltd intended setting up an alternative competition to that conducted by the Australian Rugby League ("ARL") which (with its predecessor bodies) was the sole rugby league premiership organiser.

News Ltd subsequently discussed conducting a competition under the auspices of the ARL but this collapsed when Kerry Packer, owner of Channel 9, which held the exclusive rights to telecast all ARL matches, directed the ARL to break off negotiations. The tactic organised by the ARL to prevent the entry of News was the signing by all rugby league clubs, as a precondition of entry into the 1995 Australian rugby league competition, of a "Commitment Agreement" and a "Loyalty Agreement", the effect of which was that no clubs would play in any competition other than one organised by the ARL for a period of five years. This was a precondition of entry into the 1995 Australian rugby league competition, notwithstanding the fact that a year earlier all clubs had, in fact, been formally admitted to the 1995 competition under the ARL rules.

News Ltd took action in the Federal Court of Australia alleging that the Loyalty and Commitment Agreements had breached the Trade Practices Act as being anti-competitive, a collective boycott and a misuse of market power. In the ultimate, as is now history, News Ltd comprehensively lost at trial but, equally comprehensively, won on appeal.

LEAGUE AS CULTURAL ASSET

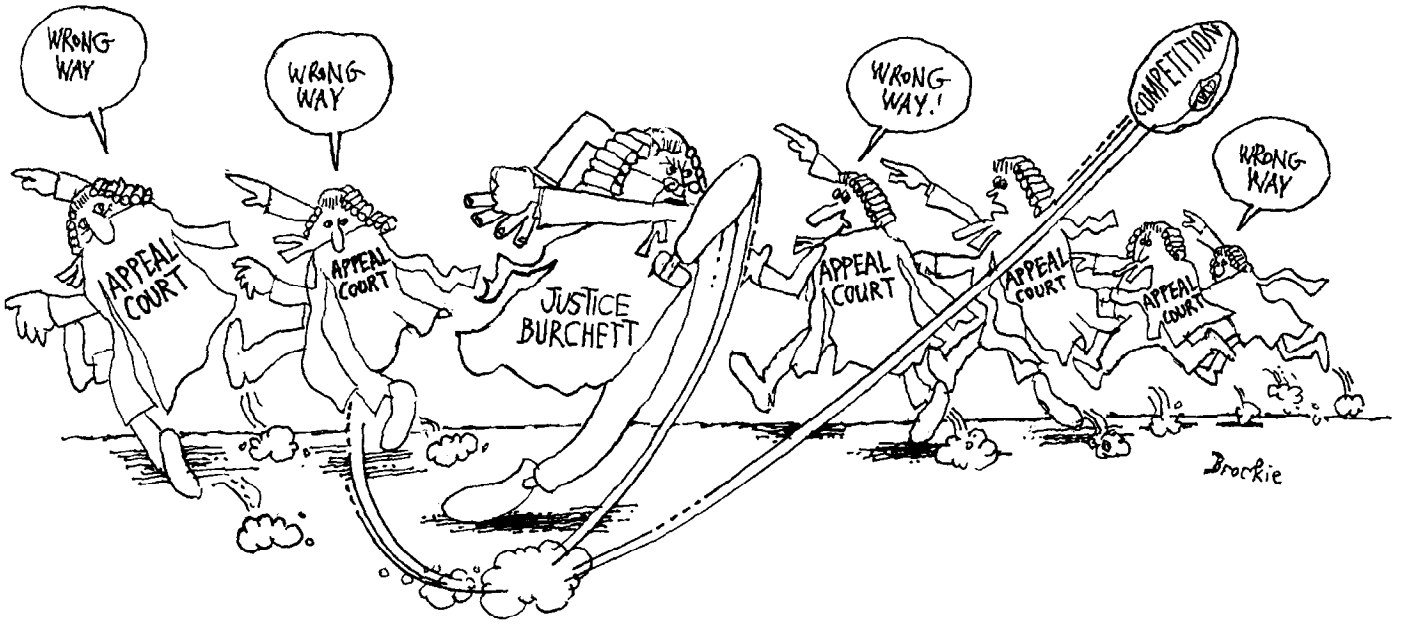
Counsel for the ARL argued that contest was not a commercial conflict between rivals. It was not competition that was involved but a takeover of an Australian institution by someone motivated by unworthy commercial objectives. It was an attempt to sacrifice an important part of Australia's cultural life on the altar of Mammon. It was not a case which arose for decision under the Trade Practices Act at all. The final submissions for the ARL strongly urged that its activities were not in trade or commerce – a proposition which most would have considered not even remotely arguable. These submissions led Justice Burchett into the error of viewing rivalry as turpitude and failing to appreciate the significance of the conduct of the combatants to the issue of market definition. For further elaboration see the article by Charles Sweeney (one of many counsel involved in the case) in the May 1997 *Competition and Consumer L J*.

The real issue in the case, therefore, was not a competition issue at all. The real issue was the conceptualisation of the whole structure of the ARL and the place of league clubs in the ARL. Burchett J found that the competition between clubs was not economic competition but sporting competition. The Australian Trade Practices Act, His Honour believed, had no relevance to sporting competition at all. The ARL, he said, was not in the business of making profit for profit's sake but was primarily established to promote the game of rugby league, any monetary matters being subsidiary to this more noble end. By an extension of this analysis, His Honour found that all constituent clubs in the ARL held their assets and their player contracts in trust for the ARL, a joint venture of which all clubs were part. His Honour's views were expressed forcefully, dramatically and emotively. The ARL was variously compared to a school tuckshop, a church, a hospital and the Good Samaritan. When News Ltd attempted to set up a rival competition, it was in sin for the most horrendous of legal conduct. It was attempting to involve clubs and players in a breach of trust. His Honour said that News Ltd was not merely trying to get clubs to leave one competition to join another. The clubs were "hastily, and with high-handed disregard of the rights of other clubs, transferring all the joint assets that were within their control to the Super League companies". The attitude of News Ltd and the mere fact that it was attempting to establish a new competition was described as "clandestine conduct ... a deliberate exercise in deception ... a misrepresentation ... an infiltration by the back door ... conduct involving secrecy, suddenness and deception ..." and as being "unprecedented". His Honour actually came to use the expressions "war room ... corrupted ... suborned ... secrecy, deceit and suddenness ... prolonged deception ..." and "extraordinary conduct well outside the norms of proper and accepted commercial conduct". For the very reason that he dared to negotiate with News Ltd, Bullfrog Moore, the President of Canterbury Club, received the gratuitous appellation of "utterly corrupt".

All of this made the decision very easy for Burchett J at trial. This was not a trade practices case at all. It was a breach of trust case. Indeed, News Ltd conduct was so appalling to His Honour that he actually said that even if News Ltd had made out all its trade practices claims, he would have refused an injunction to it because of its not only unclean, but absolutely filthy and unbearably soiled hands.

COMPETITION ISSUES

On the trade practices issues, His Honour found there was no competition between clubs. His Honour even found that the agreement which was negotiated by all club repre-



sentatives at a common meeting was not "a contract, arrangement or understanding" at all. The agreement was in format an agreement between individual clubs and the ARL and, because it was taken away and executed at individual club premises, it was not an agreement between the clubs themselves. His Honour thought that smart businessmen trying to evade the Trade Practices Act would have been guilty of entering into an arrangement under the Trade Practices Act if they did what the league club officials did. But this logic did not run to league clubs because "the chairmen and chief executive officers of the clubs included persons who were relatively unsophisticated so far as the Trade Practices Act was concerned and ... did not advert to it at all". His Honour thus wrote into the Trade Practices Act a defence which all who have ever breached the law have wanted written into it – that is, that not adverting to the law or ignorance of it is excuse for its breach.

His Honour also held, against what one might think was all the evidence in the case, that the ARL really had no purpose to exclude News Ltd at all. The ARL's purpose was to secure the involvement of top teams for a period of years and to give them security relating to grounds, sponsorship, television, players and coaches and other matters which involve long term contracts and the commercial necessity to have continuity of representation in the competition. The Trade Practices Act, like the Commerce Act, has a provision that the "purpose" test is satisfied if the purpose alleged is a substantial purpose even though not the sole purpose.

THE APPEAL

Not surprisingly, News Ltd appealed to the Full Federal Court. The Full Court considered only one aspect of the case. This was whether or not there was an "exclusionary provision" (known more commonly as a collective boycott) involved in what the ARL had done. Because the Full Court held that there was an exclusionary provision, it did not waste judicial time and timber expanding any further on the other points raised at trial.

I will deal with the exclusionary provision point here but will return to other points decided at trial but not canvassed on appeal later in this talk. The primary contentious issue not determined on appeal is that of the relevant market definition.

In order to prove an exclusionary provision, it had to be demonstrated that there was a contract, arrangement or understanding between competitive rugby league clubs with the purpose of limiting the ability of those clubs to deal with News Ltd. As previously stated, the relevant "purpose" may be one purpose amongst many so long as it is a "substantial" purpose.

Not surprisingly, in view of the way in which the trial Judge had characterised the case, the Full Court spent a considerable amount of its time in re-evaluating the various facts and in re-conceptualising the ARL competition. The Full Court held that there was no trust involved pursuant to which rugby league clubs held their assets for the ARL as beneficiary. In order to have such a trust, there must be some intention expressed to act solely for the benefit of the ARL and to hold assets solely for ARL benefit, and thus to the complete exclusion of benefit to individual clubs. There clearly was no such intention. One of the strange things to me is that those league club officials who have supported the decision of Burchett J seem to have failed to understand that his decision meant that no club owned any assets, the ARL owned them all.

Having reconceptualised the ARL competition and the part played by clubs in it, the Full Court looked at the matter in an entirely different way to that of the trial Judge. The Court found that there was an arrangement or understanding between competitive clubs. It relied on the simple uncontradicted evidence that:

> Participants at the meeting were repeatedly told of the importance to stick together. The Commitment Agreements were clearly aimed specifically at News as a rival competition organiser and were understood that way by the representatives of the clubs.

This, to the Full Court, disposed of the issue quite succinctly. All aspects of the exclusionary provision requirements of the Trade Practices Act were held to be fulfilled. This is in dramatic contrast to the trial Judge's decision that none of these aspects were fulfilled.

Thus, the law from *Super League* is that professional league clubs are in competition and that for this reason their executives can make illegal arrangements. Above all, clubs in entering professional sporting competitions do not launch

themselves into some sort of trust quagmire, escape from which is never possible. It is this conceptualisation of professional sport, more than any competition law principle, which was the basis of the Full Federal Court decision.

RESTRAINT OF TRADE

To erudite competition lawyers, the common law doctrine of restraint of trade is rather a quaint one. We frequently assume that it has been overtaken by competition law but this is not so. In Australia s 4M(a) Trade Practices Act provides that the common law restraint of trade doctrine is to continue in effect "in so far as that law is capable of operating concurrently" with the Act. Section 7(1) Commerce Act specifically provides to similar effect.

Common law restraint of trade preceded competition law. The doctrine has a rich history of protecting individual freedoms. In the football world, we have cases such as *Buckley v Tutty* (1971) 125 CLR 353 in the Australian High Court, *Adamson v NSW RFL* (1991) ATPR 41-084 (at trial); (1991) ATPR 41-141 (Full Court), *News Ltd v Australian RFL* (1996) ATPR 41-466 (at trial); 1996 ATPR 42-521 (on appeal); *Blacker v NZRFL* [1968] 3 NZLR 547 and *Kemp v NZRFL* [1987] 3 NZLR 463 413 in 1989. In England *Eastham v Newcastle United FC* [1963] 1 Ch 413 is well-known. *Union Royale Belge des Societies de Football Association ASBL v Bosman* [1996] All ER (EC) 97 in the European Union has applied what appear to me basically to be common law restraint of trade concepts to permit soccer players to transfer between nations.

All of these cases have held, in effect, that players who are not contracted to a club, or whose contracts with clubs have expired, cannot be prevented from contracting with other clubs of their choice.

I think that the common law restraint of trade doctrine can be looked at as a descendant of those cases which declared slavery illegal. It is illegal to impose certain restraints on individuals on the grounds of preservation of liberty and this is so whether or not there is a general effect on competition in the market as a whole.

Rugby league in Australia has also given us the major common law restraint of trade case of *Adamson*. Like *Adamson* the *NZRFU Case* decided by the Commerce Commission on 17 December 1996 (upheld by the High Court on 21 August 1997) involves restrictions on player drafts and it is useful to look at what the common law has said on these issues as well as what competition law has said. It is also of interest to hear the Chief Executive Officer of the ARL, once more talking about the desirability of a player draft. Hopefully the ARL will take into account in planning its draft those common law restraint of trade issues which it ignored to its detriment in its proposed 1991 Player Draft.

THE PLAYER DRAFT

The facts of the New South Wales Rugby League Draft were that players who had placed themselves on transfer were to be selected by clubs in the reverse order in which the clubs had finished in the previous year's competition. Players could nominate their playing terms but, subject to an appeal in the case of personal hardship, they had to accept a contract with the club selecting them under the selection arrangements. This obviously meant that players could be transferred around the nation against their will and that they could be contracted to clubs for which they did not wish to play.

The reason given for the transfer system was, of course, that it was necessary to "even up" the competition. This concept has been recognised by Courts around the world as being something to which the Courts should give effect and which is a valid concern of competition organisers.

The real problem with common law restraint of trade cases is the balancing of the individual's rights of liberty with the theory that a certain process will balance the competition. In each case, the Court is confronted with a clear imposition on the liberty of an individual. Against this, it has only a theory to evaluate. The result is fairly predictable in that Courts, while expressing sympathy for the theory, have almost universally held for the individual and that individual's freedom.

There has thus been only one case – a 1978 unreported case relating to soccer transfers in New South Wales *Hoszowski v NSW Federation of Soccer Clubs* which I have been able to find in Australasia which has validated a player draft arrangement at common law. This case validated a requirement that players could not transfer unless a transfer fee was paid to the player's prior club. A formula for calculation of the fee was based on criteria including the cost of the player to the club, the length of player's service with the club, coaching provided and other matters. If a transfer fee could not be agreed, there was an appeal procedure available whereby the Executive Committee of the Soccer Federation could set a reasonable fee. The validation of the arrangement was largely on the basis that a player's club could not retain a player against that player's wishes except by fixing an unrealistic transfer fee. However, the appeal mechanism was an appropriate check on any abuse of power by a club in this regard. There are a number of similarities between this case and the NZRFU Player Draft arrangements. It is to those arrangements that I now turn.

The Rugby Union Draft is not just a competition question. Notwithstanding whatever public benefit blessings the Commerce Commission may give the rugby union arrangements, the arrangements will fall over if lawyers concerned with individual liberties find them abhorrent to common law restraint of trade concepts.

The New Zealand system involves the "banding" of players into various "bands" of ability. Provincial unions are restricted as to how many players per annum they can take from each band, the stated object of this restriction being to prevent the formation of provincial union "dream teams". There is a "transfer fee" payable by a "purchaser" provincial union to a "vendor" provincial union. Provincial unions can negotiate the "fee" for any player but this cannot exceed the maximum transfer fee which is established each year by the NZRFU. Only about 1,100 players are affected by the arrangements and it was anticipated that somewhere between 54 and 135 band classified players would be subject to inter-provincial transfers each year. Of particular importance to my mind is the fact that no player can be transferred against his will and no player can be prevented from transferring by his provincial union.

The Commerce Commission found some public benefits in the arrangement on the basis that it would contribute to the evenness of teams in the New Zealand competition. It thought that the public benefits were not great. However, neither were the detriments. On balance, therefore, the arrangement was authorised. The High Court, on appeal, agreed.

It seems to me that the parties behind the NZRFU Player Draft have been well advised in doing what they have done.

The Commerce Commission spoke in terms which, to my reading, would indicate that there was greater public benefit in a somewhat more intrusive transfer scheme. However, if there were a more intrusive scheme, I think it is highly likely that it would fall foul of common law restraint of trade in that it would then be mandating or preventing transfers against the wishes of the players concerned. The essence of the survival of the New Zealand scheme seems to be that it is very mild and the intrusions into player liberties are not great. In this regard, it is somewhat like the New South Wales Soccer Case. It may well survive restraint of trade attack on the same basis.

I would therefore believe that the New Zealand player draft arrangement, whether or not it is of great public benefit, cannot be expressed in any more mandatory terms and still survive the wrath of common law lawyers wielding their restraint of trade swords.

The New Zealand High Court specifically blessed the concept of "equalising the competition". Some may feel that this concept is a gigantic myth notwithstanding the world-wide homage paid to it. One must query whether the New South Wales rugby league competition required any equalisation at all in the early 1990s when the player draft arrangements were attempted. The draft was never put into effect and was invalidated by the Federal Court in 1991. In the period 1988 to 1993, 13 of the League's 16 teams were represented in the final five and in 1992, the year after the invalidation of the draft, four teams qualified for the final five who had not done so since 1988. This indicates a fairly even competition notwithstanding the absence of a player draft. Given these statistics, how can it be that a player draft could be justified on the basis that competing teams needed to be "evened out" in order for the competition to flourish? Further, there is a good deal of academic literature around, some of which is cited in the Commerce Commission's Rugby Union Determination, which seems to support the conclusion that even with strong player labour controls over long periods, sporting competitions have never come close to attaining competitive balance. This seems particularly to be the United States experience.

UNANSWERED QUESTIONS

May I now turn to some of the unanswered questions in the Super League Case? Basically, I think, the major two such questions are: the effect of the case on professional sporting joint ventures; and what is the relevant "market" in sporting evaluations?

SPORTING JOINT VENTURES

Let us turn firstly to the effect of the Full Court decision on sporting joint ventures. The case has been read by some, as one would expect, as the demise of sporting joint ventures. Michael Gray of Freehills in Sydney said, for example, in a January 1997 commentary that the case has:

> Serious implications for all forms of joint commercial activity – joint ventures, consortium bids, research and development syndicates, networks, cross-licensing arrangements and strategic allegiances of all forms – and in the long run may prove to be anti-competitive rather than pro-competitive.

I cannot read the case this way. There is an immense difference between intra-venture restrictions, so important to the conduct of sporting joint ventures and joint ventures in general, and those which are inter-joint venture restraints. no rugby league competition can eventuate without rules, determinations as to venues, "sinbins", "bloodbins" and procedures for adjudication of, and punishment of, breaches of the rules of the game. These are technical aspects to the competition which are necessary to its survival. The acceptance of these restraints cannot be seen as limiting the supply of services to anybody. Without acceptance of such restraints, the relevant "service" (that is, the competition) would simply not exist. These restraints are, therefore, not affected by competition law.

However, when independent actors join together to achieve a mutual advantage or jointly to disadvantage another entity, the position changes. Here there is joint activity not to create or conduct a competition necessitating some jointly accepted restraints but to act as a single entity using the market power of collaboration to the detriment of outsiders. In this scenario, we have a group seeking to achieve by mutual coercive power that which its members cannot achieve individually. Those joint coercive activities must be held to be subject to competition law scrutiny. To exempt them from competition law would sanction, for example, both price fixing and collective boycotting purely because the parties involved had a joint venture structure or had joint venture needs.

The undeniable fact is that the Full Court in *Super League* was concerned only with the ARL acting coercively as a single entity. At no time did the Full Court deal with the mechanics of sporting competitions, their rules and the restraints involved in these. It is not true to say that the Court has created new doubts as to the validity of intra-enterprise joint venture restraints. The Court said virtually nothing about these restraints. Those who say that the case heralds the demise of sporting joint ventures, and joint ventures generally, are putting a gloss on the decision which, in my view, simply does not exist.

THE MARKET DEFINITION

But probably the most vexed question arising from *Super League* is the question of the relevant "market" when sporting joint venture arrangements are involved.

There are two aspects to this question. The first is the question of misuse of market power. If the market is defined widely, then it will be difficult for any sporting organisation to be involved in a misuse of market power. The second is perhaps more pragmatic. If the ARL and Super League ever get back together again, will they need the authorisation of the Australian Competition and Consumer Commission to do so? If the market is confined to rugby league, one would think that any ARL – Super League reunification would be a substantial lessening of competition and thus illegal without ACCC Authorisation.

Burchett J at trial had much to say on the market. The Full Court did not consider the matter on appeal because it did not have to do so. Thus Burchett J's decision remains the judicial pontification on the matter and it is relevant to consider the issue of whether His Honour is right or wrong.

It must first be said that His Honour undoubtedly has set out in his judgment the correct principles in relation to market definition. The real question is whether His Honour has correctly applied the principles to the facts.

There are a number of points one can make in relation to His Honour's market definition. As is known, he found the market to be not rugby league, as pleaded by News, but

a "four sport" market incorporating rugby league, rugby union, Australian rules football and basketball.

Firstly, His Honour argues that s 4E Trade Practices Act necessitates the widest possible market definition in that it says that goods and services "otherwise substitutable" with other goods and services are to be considered part of the same market. My comment on this is that s 4E does not, because of what it says, mandate a wide, and certainly does not mandate "the widest possible" market definition at all. It merely counsels lawyers to look at the economic concept of market when making market evaluations. To take the view of His Honour that the widest market definition possible is necessarily the correct market definition is, in my view, merely market gerrymandering.

A second point of interest is His Honour's treatment of the United States cases. He finds they are all wrongly decided. They found that individual sports were individual markets. He is at pains to distance himself from all the wealth of United States jurisprudence in this area. This makes one wonder which side of the Pacific has so completely misunderstood the concept of market in relation to sport in a competition law context.

In my view, the main problem in His Honour's reasoning is that he finds that there is only one market. This may be influenced by the fact that the whole case did have a background of television interests. However, it was not a television case. It was a case involving a rugby league competition and rugby league players and teams and, on the face of the record, this is how it appears. If only television were involved, then I see the wider market definition as having merit. Television companies, no doubt, regard one sport as substitutable television for another. However, this is far from the case when we are talking about rugby league clubs, a rugby league competition and rugby league players. Clearly enough, a rugby league team is not substitutable for a basketball team. Indeed, as the New Zealand Commerce Commission found, perhaps showing more football acumen than Mr Justice Burchett, rugby league teams are not substitutable for rugby union teams. Those who transfer between codes are backline players and, even then, there is some re-education required. Forwards in rugby league, being essentially rambling sheep, simply do not know how to ruck in the rugby union sense and, therefore, cannot transfer with any ease to rugby union.

I think also that the pragmatics of the position clearly show that rugby league is a separate market. If it were not, why would the rugby league Loyalty and Commitment Agreements have made no mention of any restriction on players or clubs transferring to rugby union, Australian rules football or basketball? If these sports were in the same market as rugby league, surely any sensible commitment or loyalty agreement would have prevented defection to them. The rugby league was not worried at all about teams or players defecting to basketball or Australian rules football or even to rugby union. This is the reason that there was no mention made of these sports. This is the reason why the four sports are each in different markets.

It seems to me that the ARL also clearly believed that it did have market power. Collective boycotts are entered into only by people who believe they have market power. You cannot bully from a state of weakness. The ARL at the time ran the only Australian premiership rugby league competition and, at the time, it had exclusive international recognition arrangements with Great Britain, New Zealand and all other rugby league countries in the world. The ARL clearly believed that it had the relevant market power to such an extent that it could do what it liked with News. The fact that it misread News is a different question. The ARL acted as it did because it thought it would be successful. It thought it would be successful because it had the market power in the relevant market – the rugby league market. Then to accept a submission by the ARL that the market was so wide that it had no market power in it flies in the face of what the ARL, in fact, did and of how it actually saw its market power situation.

The correct approach to market definition is, I believe, that which was taken by the New Zealand Commerce Commission in its New Zealand Rugby Union Player Draft. In this case the Commerce Commission saw three markets, these being:

- a market for player services;
- a market for the rights to player services (that is the field of potential transactions between provincial unions for buying and selling the rights to player services); and
- a market for sports entertainment services.

Burchett J correctly identified the third market in *Super League* – that is, the sports entertainment market. However, he found this to the exclusion of the other two markets and, in my submission, he was wrong to do so.

It therefore seems to me that there is a competitions market limited to rugby league and a teams market limited to rugby league. All the academic comment on the case to date soundly supports this view. The case to the opposite is, to my mind, quite unarguable, notwithstanding that Burchett J found it proved.

THE PRESENT STATE OF PLAY

What is the legal state of play? To my mind, the following propositions follow:

- Probably the most important thing to come out of the *Super League* case is that there is no exemption from competition laws for obviously commercial sport.
- It is also gratifying for sporting clubs now to know that when they enter into sporting competitions, they are not signing away in perpetuity all their assets into some kind of trust for the competition organiser, escape from which may well be impossible.
- I do not go along with the view of those critics who argue that the *Super League* case is the beginning of a disaster for joint ventures. The *Super League* case said nothing at all about joint venture restraints in the sense of those restraints necessary to cooperate in the running of a competition. It was a straight boycott case and nothing else. It cannot be read in any other way.
- The market issue is still unresolved. All I can say on this is Burchett J, in my view, is clearly wrong and that had this issue been evaluated by the Full Federal Court, the Court would have overturned his decision on the market question along with his decision on everything else. The relevant market must be the narrower market limited to one sport. This almost certainly means that an Authorisation from the Australian Competition and Consumer Commission will be required if the Australian rugby league competitions are to be reunified.
- It is not all competition law. The common law doctrine of restraint of trade is still very much alive and kicking. ❑