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FOREWORD

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This, the 2009 issue of the New Zealand Law Students' Journal continues the pattern set by earlier issues in the following key ways:

- There is a very high level of scholarship demonstrated by the authors of all of the articles published in this journal. Those who have written the articles and those who have taught them their legal research and writing skills are to be warmly congratulated for the quality of their efforts.

- The topics addressed in this issue vary widely. They range from an examination of the use which Henry VIII made of Acts of Attainder through to the problems raised by internet defamation. There has been no reluctance on the part of most of the contributors to tackle issues that present challenges in today's world for legislators, judges, teachers of law and legal practitioners. Some topics addressed in this issue, such as whether New Zealand should have a written constitution are particularly vexing. The fact that New Zealand's best and brightest law graduates have been willing to accept the challenge of addressing these issues is a source of considerable satisfaction and reassurance.

Rowan Armstrong, who contributed to the 2007 issue of this journal has provided a thought provoking analysis on the application of the restraint of trade doctrine to sports' governing bodies. His article is particularly relevant in the modern era of professional sport in which sports' administrators frequently attempt to constrain the ability of a sportsperson to join competing clubs and compete in different competitions.

Those who appreciate legal history will be intrigued by Matthew Davie's remarkable analysis of the use which Henry VIII made of the

device known as an Act of Attainder to send his enemies to the scaffold and to confiscate their properties.

William Fotherby has provided a thought provoking article in which he explains how international law governing mercenaries has aided the exploitation of third world societies by colonial States.

In his insightful article, Ronen Lazarovitch advocates an "expected value" approach to the evaluation of uncertainty in merger clearance applications, as an alternative to the "real risk" formula used by the Court of Appeal in *Commerce Commission v Woolworths Limited*.

Joshua McGettigan continues the commercial theme in his analysis of the personal liability of company directors in light of the Court of Appeal's decision in *Body Corporate 202254 v Taylor*.

In his article, Nick Mereu focuses on one of the most fundamental constitutional issues in New Zealand, namely the dilemma of whether or not we should have a written constitution. The learned author concludes, appropriately in my view, that New Zealand's unique, unwritten variety of constitutional arrangements is "happily doing its job".

The article submitted by Jennifer Moore is compulsory reading for all university law teachers and others with an interest in legal education. The theme of her paper is the need to empower students in modern legal educational institutions.

The notion of deference in judicial review proceedings has been carefully examined by Daniel Pannett with particular emphasis on the application of the deference concept to proceedings of the Maori Land Court.

Rebecca Rose has courageously and skilfully grappled with the challenges of internet defamation, a topic which jurists and law reformers have struggled to come to terms with in recent years.

The preceding thumbnail sketch of the nine papers in this issue of the journal cannot give the slightest justice to those who have diligently

crafted their outstanding articles. What the brief outline of these papers illustrates is the diverse nature of the articles and that the future of legal research and writing in New Zealand is in excellent hands.

Dr David Collins QC
Solicitor-General

EDITORIAL

TIM COCHRANE AND REBECCA THOMSON

Publishing a journal is easily likened to giving birth – a nine month labour of love resulting in a brand new and beautiful creation. A less obvious simile is attending high school. Reading new submissions is as exciting as the first day of school. The networks of academics and students who have contributed their critical insights could be imagined chattering in a linoleum-floored cafeteria. The cast of editors, review board members and authors changes with the years just like the graduating Seventh Form class.

Where this metaphor breaks down is in the cliques which form and the angry words which are so often heard in high school corridors. As Co-Editors this year we have been privileged enough to work with the most dedicated, cheerful and enthusiastic Chief Editorial Board one could wish for. Our thanks go also to the newly instituted Regional Representatives whose work in raising our national profile was seen in the flood of submissions received. Finally, the Student and Academic Review Board members, who gave their time so willingly to winnow out the nine articles which are published here, deserve a hearty round of applause.

Further applause is due to the New Zealand Law Students' Journal (NZLSJ) itself, which last year became the longest running nationwide academic journal publishing exclusively law students' work. Its role in giving New Zealand's brightest young legal minds a platform from which to showcase their talents ought not be underestimated. This year the New Zealand Law Students' Association has recognised the value of the NZLSJ through generous financial contributions.

Last but not least thanks are due to all who submitted to the Journal this year. The quality of your work and the difficulty of narrowing the scores of submissions received to just nine bear testament to the high standard of New Zealand law faculties today.

Tim Cochrane and Rebecca Thomson
Co-Editors

PARLIAMENTARY ATTAINDER FOR TREASON IN LIEU OF TRIAL DURING THE REIGN OF KING HENRY VIII

MATTHEW DAVIE*

"Now for King Henry the Eight: if all the pictures and patterns of a mercilless prince were lost in the world, they might all again be painted to the life, out of the story of this King. For how many servants did he advance in haste (but for what vertue no man could suspect) and with the change of his fancy ruined again, no man knowing for what offence? To how many others of more desert gave he abundant flowers, from whence to gather Hony, and in the end of Harvest burnt them in the Hive."[1]

Introduction

So wrote the pen of the great adventurer, sailor and pirate, Sir Walter Raleigh at the beginning of the seventeenth century. Raleigh, under sentence of death in the Tower of London, filled in his days by writing a history of the world. Unfortunately he did not manage to progress any further than 130 AD, but his introductory comments on the time in which he lived are nevertheless instructive. His opinion on King Henry VIII forms part of our corpus of knowledge on how the King was perceived during and immediately after his reign. Generally, the consensus was that he was a ruthless and capricious tyrant. Modern scholars agree with the first characterisation, but have reservations over the second. Over the past half-century a number of revisionist historians have challenged the interpretations of Raleigh and his contemporaries that the Henry's reign was defined by arbitrary personal power. These scholars, such as G.R. Elton and John Bellamy, acknowledge that this epoch of history was bloody but assert that the King shed blood within the framework of a semi-modern legal system which adhered to the Rule of Law.

Perhaps the most notorious manifestation of the King's malevolence was his contribution to the English law of treason. Under

* Candidate for BA/LLB (Hons), University of Auckland. This article is an abridged version of a research paper submitted in 2008 in partial completion of studies. I would like to acknowledge the advice and support of my supervisor and friend, Dr David V Williams, and also of my parents, Laurence and Louise Davie.

[1] Sir Walter Raleigh, *The History of the World* (London, 1687) viii, quoted in Joel Hurstfield, "Was There A Tudor Despotism After All" (1967) 17 *Transactions of the Royal Historical Society*, 83.

his rule the law of treason expanded explosively, ensnaring and destroying hundreds if not thousands of people. But there was a method to Henry's madness. The King believed that only through the judicious use of terror could he steer the great ship of state through the tempests of the age. And, indeed, Henry's reign was chaotic. It saw breach with Rome, the Reformation of the English Church under the Crown, the dissolution of the monasteries and a succession of royal marriages. Each of these upheavals generated resistance to Henry's government, both foreign and domestic, which had to be quelled. And at the same time Henry faced enemies on other fronts. Ambitious noblemen with competing claims to the Throne of England conspired against the King and sought to defeat his plans for the succession. Confronted by these threats, Henry turned to the general law to curb dissent and maintain the Tudor peace.

Although many scholars have written extensively on the Tudor law of treason,[2] comprehensive discussion of the use of a special kind of Act of Parliament, an Act of Attainder, to punish conduct deemed treasonous is lacking. Both G.R. Elton and John Bellamy inaccurately calculate the number of people attainted for treason in lieu of trial to be fewer than ten, and although they condemn the government's actions little analysis is offered.[3] More recently Stanford Lehmberg and William Stacy have shed some more light on Attainder for treason in lieu of trial, and have provided a platform for further research.[4] It is the goal of this paper to build on the labours of these historians. It will examine Henry VIII's approach to Attainder and hopefully offer some insight as to what it means for current perceptions of the existence (or absence) of the Rule of Law during this period. Ultimately, it may be that efforts of revisionist historians to

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[2] See for example, S. Rezneck, *The Trial of Treason in Tudor England, Essays in Honour of C.H. McIlwain* (Cambridge University Press Cambridge 1936); I. D. Thornley, "The Treason Legislation of Henry VIII (1531-1534)" (1917) 11 *Transactions of the Royal Historical Society* 87; Lacey Smith, "English Treason Trials and Confessions in the Sixteenth Century" (1954) 15 *Journal of Historical Ideas* 417; John Bellamy, *The Tudor Law of Treason* (University of Toronto Press, Toronto, 1979) ["*Tudor Law of Treason*"]; G. R. Elton *Policy and Police: The Enforcement of the Reformation in the Age of Thomas Cromwell* (Cambridge University Press, Cambridge, 1972) ["*Policy and Police*"].

[3] Bellamy, *Tudor Law of Treason* ibid, 211-212; Elton, *Policy and Police* ibid, 390-391.

[4] See Stanford Lehmburg, "Parliamentary Attainder in the Reign of Henry VIII" (1975) 18 *The Historical Journal* 675 ["Parliamentary Attainder"]; William Stacy, "Richard Roose and the Use of Parliamentary Attainder During the Reign of Henry VIII" (1986) 29 *The Historical Journal*, 1.

rehabilitate Henry and his era have been in vain. Indeed, perhaps Sir Walter's portrait of the King as a paranoid madman unconstrained in practice by man, law, or God, remains the most faithful after almost five centuries.

I.

Historically the term "Act of Attainder" has been used to describe a piece of legislation which deemed an individual, or an ascertainable class of individuals, guilty and "attainted" of an offence. A punishment was usually prescribed, but this was not strictly necessary. An attainted person was outside the protection of the law; he or she was not legally a 'person' and could be killed or otherwise dealt with in any way by anyone.[5] The lands and possessions of the attainted were forfeit to the king and his or her blood 'corrupted' and 'disabled'. Corruption of blood ensured that property could not be passed to the attainted by inheritance and that he or she could not pass property to anyone.[6] It also meant that no person could inherit property from an ancestor if he or she possessed that ancestor's blood only by inheritance from the attainted.[7]

Although the early history of Attainder is rather opaque, it was probably first used in the early fourteenth century[8] and evolved as an offshoot of the common law procedure of indictment by notoriety. Indictment by notoriety is a modern name given to the practice whereby local people would indict a person by a crime before a sheriff or a royal judge based purely on his or her poor reputation. But in sufficiently serious cases this practice could transcend its procedural roots and operate to convict a person of a crime without more.[9] Therefore, it seems likely that Attainder, which constituted a judgment of guilt by the Commons Lords and King combined, was the notoriety procedure writ large.[10] However, while the procedure of notoriety

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[5] William Blackstone, *Commentaries on the Law of England*, volume 4 (1769), 373-374.
[6] William Blackstone, *Commentaries on the Laws of England*, volume 2 (1766), 254.
[7] Ibid, 254.
[8] Posthumously against Piers Gaveston in 1308 and the Elder and Younger Despenser in 1321. L W Vernon-Harcourt, *His Grace the Steward and Trial of Peers* (Longmans, London, 1907), 388
[9] T. F. T. Plucknett, "The Origin of Impeachment" (1942) 24 Transactions of the Royal Historical Society 47, 60-61 ["Origin of Impeachment"].
[10] John Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge University Press, Cambridge, 1970), 179-180 ["Law of Treason"].

waned over the centuries, becoming obsolete in the reign of Richard II,[11] Attainder transcended its origins and became a legislative tool of considerable use.

During its early history Attainder was primarily used to affirm pre-existing convictions at common law or under the law of arms. In 1415 the convictions of the Earl of Cambridge, Lord Scrope of Masham and Sir Thomas Grey for imagining the king's death contrary to the Treason Act 1352 were impeached.[12] The earl of Cambridge and Sir Thomas Grey conspired to kill the king, which was clearly within the ambit of the Statute. But Lord Scrope merely knew of the plot and failed to reveal it, a crime which was arguably only misprision, or concealment, of treason. If Scrope's relatives had challenged the conviction it may have been quashed and the Crown may have had to disgorge his confiscated lands. An Act of Attainder was deemed to be an appropriate panacea and one was promulgated which confirmed the convictions of all three men.[13]

Nevertheless, on a number of occasions people were convicted of treason by Act of Attainder alone. They were generally rebels engaged in open warfare against the king who could not be brought before a court, or dissidents who had fled the realm. Usually the Attainder would be conditional on the subject failing to cease resistance and answer for their crimes. In 1394 Sir Thomas Talbot raised a rebellion against King Richard II in Lancashire and Cheshire. In retaliation Parliament declared his conduct treasonable via the declaration proviso of the Treason Act 1352.[14] This notwithstanding, until Talbot could be found and presented before a court he remained an innocent man at law. To surmount this inconvenience Parliament attainted him of high treason, but provided that this sanction would not come into effect if he presented himself before the King's Bench

[11] T. F. T. Plucknett, "Origin of Impeachment", supra note 9, 70-71.
[12] 25 Edward III, stat. 5, c. 2.
[13] Bellamy, *Law of Treason*, supra note 10, 195.
[14] 25 Edward III, stat. 5, c. 2.After enumerating the statutory treason offences the original statute went on to state that: "Inasmuch as divers other cases of like character may arise in time to come, which at present one can neither think of nor declare, it is, therefore, agreed that if any other case, which is supposed to be treason, but which is not specified above, shall come for the first time before any justice, the said justice shall stay without giving judgment of treason, until the matter has been exhibited before our lord the King in his Parliament, and declaration made as to whether it shall be adjudged treason or other felony".

within three months.[15] A virtually identical act was passed against another rebel, Sir Thomas Mortimer, in 1398.[16]

In an age when central government was conspicuously weak, Acts of Attainder were used to convict criminals *in absentia* out of desperation. During the medieval period penury dogged the Crown and royal servants were few in number, and consequently criminals frequently escaped the long arm of the law. Brigands and gangs roamed the countryside, making a mockery of the king's peace. Faced with the need to stymie a deteriorating law and order situation without the practical power to enforce the law, royal governments turned to the somewhat metaphysical sanction of Attainder. It was thought that formal exclusion from the law's protection of a few rebels and hoodlums might persuade some of them to throw themselves at the king's mercy or deter others from joining them.[17] Therefore, even though during the early history of Attainder men and women were attainted without benefit of a trial it may not be said that the instrument effected judgment by means of legislation or was a political tool. Attainder was used not to supplant the ordinary legal system but to augment its effectiveness.[18]

II.

In some ways Henry VIII's use of Attainder was consistent with the policies of his forebears. Statutes were used to confirm the common law convictions of traitors like the Duke of Buckingham in 1523 and Rhys ap Griffith in 1532 and affirm Crown title over their forfeited estates.[19] However even a cursory overview of this period shows that under Henry the Crown's attitude towards Attainder in lieu of trial shifted dramatically. At least 57 people were condemned by statute alone.[20] What is more, only a few of these people can be considered to have been rebels in flight. Sir Thomas Fitzgerald and his supporters were attainted in 1534 for their part in the Irish Rebellion, and Cardinal Reginald Pole[21] and several of his acolytes earned the same treatment in

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[15] Bellamy, *Law of Treason*, supra note 10, 182.
[16] Ibid.
[17] Ibid, 190.
[18] Ibid, 204.
[19] Lehmburg, Parliamentary Attainder, supra note 4, 678, 679.
[20] See Stacy, supra note 4.
[21] Pollard, *Henry VIII* (3 ed, Lowe & Brydone, London, 1970), 287.

1539 for fermenting rebellion against the King while abroad in Europe.[22] Two renegade priests who had fled England, Richard Pate and Seth Holland, were also convicted *in absentia* by statute in 1542.[23] But most of those attainted of treason in lieu of trial during the reign of Henry VIII were alive and within the physical and legal jurisdiction of the king's courts. The government had the option of proceeding against them with indictment and trial but, for a variety of reasons, elected to use the blunt instrument of parliamentary Attainder instead.

The unfortunate victims of Crown policy can be divided into three rough categories:

1. Common criminals;

2. Religious and political opponents; and

3. Those who threatened Henry's dynastic policies or otherwise became casualties of the vicissitudes of high politics.

The most important cases of each category will be examined in order to form some conclusions about Henry's approach to Bills of Attainder.

The first group of victims contains only two members, Richard Roose and John Lewes. Roose was a cook employed in the household of a man who was to become one of Henry's most vociferous opponents, Bishop John Fisher. In mid-February of 1531 Roose mixed poison into the porridge prepared for the Bishop's household. Fisher, who fortunately chose to forgo the meal, emerged unscathed, but others were not so lucky. Many members of Fisher's household became violently ill and two people died. Roose was immediately uncovered as the culprit, arrested and examined. He confessed to poisoning, "as a jest" but claimed he had intended no wrong.[24]

It is odd that the Crown would chose to interfere in this matter because it appears a simple case of felony murder. As his actions were purportedly in "jest", Roose could have argued that he lacked the

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[22] *Letters and Papers, Foreign and Domestic of the Reign of Henry VIII* (2008) British History Online <http://www.british-history.ac.uk/period.aspx?period=6&gid=126> (at 26 August 2008),xiv, i, 867 ["LP"].

[23] Ibid, xvi, 119, 140, 446, 448-9, 535, 981, 1139.

[24] Stacy, supra note 4, 2, K. J. Kesselring, "A Draft of the 1531 'Acte for Poysoning" (2001) 116 *English Historical Review*, 894.

requisite *mens rea* for murder. As intent to kill had become an essential component of the offence of murder by the sixteenth century such a plea could have resulted in an acquittal.[25] However the sources make no mention of any perceived difficulty in convicting Roose for murder so it can be assumed that such a defence was untenable on the facts. Understandably, Henry had an interest in the punishment of murderers, but there is every reason to believe that the ordinary processes of justice would have been sufficient in this case.

Even though Roose could have been brought to justice in the ordinary fashion Henry judged the case so abhorrent as to require his personal intervention. The King himself brought the matter to the attention of the House of Lords in a lengthy speech which emphasised his love of justice and determination to keep the peace.[26] A Bill of Attainder was sent to Parliament to convict Roose of high treason and quickly became law. Instead of the usual punishment for treason – hanging, drawing and quartering – Roose was sentenced to be boiled alive.[27]

The most likely reason for legislative action was the government's desire to roundly and publicly condemn the offence by giving it the epithet of "treason".[28] Poison was a historical instrument of regicide and its attempted use on as prominent a person as Bishop Fisher would have scared and angered the King. Decisive intervention was required to deter those who wished to harm other magnates or even Henry himself in such a fashion. Attainder also allowed the King to select a penalty which he considered appropriate: if Roose had merely been prosecuted for felony no punishment but hanging could have been metered out.[29] Boiling was probably selected because it added another layer of deterrence to mere death. It was not only unusually pitiless but mirrored Roose's crime as well. He delivered the poison through porridge, a substance created by boiling oats in water, and in turn he was boiled himself. Such a fate would be permanently associated with Roose's crime in the public mind.[30]

Several years latter in 1536 the precedent of Richard Roose was invoked when the rebel John Lewes came to the attention of the

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[25] H Potter, *English Law* (4 ed, Sweet & Maxwell, London, 1958), 355.
[26] Stacy, supra note 4, 2.
[27] 22 Henry VIII c. 9.
[28] Stacy, supra note 4, 4.
[29] Stacy, supra note 4, 5.
[30] Ibid.

King. Lewes was a confederate of the Welsh merchant James ap Griffith ap Howell, and Howell was an accomplice of the rebel Rhys ap Griffith, executed in 1531 for raising an insurrection at Carmarthen.[31] At that time Howell had bought his life with a ransom of £500,[32] but the government later changed its mind and sought to arrest him. Fearing for his safety he fled the country, forcing the government to be content merely with the skins of his supporters. Lewes was arrested on suspicion of treason in Gloucestershire and ordered to be taken to the Marshalsea, but murdered his sleeping escort at Hounslow and escaped.[33] Henry, shocked at this impudence, directed Parliament to attaint him of high treason. As in the case of Roose an unusual penalty was prescribed: Lewes was to suffer abscission of the hands and then be hanged, drawn and quartered.[34]

Lewes was clearly guilty of murder and would have faced trial, conviction and execution if the Crown had left him to the common law. The reasons why Henry was not content to let justice take its course are probably similar those which moved him in Roose's case. He felt that this crime was so shocking that deterrence required it to be called treason.[35] As in the case of Roose, Parliament sought to provide additional deterrence by making the punishment a metaphor for the act: in slaying the King's servants Lewes severed the hands of the State, and in retaliation the State deprived Lewes of his.[36] While Lewes was not in custody at the time the Attainder was passed, it does not seem that his Attainder can be considered analogous to those historically used against rebels in flight because Lewes was not well armed and did not have any support. The government would have considered itself capable of apprehending him.

Henry tended to turn to Attainder when confronted by a particularly abominable violent crime in order to buttress his existing law and order policies. By directing Parliament to deem such conduct treasonous and proscribing particularly cruel and striking punishments, the King felt that he could strengthen the deterrence value of the ordinary sanctions of the law. These cases also show that Henry was not wedded to a specific definition of treason, but regarded the crime

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[31] LP, supra note 22, v, 563.
[32] Ibid, 657.
[33] Lehmburg, Parliamentary Attainder, supra note 4, 680.
[34] 27 Henry VIII c. 59.
[35] Stacy, supra note 4, 9.
[36] Ibid, 9-10.

as anything he especially abhorred. Crimes similar to those of Roose and Lewes which attracted the Monarch's attention were only saved from the label of treason because of the King's arbitrary judgment. For example John Wolfe, his wife Alice and John Litchfield were attainted of felony for murdering and robbing a number of foreign merchants in 1533[37] and Charles Carew was awarded the same penalty for armed robbery in 1540.[38]

Henry's religious and political opponents composed the largest group of people attainted for treason in lieu of trial. The Reformation and Henry's frequent marriages generated a significant amount of opposition to the Crown from a number of areas of society. Much of this hostility manifested itself in seditious and slanderous speech which had the potential to stir emotions and produce violent resistance. The government recognized the perniciousness of such conduct and sought to quell it through the law of treason and a vigorous system of enforcement.[39] Statute law, the ordinary courts and the co-operation of local worthies with the Crown proved reasonably successful in controlling public opinion.[40] However, in a number of instances opponents could not be convicted by ordinary judicial procedure due to legal or evidential difficulties. Where the person in question was viewed as particularly dangerous the government fell back on parliamentary Attainder to ensure that 'justice' was done.

The first and most famous critic of Henry's religious policy to feel the axe of Attainder was Elizabeth Barton, the Nun of Kent. Barton was a prophetess who resided near Canterbury who habitually raised the hue and cry over many matters, spiritual and temporal. Initially her ravings were tolerated by the government because they supported the status quo; however the tone of her prophesies changed as Henry drifted away from Rome. She began to publicly foretell that if Henry divorced Catherine of Aragon he would die: a serious threat to the integrity of the government.[41] In an age where God and magic were perceived to directly shape events prophesy of a royal death could cause a serious problem to public order. If convinced that God was going to smite Henry for turning his back on Rome, the people might

[37] 25 Henry VIII c. 34.
[38] LP, supra note 22, xv, 953.
[39] See Elton, Police and Police, supra note 2.
[40] Ibid, chapter 8, 'Police'.
[41] Pollard, supra note 21, 244.

reason that they were excused from their oath of allegiance and support another claimant to the throne.[42]

The government first sought to proceed against Barton at common law, but was advised that her conduct was not treasonable. The King called his most senior judges and lawyers to a three day conference and impressed upon them his view that Barton and her adherents were traitors.[43] The judges readily agreed that to prophesise the King's death amounted to imagining his death under the 1352 Treason Act, for this proposition was well supported by precedent. In October 1440 Roger Bolinbroke, on behalf of Eleanor Cobham, Duchess of Gloucester, predicted that the King would soon die and was rewarded with a treason conviction.[44] However Barton had only made a conditional prophesy, that Henry would die if he divorced Catherine and married Anne, which was deemed by the judges to be insufficient. This seemingly amounted to an about face, for in 1509 a conditional threat to take the King's life was considered "imagining". In that year Sir Richard Empsom and Edmund Dudley, Henry VII's unpopular taxmen, were convicted for treason because they had plotted to destroy the young Henry VIII should he refuse to be governed by their faction.[45] Either the judges distinguished prophesy from threat or they considered the precedent to be wrong in law. With conviction under common law impossible, the King turned instead to Parliament. In March 1534 Barton and her accomplices William Maister, Edward Bocking, John Derying, Hugh Rich, Richard Risby and Henry Gold were attainted of treason.[46]

The Barton Attainder allowed Cromwell to turn the government's defeat into a victory. Although the King had been rebuffed by the judiciary, Cromwell soon perceived that an Act of Attainder could solve the Barton situation. He also reasoned that such an instrument, when properly used, could prove as decisive at destroying an opponent's public standing as a guilty verdict from a jury.[47] Cromwell phrased the Attainder as a petition to the King from both Houses of Parliament who, pressured by the public, had urged

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[42] Thomas Keith, *Religion and the Decline of Magic: Studies in Popular Beliefs in Sixteenth and Seventeenth Century England* (2 ed, Oxford University Press, New York, 1997), 113-50.
[43] LP, supra note 22, xv, 1445; viii, 48.
[44] Bellamy, *Tudor Law of Treason*, supra note 2, 29.
[45] Ibid.
[46] 25 Henry VIII c. 12.
[47] Lehmburg, Parliamentary Attainder, supra note 4, 683.

him to intervene. It gave detailed reasons for the government's intervention,[48] arguing that that Henry VIII's divorce from Catherine of Aragon was valid and charged that the subjects named, being:[49]

> Maliciously fixed in a contrary opinion ayenst the pure jugment of the kynges own conscience, [had] set forth and put in the heddes of a greate number of subjectes of this Realme aswell noble as other Spirytuall and temporall persones that they had knowledge by revelacion from Almighty God and holy Sayntes that God shuld be displeased with our seid Soveraigne Lorde for his procedynges in the seid divorce.

The Act declared that the message of the condemned was fraudulent, malicious and contrary to the conscience of the King, God's chosen ruler. Moreover, it accused Barton and her followers of filling the heads of many subjects with pernicious thoughts by calling into question Henry's divine mandate, thus endangering the realm. To further undermine Barton's message the Act directed that all books mentioning her be delivered to Cromwell, Chancellor Audley or the King's Council.[50] Furthermore, in order to guarantee that his instrument would have maximum efficacy, Cromwell ordered that the Act be printed and read aloud in each shire and corporate town.[51]

It was the Barton case which precipitated the expansion of the English law of treason which defined the Tudor era. Refusal on the part of the judges to broadly construe the Treason Act 1352 made it clear to Cromwell and others that the judiciary could not always be relied upon to be of one mind with the government.[52] In order to tame the turbulence unleashed by the Reformation a broader law of treason would be needed which criminalized a greater variety of slanderous and incendiary speech. And although initially the government struggled against strong currents of parliamentary resistance, by the end of the 1530s virtually every kind and form of religious dissent fell within the ambit of the expanded law of treason. Yet the Crown still faced evidentiary difficulties in securing convictions in cases of treasonous words. Its solution was Attainder, the weapon which had proved itself

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[48] Ibid, 682.
[49] Ibid.
[50] 25 Henry VIII c. 12.
[51] Lehmburg, *Parliamentary Attainder*, supra note 2, 682.
[52] Bellamy, *Tudor Law of Treason*, supra note 2, 23.

so useful in the destruction of Barton and her confederates. A statute of 1539 attainted 53 people, most of whom had already been convicted at common law.[53] Some, however, had not been brought to trial and were deemed traitors without even being afforded a cursory opportunity to defend themselves. The Act named four men, C. Joyce, R. Buckingham, Henry Phillippes and James Prestwhiche. These malefactors had allegedly affronted the King by naming the Pope as the head of the Church of England,[54] conduct which was probably treason under the Treason Act 1534. The Treason Act prescribed that it was treason to deny any of the Monarch's titles, one of which was "Supreme Head of the Church of England".[55] As an assertion that the Pope was the head of the Church of England was by implication a denial that Henry was, the rash words of these men brought them under the ambit of the 1534 Act. Although it was legally possible for the Crown to bring proceedings, Attainder was used because insufficient evidence was available to secure a conviction. The Crown felt that a jury would not accept its case that the accused had in fact uttered the treasonous words.

In the sixteenth century the rights and protections afforded to a person accused of treason were extremely limited: the accused could not cross-examine Crown witnesses or call his own, he was not permitted counsel, and could not see his indictment before trial.[56] But, to a degree, the petty juries which generally acted as finders of fact during criminal trials provided a counterbalance to the law's failings. By the sixteenth century juries had virtually acquired their modern role of acting as an objective finder of fact in criminal proceedings.[57] In criminal trials they usually took their role seriously and jealously scrutinized the Crown case. An accused could secure an acquittal if he could raise doubt in a jury's mind about his guilt.

This proved easier than usual in cases of treason by slanderous words because often the Crown only had one witness, the accuser. Such people could usually be portrayed as having a motive to lie. In May 1537 two men, Levenyng and Lutton were acquitted of treason because of insufficient evidence. The jury had cause to

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[53] 31 Henry VII c. 15. The Act was never printed, but there is a summary of it in LP, supra note 22, xiv, 867. Lehmburg, Parliamentary Attainder, supra note 4, 686.
[54] LP, supra note 22, xiv, 867.
[55] 26 Henry VIII c. 13.
[56] Bellamy, *Tudor Law of Treason*, supra note 2, 144, 161, 155-154.
[57] Ibid, 177.

disbelieve the lone witness, Sir Ralph Ellerker, who had allegedly been promised part of Levenyng's lands by the King should he be convicted.[58] And in September of the same year Lord Audley reported to Cromwell that Thomas Nevill, the brother of Lord Latimer, had been accused of traitorous words, but lamented that there was only one witness, a woman.[59] It also seems likely that jurors were particularly sensitive about condemning a person to the brutal penalties of treason for merely speaking words. During the trial of William Freeman one of the jurors asked the court whether he might in good conscience "cast a man awaie for speakinge a word in jest".[60] Englishmen believed that it was an ancient, God-given right to voice one's opinions and would often err on the side of the accused in slanderous words trials. Thus, in the case of Joyce, Buckingham, Phillippes and Preswhiche the Crown relied on a Bill of Attainder to compensate for its lack of evidence and defeat the common sense and mercy of the jury.

During the reign of Henry VIII Acts of Attainder were used by the Crown to purge men and women who became entangled in the high politics of the realm. These people sought to interfere with the King's dynastic ambitions, were viable candidates for the throne, or found themselves on the wrong side of power struggles within the King's Council. The first of these Attainders took place in 1536 and was directed against Lord Thomas Howard, the half-brother of the Duke of Norfolk. Howard had contracted to marry Lady Margaret Douglas, daughter of Henry's sister Margaret, Queen of Scots, and Archibald Douglas, the Earl of Angus. This marriage posed a unique problem for the Crown because Margaret was at the time the highest ranking woman in England and had the best claim to the succession aside from King James V of Scotland.[61] Until Jane Seymour produced a child Margaret Douglas was the heir apparent.[62] If Thomas Howard married her and Henry died without producing an heir Howard could

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[58] LP, supra note 22, xii, 731.
[59] Bellamy, *Tudor Law of Treason*, supra note 2, 153.
[60] Ibid, 178.
[61] Lehmburg, *Parliamentary Attainder*, supra note 2, 691. But James was unpopular in England and an unlikely candidate for the throne. Lord Thomas Howard's Act of Attainder acknowledged this, stating that the English people would resist James "to the uttermost of theyre powers". 28 Henry VIII, c. 24.
[62] Following the fall of Anne Boleyn, Elizabeth was declared illegitimate and removed from the succession. David Head, "'Beyng Ledde and Seduced by the Devyll': The Attainder of Lord Thomas Howard and the Tudor Law of Treason" (1982) 13, *Sixteenth Century Journal*, 7.

claim the Crown through his wife. Alternatively, he could wait until Margaret gave birth to a son or daughter and then rule as Regent in the infant's place.[63] The Attainder enunciated Henry's suspicions:[64]

> The said Lord Howard false craftely and trayterously hath imagined and compassed, that in case oure said Sovereign Lord shuld die wythout heyres of his bodye, whiche God defend, that then the said Lord Thomas, by reason of a maryage in so highe a blodde, and to one suche whiche pretendeth to be a laufull doughter to the said Quene of Scottes eldest suster of oure seid Sovereign Lord, shuld aspire by her to the Dignyte of the said Imperyall Crowne of this realm…

It seems likely that Henry's need to create a dynasty motivated this Attainder. The King was obsessed with continuing the Tudor line; the production of a legitimate male heir had consistently influenced his policies in a number of areas. It is probable that this ambition, to a greater extent even than his avarice towards the riches of the monasteries and his lust for Anne Boleyn, prompted the break with Rome.[65] The notion that a Howard could claim the kingdom by a marriage contract should he fail and die without heirs would have proven unpalatable to the King.

As in the case of Elizabeth Barton, Attainder was relied on in this situation because Howard's actions were not legally treasonous. Contracting to marry the King's niece could not possibly have been construed to fall within the Treason Act 1352, the First Succession Act or the Treason Act 1534. Although such conduct might have been contrary to the Second Succession Bill, which by June 1536 was working its way through Parliament, it was felt that a conviction could not be obtained under it. The Second Succession Bill provided that marriage to a member of the royal family, if it imperilled the succession of the children of Henry and Jane Seymour, was treason.[66] However, the Bill had not been passed by the time the marriage contract was made and there was no guarantee that it could become law before the marriage was consummated.[67] By this time the King's judges were

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[63] Ibid, 7-8.
[64] 28 Henry VIII c. 24.
[65] G.R. Elton, *England under the Tudors* (2 ed, Methuen, London, 1974) ["England Under the Tudors"].
[66] 28 Henry VIII c 7.
[67] Head, supra note 62, 9.

beginning to refuse to construe statutes retrospectively, a fact evidenced by an opinion given by Chancellor Audley in 1535 concerning the application of the Treason Act 1534:[68]

> The words spoken in March last… touching appeals will hardly bear treason, but misprision; for there is no express mention made of the King or the Queen/ And the words spoken of the King and the Queen… at Christmas last or afore February 6th last had been treason without doubt if they had been spoken since the first day of February [when the Act took effect]; but afore that day they be no treason by the act, they be misprision by the Act of Succession.

Perhaps more importantly, it is dubious whether, even had the Second Succession Act become law before the marriage was consummated, Lord Howard would have committed treason by marriage. For in 1536 it was not strictly possible to interfere with the succession of Jane and Henry's children: their first was not born until 1537. At best the marriage would have created the possibility that a child would be born which would have a claim to the throne in derogation of the claims of future children of Jane and Henry. But it seems unlikely that the courts would have interpreted the statute as meaning interference with the rights of future royal children in light of the stricter approach to statutory interpretation which marked this period. Moreover, it is questionable whether the mere potential that a marriage would produce a child who would have far weaker claim to the throne than a child of the royal marriage would have invoked the Act.

An Act of Attainder passed in 1539 provided for the destruction of a number of people who were deemed threats to the Crown, including Gertrude Courtenay and Margaret, Countess of Salisbury.[69] Gertrude Courtenay, Marchioness of Exeter, was one of the noblest women of the realm. She was the widow of Henry Courtenay, the Marquis of Exeter, who was a grandson of Edward IV and Elizabeth Woodville. Until he mounted the scaffold he was the most senior member of the White Rose dynasty: heir to the throne if the Tudor line failed.[70] With blood of such a pedigree he was an obvious target for the King's paranoia and was under periodic suspicion of

[68] Elton, *Policy and Police*, supra note 2, 302.
[69] 31 Henry VIII c. 15. The Act was never printed, but there is a summary of it in LP, supra note 22, xiv, 867. Lehmburg, *Parliamentary Attainder*, supra note 4, 686.
[70] Pollard, supra note 21, 300.

treason throughout the 1530s. Over the years the Marquis' implacable enemy, Thomas Cromwell, gathered evidence of his conduct, which was perhaps more foolish than treacherous, and in 1539 felt strong enough to bring him to trial for treason. Exeter was duly convicted of conspiring to kill the King, largely on the strength of the correspondence with Pole.[71]

Why Gertrude Courtenay was attainted with her husband is unclear. It is likely that the Government felt that she was part of the Exeter conspiracy but could not assemble the evidence needed to convict her. The King and Cromwell would have reasoned that the Marquis' wife either advised him on his course of action, or merely failed to dissuade him. This proposition is supported by the fact that six of the Marquis' servants, Bishop Cuthbert William Kendall, Guy Keime, James Griffith ap Howell, John Griffithe, vicar of Wandsworth, and Henry Mogson were also attainted by the Act.[72] The government seemingly used Attainder to destroy anyone whom they even suspected of being part of the conspiracy. An ancillary explanation for Courtenay's Attainder is that Henry decided to seize an opportunity to prune the last of the Yorkist royalty so as to further diminish the possibility that their dynasty might revive. With the name of Courtenay disgraced the Crown had no reason to fear resistance from Parliament.

It is likely that the Countess of Salisbury fell victim to the Act because of this latter reason. Like Gertrude Courtenay, the Countess was imbued with the finest blood. She was a daughter of George Plantagenet and thus an invaluable weapon to anyone seeking to take the throne and establish a dynasty.[73] For the government 1539 must have seemed the perfect time to move against her. Her sons, Henry Pole, Baron Montague and Sir Geoffery Pole, were indicted for conspiring to kill the King in 1538. Henry was found guilty in January 1539 and executed, while Geoffrey was granted a pardon for pusillanimously turning king's evidence against his brother.[74] Reginald Pole, the Countess' other son, was at this time abroad in France and considered an incorrigible traitor.[75] The Countess shared the guilt of her sons in the eyes of the dominant forces in Parliament. When the

[71] Ibid.
[72] LP, supra note 22, xiv, 867.
[73] Pollard, supra note 21, 299.
[74] Ibid, 299-300.
[75] Ibid, 299.

Crown was presented with a window of opportunity to remove a longstanding threat it seized it.

Cromwell's strategy was to portray the Countess as hand-in-glove with the Exeter conspirators and he struck a decisive blow in May 1539 when he produced a white silk tunic in Parliament. The tunic had been found by the earl of Southampton amongst the Countess' belongings, and was endowed with the following embroidery:[76]

> On the syde off the cote there was the Kyngys Grace ys armes of Ynglonide, that ys the lyons without the flowar delysses, and abowte the holl armys was made pancys for Powll, and marygoldes for my lady Mary… And betwyxt the marygolde and the pancy was made a tree to rys yn the myddes, and on the tree a cote off purpell hangyng on a bowgh, yn tokynnyng off the cote of Cryste, and on the other syde of the cote all the Passchyon of Cryste.

Allegedly the embroidery demonstrated that the Countess envisaged that her son, Cardinal Reginald Pole, would marry Mary Tudor and return England to Roman Catholicism. The Countess was thus part of a wider conspiracy to defeat the gains of the Reformation and subjugate the realm once more to the papist yoke, and was deserving of death. But the meaning alleged was not treason under any statute and in any case it places a highly artificial construction on the embroidery.[77] Nevertheless, in the circumstances Cromwell's threadbare accusations were enough for a Parliament so sensitive to Henry's interests.

Ironically, the next magnate to be destroyed solely by an Act of Attainder was the man who had played a leading role in augmenting the role of these instruments. Thomas Cromwell, one of the most powerful and feared men in the kingdom, finally fell from grace on 10 July 1540 and was committed to the Tower on suspicion of treason.[78] Since 1532 he had held the country in his sway. Cromwell was the architect of the Reformation, the executor of England's foreign policy and Henry's security tsar. While the King was an adept survivor and a man of relentless energy and drive, he was neither a strategic thinker nor a talented administrator. Cromwell was both. For the better part of

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[76] LP, supra note 22, xiv, i, 980. The description is contained in a letter to from John Worth to Lord Lisle, who was informed by Sir George Speke. Probably Cromwell or another councilor had displayed the tunic in the Commons, where Speke saw it. Lehmburg, *Parliamentary Attainder*, supra note 4, 687, n. 1.

[77] Ibid, 687.

[78] Lehmburg, *Parliamentary Attainder*, supra note 4, 692-693.

a decade he took his master's sometimes inchoate wishes and transformed them into coherent state policy. However Cromwell could be an abrasive man who made enemies quickly.[79] Ultimately, by the end of the 1530s, his enemies managed to gain the upper hand over him by emphasizing his association with extreme Protestantism and exploiting a number of foreign policy calamities.

The government chose not to proceed against Cromwell in the courts, but decided instead to convict him of treason with an Act of Attainder, an expedient Cromwell had counseled the King to use many times previously. Cromwell's Attainder was cast as a petition and was probably intended to suggest Cromwell's fall was precipitated by a general outcry against his tyrannical rule. It was thus quite similar to the Act which Cromwell himself drafted to destroy Elizabeth Barton. The Act outlined a series of trumped-up charges, none of which amounted to statutory treason and none of which could be satisfactorily proven in a court of law.[80] This indicates that the government probably had little real evidence against Cromwell and that if he was placed on trial a conviction could not be guaranteed.

It can also be inferred that Cromwell was denied a trial because his principal enemies, the Duke of Norfolk and Bishop Steven Gardiner, were afraid that if Cromwell was granted a chance to defend himself he would not only defeat the case against him, but counterattack. Henry was in many ways a fickle man, periodically rotating royal favor among his servants. If Cromwell was to demonstrate that the King had been lied to and that Norfolk and Gardiner were inferior counselors he could have turned the tables on them and sent them to the scaffold.[81]

With the destruction of Cromwell the conservative faction came to prominence in the realm. Gardiner and Norfolk had the King's ear and executed their policy of Catholic reaction, although their influence was never as great as Cardinal Wolsey's or Cromwell's. Norfolk was perhaps the closest to the King because his niece, Catherine Howard, had become Henry's Queen and, as a result, Norfolk enjoyed a degree of authority wholly inconsistent with his limited talents.[82] But by 1542 the fortunes of these men had begun to wane. Gardiner had fallen out

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[79] G.R. Elton, "Thomas Cromwell's Decline and Fall" in Elton, *Studies in Tudor and Stuart Politics and Government*, vol. 1 (Cambridge University Press, London, 1974) 189-190 ["Cromwell's Decline and Fall"].

[80] Ibid, 222-223. The Act itself does not survive.

[81] Lehmburg, *Parliamentary Attainder*, supra note 4, 693.

[82] Elton, *England Under the Tudors*, supra note 65, 193-195.

of favour for an unknown reason[83] and Norfolk was undone by one of his nieces for a second time.[84]On 2 November 1541 suspicion of Catherine Howard's infidelities reached the King's ears and was soon confirmed by the confessions of her lovers. Under torture Henry Mannox and Francis Dereham admitted to a sexual relationship with Catherine before she became Queen, Thomas Culpeper to one after her marriage to Henry.[85] The King was embarrassed, betrayed, and vengeful and resolved to destroy Catherine and her accomplices.

While Catherine's lovers and co-conspirators faced trial and were handed down convictions for treason and misprision, Catherine herself was not permitted her day in court and convicted solely by an Act of Attainder.[86] Once again the expedient was resorted to because the object of the King's attentions had probably not committed statutory treason. The government could have argued that she should be convicted under the 1352 Act: by consenting to intercourse with Culpeper she had aided and abetted someone who "violated" the King's companion. On the other hand "violation" has a connotation of unconsensual sex and Catherine was a willing participant.[87] While Anne Boleyn had been convicted of treason for almost exactly the same offences as Catherine had allegedly committed, the former's case constituted the high-water mark of judicial construction of treason. From mere adultery the court spelled out causing bodily harm to the King contrary to the Treason Act 1534 (by cheating on the King she knew she would disturb his equanimity and consequently cause him physical harm).[88] It seems probable that the King's judges had retreated from such a loose interpretation of the 1534 Act by 1542 and, as such, a Bill of Attainder remained the government's only option.

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[83] Peter Moore, "The Heraldic Charge Against the Earl of Surrey, 1546-1547" (2001) 116 *The English Historical Review*, 557.

[84] The first time being when Anne Boleyn fell out with the King and greatly diminished the influence of the Howard family.

[85] Pollard, supra note 21, 323.

[86] 33 Henry VIII c. 31.

[87] Indeed it is impossible for a rape victim to be charged as a part to her own "violation", for if she was not consenting how could she be said to have aided and abetted?

[88] Bellamy, *Tudor Law of Treason*, supra note 2, 41. Boleyn's affairs were also treason under the First Succession Act because they imperilled the succession of the King's daughter, Elizabeth, by giving people opportunity to question whether she was in fact of royal descent. Ibid, 40. Catherine could not have been convicted on this point because she had not born Henry a child.

It is also possible that the instrument of Attainder was chosen because Henry was so injured by Catherine's betrayal that he wished her to be quietly snuffed out and he did not have the stomach for a protracted trial.[89] Credence is lent to this proposition by the unusual level of grief the King suffered. Marrilac, the French ambassador, wrote that "he took such grief that of late it was thought he had gone mad".[90] Another significant point is that Henry did not give assent to the Bill of Attainder in person by commission: he selected a Lord Commissioner to proclaim that assent had been granted. Traditionally, the royal assent was always given by the Monarch in person in the House of Lords after a Bill was read out in full. But to Henry the prospect of being forced to listen to a comprehensive record of Catherine's betrayals in front of his entire Court must have seemed too much to bear. And if this is so, it follows that he could not have seriously entertained the idea of bringing Catherine to trial and having her indiscretions aired to the world.

Despite the considerable pressure which was brought to bear on Parliament for a speedy resolution of the matter, Catherine's Attainder took some time to become law. It was introduced on 28 January 1542 but was not passed until February 11, having had two second readings.[91] It seems that Henry had more trouble with this Attainder than with most because elements of Parliament recoiled from condemning a Queen without trial. The Howards were still powerful in the House of Lords and had allies within the King's Council. They attempted to stall the Attainder for long enough for the King to change his mind.[92] Catherine was even offered an opportunity to defend herself before Parliament, one which she curiously refused.[93] Perhaps she had accepted her guilt and resolved to accept her punishment.

III.

Some general conclusions can be drawn from the above analysis of the use of Bills of Attainder to punish treason in lieu of trial by Henry's government. It is clear that Henry dramatically broke with precedent by attainting so many people of treason when they were available for trial by common law. To a greater extent than any other English monarch,

[89] Pollard, supra note 21, 323.
[90] Ibid.
[91] Lehmburg, *Parliamentary Attainder*, supra note 4, 696.
[92] Ibid, 695-696.
[93] LP, supra note 22, xvii, 124.

he succumbed to the allure of judgment by legislation. Nevertheless, the King generally preferred to obtain conviction by common law if possible. Only when the law of treason did not encompass Henry's personal definition of it, or when the government had insufficient evidence to prove a case, was Attainder relied on. And indeed, the fact that in many cases the courts would not acquiesce to the government's wishes is a comforting sign. It shows the growing independence of the judiciary and their increased regard for the sanctity of black-letter law. It also reveals that jurors had a sense of fair play and conceived their role was to genuinely judge the guilt or innocence of the accused, not merely operate as a rubber stamp for the Crown. Conviction for treasonous words proved particularly difficult because jurymen felt it was an Englishman's right to speak his mind and would only convict on compelling evidence. Consequently the government began to rely heavily on Bills of Attainder to punish especially dangerous malefactors.

In some instances to attempt to secure conviction at common law was not the government's first instinct. If the King wished to inflict an innovative punishment which was alien to the common law, as in the cases of Roose and Lewes, Parliament was naturally the first port of call. In the case of Cromwell it was quite reasonably feared that if he was presented with a podium from which to deliver an oration he could snatch victory from the jaws of defeat. As such it is unlikely that Norfolk or Gardiner contemplated a trial. Regarding Catherine Howard, it is possible that the King never would have allowed her to stand trial because of heartache.

Generally the common law was the preferred method of enforcing the King's will because it conferred legitimacy in a way that Attainder did not. If someone was arraigned before a court and proved to have transgressed a written law then people understood and accepted his fate, even when the law itself was unjust. This belief in the sanctity of law was the bedrock of the English State for centuries, for it was neither bureaucratic nor backed by a standing army. Its powers rested largely on consent rather than coercion.[94] But conviction through Bill of Attainder evoked an entirely different reaction. Although the burgeoning doctrine of parliamentary supremacy held that such legislation was lawful, it was not seen to be just. In *The Fourth*

[94] For a discussion of this phenomenon in the eighteenth century, see E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (1977) 262.

Part of the Institutes of the Laws of England Chief Justice Coke related a discussion between the King and his judges on the subject:[95]

> King H. 8. commanded him to attend the chiefe justices, and to know whether a man that was forth-coming might be attainted of high treason by Parliament, and never called to his answer. The judges answered, that it was a dangerous question and that the high court of parliament ought to give examples to inferior courts for proceeding according to justice, and no inferior court could do the like; and they thought that the high court of parliament would never do it. But being by the expresse commandement of the king, and pressed by the said earle [of Essex, i.e. Cromwell] to give a direct answer: they said, that if he be attainted by parliament, it could not come in question afterwards whether he were called or not called to answer.

Nevertheless Parliament usually acquiesced to Bills of Attainder, with varying degrees of enthusiasm. This was predominantly because of the Crown's influence over the legislature. In both Houses the Crown possessed a nucleus of loyal placemen who would reliably vote for the government. The House of Lords was relatively easy to dominate because the civil strife of the previous century had greatly thinned the ranks of the hereditary nobility. Those which Henry VII and his son ennobled to replace them were generally restrained from independent action by gratitude and self-interest. They were tightly bound to the Crown and did not have the resources or social standing to maintain their position without royal favour.[96]

Control over the House of Commons proved a more difficult task owing to its greater size and because its members were elected. However, the King and his servants overcame these obstacles. Electors could be influenced to choose 'appropriate candidates' for the House of Commons by the offering of incentives such as sinecure positions and cash advances. In 1539 Cromwell boasted to the King that "I and other your dedicate counseillers be aboutes to bring all things so to passe that your Maiestie had never more tractable parliament".[97] Later

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[95] Coke, *The Fourth Part of the Institutes of the Laws of England* (1681) Early English Books Online, <http://eebo.chadwyck.com.ezproxy.auckland.ac.nz/search/full_rec?ACTION=ByID&SOURCE=pgimages.cfg&ID=V41386pp> (accessed 28 August 2008), 37-8.

[96] Thomas Taswell-Langmead, *English Constitutional History: From the Teutonic conquest to the present time* (6 ed, Riverside Press, Cambridge, 1905), 292.

[97] LP, supra note 22, xiv, i, 869.

he mused that one Richard Morisson would prove useful to the Crown if he was to become an MP: "no doubte he shalbe redy to answer and tak up such aswold crak or face with literature of lernyng or by Indirecte Wayes If any such chalbe, as I thinke there shalbe few or none".[98] Some of the King's greatest servants maintained a strong presence in the Commons to guide the Crown's Bills through. Cromwell was an imposing figure during the years of the Reformation Parliament, and two of Henry's Chancellors, Sir Thomas More and Sir Thomas Audley held the office of Speaker of the House of Commons.[99]

Fear of anarchy and the unknown was another reason which underlay the ease with which Parliament acquiesced to Bills of Attainder. While only the oldest of the nobility and 'middle classes' who composed the House of Commons could personally remember the Wars of the Roses, its spectre had shaped their upbringing. These men were brought up in a country which had only recently slid out from under decades of violence, uncertainty and economic chaos.[100] At times Henry Tudor and his son behaved tyrannically and impiously, but they had brought order and stability to a devastated and confused realm. Many of the elite willingly gave consent to an expansion of the royal prerogative and of the Crown's control over Parliament in exchange for a return to order.[101] One piece of prose produced in 1547 for educating unreliable or disloyal clergy succinctly articulates the prevailing mood:[102]

> Take away kings, princes, rulers, magistrates, judges, and such states of God's order, no man shall ride or go by the highway unrobbed, no man shall sleep in his own house or bed unkilled, no man shall keep his wife, children and possessions in quietness, all things shall be common, and there must needs follow all mischief and utter destruction both of souls, bodies, goods and common wealths.

Parliament acquiesced to Henry's Bills of Attainder because of a perception that only a strong Crown stood in the way of anarchy and

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[98] Ibid.
[99] See Stanford Lehmburg, *The Reformation Parliament, 1529-1536* (Cambridge University Press, London, 1970, 28-30, 79-80, 119.
[100] See Elton, *England Under the Tudors*, supra note 65, 1-17.
[101] Hurstfield, supra note 1, 83.
[102] F. Van Baumer, *The Early Tudor Theory of Kingship* (Yale University Press, New Haven, 1940), 104-05.

chaos. If the King believed that a religious or political dissenter or an ambitious nobleman was too dangerous to be left alive then usually parliamentarians conceded to his wishes. Fear that an unchecked fiend would thrust the realm into full-blown civil war once again weighed heavily on the minds of England's elites. Rather than think independently, parliamentarians usually preferred to trust the man who safeguarded their lives, children and property from the dangers of the unknown.

But Parliament could show a significant degree of independence and at times delayed controversial Attainders, as in the case of Catherine Howard. And it even refused to attaint Sir Thomas More when charges of misprision were initially laid against him.[103] Another example can be found in the case of the King's lieutenants at Calais, Lords Lisle and Grey. They were included in a Bill of Attainder in 1540 for failing to quash religious dissent in their satrapy[104] and by May 1540 their deaths seemed a foregone conclusion. Lisle had been accommodated in the Tower of London and the French ambassador wrote that only a miracle could save him.[105] Nevertheless, on the Bill's third reading both Lisle and Grey were granted a reprieve.[106]

Generally Parliament would only defy the Crown's wishes in special circumstances. The subject had to be prestigious and well-liked and only slim evidence of wrongdoing could exist. More was a former Chancellor, a leader of the Commons and of the Lords and one of the great thinkers of the day. Moreover, it was clear that he was innocent of any complicity with Barton or her confederates. When she approached More he counselled her to avoid talking of 'eny suche maner thinges as perteyne to princes' afferis, or the state of the realme".[107] The Lords refused to give the Barton Bill a second reading while More's name remained on it, and rather than have the Crown case against him exposed as a fraud by a Star Chamber inquiry, the King retreated.[108] Lisle and Grey were high born nobles, the former being a bastard son of Edward IV. Moreover, little evidence existed of malfeasance.[109]

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[103] Lehmburg, *Reformation Parliament,* supra note 99, 194-196 ["*Reformation Parliament*"].
[104] LP, supra note 22, xv, 830; xvi, 304.
[105] Lehmburg, *Parliamentary Attainder*, supra note 4, 689.
[106] Ibid, 689-690.
[107] Lehmburg, *Reformation Parliament*, supra note 99, 194.
[108] Ibid, 185.
[109] Lehmburg, *Parliamentary Attainder*, supra note 4, 690.

Usually, however, Parliament operated as a rubber stamp. Attainder of non-entities such as Roose and Lewes did not attract much resistance, nor did the destruction of those whose family name was disgraced. It is likely that Henry would have had more trouble with Gertrude Courtenay and the Countess of Salisbury but for their association with convicted traitors. Those who were generally unpopular or possessed only fair-weather friends did not give the Crown significant difficulties either. Cromwell accumulated a noteworthy tally of allies over his years as the King's chief minister, but these men were drawn to him only by self-interest. Their support evaporated once the King's favour began to run against him and not one voted against the third reading of Cromwell's Attainder.[110]

In light of all this, now may be the time to revisit some conclusions about the Tudor law of treason and the constitutionality of the Henrician regime. Elton finds that under Henry "the most heinous offence of all, so political in its implications, had been firmly reduced under the supremacy of 'due process', with all its technicalities, with its use of indictment and jury".[111] This statement is patently false. In some ways the law of treason was more arbitrary than before: although statute was more strictly adhered to, Attainder cast a giant shadow over the land. More fundamentally, the above analysis of the use of Attainder seems to render Elton's central thesis on Henrician society and government unsteady. His bold claim that "Tudor thinking and practice on the law subordinated everybody, the king included, to the rule of law which defined rights and duties and defined the processes by which these could be obtained or enforced"[112] now seems entirely disingenuous. The 'Rule of Law' did not exist during the Henrician period.

This term has become highly nebulous through over-use and constant redefinition by scholars, judges and politicians and this article is certainly not the place to attempt a truly authoritative definition. It will suffice to borrow F.A. Hayak's assertion that:[113]

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[110] Ibid, 694.

[111] Elton, *Policy and Police*, supra note 2, 292.

[112] G.R. Elton, "The Rule of Law in Sixteenth Century England" in Elton (ed) *Studies in Tudor and Stuart Politics and Government*, vol. 1 (Cambridge University Press, London, 1974), 277 ["Rule of Law"].

[113] F.A. Hayek, *The Road to Serfdom* (Dymock's Book Arcade, Sydney 1944), 54.

> Stripped of all technicalities this [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

To this it should be added that the organ of government which exercises judicial power should be independent, and thus that rudimentary division of powers should exist. Particularly, the same body should not exercise judicial and legislative functions, for otherwise people cannot plan their affairs around the law. Men and women cannot have confidence that a body which exercises both of these powers will act impartially and consistently with principles of natural justice. When pronouncing judgement its members could be influenced by factors which are improper when acting judicially, such as personal interest or notions of 'the greater good'.[114]

In this most limited sense, the Rule of Law does not guarantee a just society. It is perfectly possible for a society ruled by law to be manifestly unjust. But the Rule of Law is a prerequisite for a just society. Without it a person is at the utter mercy of the sovereign power and is essentially in a condition of slavery. Life and property are subject to the arbitrary control of one's rulers, and one is scarcely better off than in Hobbes' state of nature.[115] In contradistinction the Rule of Law provides for freedom: people can avoid confrontation with the power of the State by behaving consistently with the law. They can choose whether to be interfered with by the State. Under the Rule of Law men and women are masters of their own destiny and are treated as autonomous, reasoning beings. Because of this the Rule of Law is essential for human dignity and respect for the individual. As the apostate Marxist E.P. Thompson declared, the Rule of Law is "an unqualified good" and a symptom of human progress.[116]

It is true that during the sixteenth century English society took huge strides towards being ruled by law. During the reign of Elizabeth I the judiciary felt confident enough to declare the law of the

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[114] *United States v Brown* 381 US 437, 445 (USSC, 1965).

[115] Individuals are in the worst condition possible when there is no government at all. Without the restraint of authority man's self-interest, diffidence and glory result in perpetual conflict between all humans. Thomas Hobbes, *Leviathan* ((Penguin Edition, Cambridge University Press, London, 1982), chapter 13.

[116] Thompson, supra note 94, 267.

realm applied to each and every denizen. In *Williams v Berkeley* Brown J. enunciated the doctrine of the supremacy of statute: "The Estate was the cause of the Act, and is restrained by the Act, which the King cannot enlarge by his Prerogative without another Act of Parliament, but in taking the Estate he is restrained along with the Estate".[117] By 1568, in the *Case of Mines*, the Queen's justices were able to categorically state that the royal prerogative was "allowed to the king by the law", and thus controlled by and subject to it.[118] Statute law was supreme and the royal prerogative was subordinate, limited, and constrained. Every individual was equally subject to the law, for no-one could pretend to be above Parliament's authority.

Moreover, during the reign of Henry VIII most legal disputes were funnelled through the ordinary courts and were subject to consistent and prescribed legal procedure. Judges began to adhere more strongly to the black letter of the law and would not adopt the expanded and fanciful meanings that the King's Council argued for. Nor would they construe statutes retrospectively, but would only judge people for conduct which was criminal at the time it was committed. But if these developments amounted to an advance towards legality, Henry's policy of Attainder resulted in a grand retreat.

The frequent use of Acts of Attainder to punish conduct which Henry deemed treasonable is wholly inconsistent with a finding that the Rule of Law prevailed during his reign. Each time Parliament passed a Bill of Attainder at the bequest of the Crown equality before the law ceased to exist. By enacting specific rather than general legislation and subjecting only the attainted to the law, Parliament actually expelled him or her from civil society and back into the state of nature. Deprived of the law's protection, he or she faced the Leviathan of Parliament utterly alone. This Leviathan was analogous to every other tyrant in history who condemned men and women to die by caprice and naked power. It can be distinguished from the likes of the Persian kings Xerxes and Darius or Attilla the Hun on only two points. First, the decision to destroy and individual did not lie with one man, but had to be agreed upon by a majority of both Houses and the King. Secondly, it did not rely for its authority on naked military power, but on the tacit consent of the people which was procured in part, ironically, by respect for the 'law'.

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[117] Elton, Rule of Law, supra note 112, 265.
[118] Ibid.

Obviously the attainted had no opportunity to plan his or her affairs around the law, for the law fell swiftly an often unforeseeably on them. As a matter of law Parliament declared that their alleged conduct could be treason and found that they were guilty in fact. But the use of Bills of Attainder not only removed the attainted's ability to be guided by the law, but everyone else's as well. The spectre of Attainder haunted the lives of Henry's subjects, for they could not predict when he would later take umbrage at their conduct. Men and women could not tell whether their actions would later be called treasonous, discern what level of proof Parliament would require before signing their death warrant, or ascertain what procedural benefits they would be afforded. Only one's instinctual awareness of imminent danger could save one from the law.

Throughout history nations have agreed that the use of Bills of Attainder is manifestly contrary to the Rule of Law. Retrospective criminal punishment, which is part and parcel of statutory Attainder, is universally condemned. Nations as diverse as France, South Africa and New Zealand have decried its use.[119] The Founding Fathers of the United States of America found the use of Bills of Attainder to be so abhorrent that they made specific provision for them. Article I, section 9, clause 3 of the United States Constitution provides that Congress shall have no power to pass a Bill of Attainder. Article I, section 10, clause 1 similarly limits the powers of state legislatures. The Framers of the Constitution felt that a society in which people live in fear that they will be tried for past, legal conduct by a 'court' not bound by the maxims of natural justice cannot be called "free".[120] Moreover, they considered that due process and the right to receive an impartial and fair hearing when charged with a crime is central to the Rule of Law. Thus, in order to guarantee the Rule of Law survived the Framers resolved to guarantee that no person would ever be tried by a legislature, a partisan body which can never offer these virtues.[121] Ultimately, Elton's conclusion that the Rule of Law prevailed in Henrician England seems extremely difficult to sustain.

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[119] See Art. 8 of the French Declaration of the Rights of Man and of the Citizen (1789); s35(3)(n) of the Constitution of the Republic of South Africa 1996; ss 26(1) and 25(g) of the New Zealand Bill of Rights Act 1990.

[120] ***US v Brown***, supra note 163, n 17.

[121] See the judgement of Mr Justice Black in ***US v Lovett***, 328 US 303 (USSC, 1946); ***US v Brown***, supra note 114, 442.

Conclusion

While the number of people destroyed solely by statute pales in comparison to the number sent to the scaffold by the King's courts, Attainder played a vital role in the 'justice' policy of King Henry VIII. With the aid of a virtually subservient Parliament, Henry transformed an almost administrative instrument into a weapon of death and confiscation in order to attack his enemies where the common law proved insufficient or inconvenient. The implications of these findings for historians and constitutional scholars are significant. For one, they show that although the edifices of a modern justice system existed, the Rule of Law did not prevail. Henry was not committed to the principle of legality, believing instead that black letter law, courts and parliaments were but means to an end. Scholars seeking to discern the first green shoots of constitutional government in England must look further forward in time. However, Henry's policy of Attainder is nevertheless connected with constitutional progress, for it can be interpreted as a symptom of the decay of the idea of absolute monarchy in England. While in previous centuries monarchs could expect for precedents and statutory language to bend under the royal will, during the sixteenth century judges took a much stronger line. Faced with this resistance, the King was forced to enlist the aid of Parliament to carry out his wishes. This retreat signifies a paradigm shift in the relationship between monarch and law and state and citizen. Historically, English governments were backed by neither a standing army nor a large bureaucracy, and could govern only through the idea of law. Nevertheless, while the idea of law and the will of the monarch were synonymous, the monarchy essentially wielded the power of a military or bureaucratic tyranny of the Continental and Oriental varieties. But much of this power evaporated when the courts began to view the law as something abstract and distinct from the expression of any one individual. Incrementally the powers of the monarch decreased and he became nothing more than the chief magistrate of the land – a powerful and important figure, but not "the sovereign" in the literal sense. His powers became limited and their exercise, in theory, predictable and subject to the law. One important point to take from Henry's policy of Attainder is that its mere existence shows that the condition precedent of the Rule of Law – the separation of law and man – prevailed during his reign.

WRONGFULLY 'RED' OR 'YELLOW-CARDED' FROM A SPORT OR COMPETITION: APPLYING THE RESTRAINT OF TRADE DOCTRINE TO HOLD SPORTS GOVERNING BODIES TO ACCOUNT

ROWAN ARMSTRONG*

Introduction

Many sports can now be considered 'big business'. Tagdell JA recognised this when his Honour stated that sports clubs are "conducting an entertainment business on a large scale".[1] With the commercialisation and commodification of sport becoming increasingly prevalent, there is an escalating desire for sports governing bodies to exercise greater control over the actions of players, clubs and other participants. Probably in many cases governing bodies see this as necessary to protect and enhance their credibility, to maximise potential revenues, and to further promote the sport in an environment of fierce competition. However when a governing body acts in a way to prevent or limit a participant's ability to earn a living from a sport, by imposing an obligation going beyond that which is reasonably necessary, the act constitutes an unreasonable restraint of trade and is void. To cast an analogy with a rugby union referee, sports governing bodies may in some circumstances, if challenged, be wrongfully handing out 'red' or 'yellow' cards. In this professional age of sport it is therefore desirable, if not necessary, for interested parties to be aware of how they can apply the restraint of trade doctrine to hold a sports governing body to account.

The term 'restraint of trade,' has recently been thrust into the media spotlight after speculation that the conduct of a number of governing bodies may be in breach of the doctrine. Probably the best known situation was the stance taken by national cricket bodies (under the umbrella of the International Cricket Council (ICC)) who, in 2008, threatened to exclude those players involved in the 'rebel' Twenty20 Indian Cricket League (ICL) from playing all other ICC-sanctioned

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[1] *Australian Football League v Carlton Football Club Ltd* [1998] 2 VR 546, 548.

forms of cricket.[2] If this position is maintained, it would effectively put the players who participated in the rebel league out of full time employment.

Another situation where athletes may invoke the doctrine is in response to a governing body preventing them from competing in a sport or competition after committing a doping infringement. For example, the enforcement and legality of the British Olympic Association's (BOA) byelaw 25 has come into question. This stipulates that:

> [a]ny person who has been found guilty of a doping offence… shall not [subject to stipulated grounds of appeal] thereafter be eligible for consideration as a member of a Team Great Britain or be considered eligible by the BOA to receive or to continue to benefit from any accreditation as a member of the Team Great Britain delegation for or in relation to any Olympic Games...[3]

Christine Ohuruogu (the 2006 Commonwealth 400 metres champion), successfully appealed the enforcement of this byelaw to be granted permission to compete at the 2008 Beijing Olympic Games.[4] However British sprinter, Dwain Chambers, who served a two year suspension for doping, was not so fortunate. Chambers did not fall within any of the stipulated grounds for appeal prescribed by the byelaw and therefore the only realistic route for him[5] was to challenge its legality on the basis that it constituted an unreasonable restraint of trade. Mackay J, in the English High Court, refused to grant Chambers an injunction to temporarily suspend the BOA's byelaw in the absence of a full hearing.[6]

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[2] See Part C (1) of this article, in particular commentary in footnotes n 89-108, for comprehensive analysis of this situation.

[3] <http://www.olympics.org.uk/documents/Eligibility%20bye%20law%20(Final%20Nov%202004).pdf>. The stipulated grounds of appeal are contained in byelaw 25(6)(5).

[4] The Daily Mail, 'Christine Ohuruogu Cleared to Run in Olympics after Lifetime Ban Drug is Lifted'(2008) *Daily Mail Sport,* <http://www.dailymail.co.uk/pages/live/articles/sport/sport.html?in_article_id=496693&in_page_id=1771> at 29 January 2008.

[5] The Guardian, 'BOA Ready for Chambers Challenge'(2008) *The Guardian Sport*, <http://sport.guardian.co.uk/athletics/story/0,,2262362,00.html> at 5 March 2008. Any appeal to the Court of Arbitration for Sport was unlikely to have been heard before the Beijing Olympics started on 8 August 2008.

[6] *Chambers v British Olympic Association* [2008] EWHC 2028 (QB). MacKay J noted at [66] that "many people inside and outside the sport, would see [this byelaw as unlawful].... In my judgment, it would take a much better case than the claimant presents to persuade me

Aside from restrictions on participating in a sport or competition, there has also been recent speculation that salary caps, as a form of labour market control, may constitute an unreasonable restraint of trade.[7] This matter has yet to be determined and one can only wait with interest until inevitably an aggrieved sportsperson challenges a governing body for not being able to earn the amount that they deem themselves to be worth.

This article will further explore and expand on these situations, with an aim to provide interested parties with a practical analysis as to the scope and circumstances in which a restraint of trade claim may ultimately succeed. As the categories of restraint of trade are "not exhausted and never closed"[8] it is simply not possible to foresee every situation in which a challenge could successfully be brought. Nevertheless it is fundamental in this professional age of sport for interested parties to have an appreciation of the principles and the established circumstances in which the doctrine may be called upon to challenge the authority of a self-regulatory[9] governing body. This article will significantly analyse the Australian and English restraint of trade cases. As the doctrine is premised in the common law, these authorities hold a great deal of influence in the New Zealand courts.

A. Restraint of Trade as a Mechanism for Challenge

It is important to emphasise from the outset that restraint of trade is merely one mechanism available to hold a sports governing body to account. Judicial review,[10] a contractual cause of action,[11] interference

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to overturn the *status quo*, that is to say, the validity of this byelaw at this stage and thereby compel his selection".

[7] For example see: M Beloff QC, 'Gaming and Doping Continue to Threaten Sport'(2007) *The Telegraph Sport,* <http://www.telegraph.co.uk/sport/main.jhtml?xml=/sport/2007/12/26/sodrug126.xml> at 25 December 2007. For further information see commentary below n 87.

[8] G Treitel, *The Law of Contract* (9th ed, 1994), 413 in P Morris & G Little, 'Challenging Sports Bodies Determinations' (1998) 17 *Civil Justice Quarterly* 128, 140.

[9] J Black, 'Constitutionalising Self-Regulation' (1996) 59 *Modern Law Review* 24, 27. This describes the situation of "a group of persons or bodies, acting together, performing a regulatory function in respect of themselves and others who accept their authority".

[10] R Armstrong, 'The Whistle has Blown ... Game Over ... Or is it Really? Challenging the Decisions of Sports Governing Bodies in New Zealand' (2008) 14 *Canterbury Law Review* 65; J Caldwell, 'Judicial Review of Sports Bodies in New Zealand,' 44 in E Toomey (ed),

with a person's right to work,[12] and specific legislation such as the New Zealand Bill of Rights Act 1990[13] and the Commerce Act 1986[14] may be applicable and even brought in conjunction with a restraint of trade claim in an appropriate situation. Due to the intricacy of the restraint of trade doctrine though, this article will not elaborate on these other bases of challenge.

Restraint of trade is an extremely flexible mechanism which is founded on the public policy that no person should be unreasonably restrained in the pursuit of his or her trade or profession.[15] As seen from the factual contexts above, the common law doctrine is not limited to contractual restraints; it can be used to challenge a sports body's rules, policies, practices and disciplinary tribunal rulings. More broadly it is applicable to all restraints, however imposed, and whether voluntary or involuntary.[16]

Another important feature of the doctrine is its accessibility. Although historically case law has suggested that there must be a contractual relationship between the parties, in that the court will only decline to enforce a *contractual* term,[17] this no longer seems to be the position.[18]

Keeping the Score: Essays in Law and Sport (2002).

[11] Ibid.

[12] See *Nagle v Feilden* [1966] 1 All ER 689; *McInnes v Onslow-Fane* [1978] 1 WLR 1520; *Hughes v Western Australian Cricket Association (Inc)* (1986) 69 ALR 660, 703-704.

[13] For example see: *Stratford Racing Club Inc v Adlam* [2008] NZCA 92, [59] (per Chambers J).

[14] Commerce Act 1986 s 7(1) provides that nothing in the Act limits or affects any rule of law relating to restraint of trade not inconsistent with the provisions of the Act. Similarly the Australian Trade Practices Act 1974 s 4M(a) provides that the common law restraint of trade doctrine is to continue in effect 'insofar as that law is capable of operating concurrently' with the Act.

[15] B Ward, 'Fair Play: Professional Sport and Restraint of Trade' (1985) 59 *Law Institute Journal* 545.

[16] *Buckley v Tutty* (1971) 125 CLR 353, 375.

[17] See *R v The Benchers of Lincoln's Inn* (1825) 4 B & C 855; 107 ER 1277; Peter Watts argued that the Court in *Nagle v Feilden* perverted the doctrine of restraint of trade, "which at most involves the court in declining to give its aid to certain types of contractual provision, into suggesting that powerful parties can be *forced* to offer work to someone" (P Watts, 'The Tort of Refusing to Contract' (2008) 14 *New Zealand Business Law Quarterly* 69). On this basis it could be argued that the restraint of trade doctrine is a 'negative doctrine' only, in that it should not be used to force sports bodies to give sportspersons entry to the industry, nor impose positive obligations of reasonableness on sports bodies.

[18] *Nagle v Feilden* [1966] 1 All ER 689; *Buckley v Tutty* (1971) 125 CLR 353; Smellie J in

This was clearly illustrated in ***Stininato v Auckland Boxing Association (Inc)***[19] where the claimant, a professional boxer, was refused access to the sport. Despite the absence of a contract with the governing body, the Court was willing to apply the doctrine.

It is also not necessary to be a party to a challenged agreement to lodge a restraint of trade claim. A third party can bring an action if they are unreasonably restrained by an agreement's operation.[20] It is anticipated that third parties (notably sportspersons and coaches) will invoke the doctrine more frequently in the future where there is a fettering of commercial freedom. For instance, one situation may be where there is a conflict between a governing body's or team's sponsorship, media or marketing arrangements and the sportsperson's personal arrangements.

The substantive remedies available to a successful litigant on establishing an unreasonable restraint of trade can be extremely effective.[21] Characteristically in the context of sporting restraints, a declaration will be issued either pursuant to the court's inherent jurisdiction or the Declaratory Judgments Act 1908 that the particular clause, rule, term or decision is an unreasonable restraint of trade, void, and thus unenforceable. Lord Wilberforce in ***Eastham v Newcastle United Football Club Ltd***[22] additionally noted that:

> the court has jurisdiction to grant a declaratory judgment, not only against the employer who is in contractual relationship with the employee, but also against the association of employers whose rules or regulations place an unjustifiable restraint on his liberty of employment.[23]

Rugby Union Players' Association Inc v Commerce Commission(No 2) [1997] 3 NZLR 301, 315 approved the principles set out in ***Foschini v Victoria Football League*** (unreported, Supreme Court of Victoria, 9868/82, Crockett J, 15 April 1983) where the Court noted that the correctness of the proposition that the doctrine is not limited to a contractual relationship "may now be considered to be beyond doubt"; ***Stratford Racing Club Inc v Adlam*** [2008] NZCA 92.

[19] [1978] 1 NZLR 1.

[20] S Gardiner et al, ***Sports Law*** (3rd ed, 2006), 216.

[21] Damages are rarely claimed in a restraint of trade action. Only when a contract exists between the parties could damages be awarded: ***Nagle v Feilden*** [1966] 1 All ER 689.

[22] [1963] 3 All ER 139.

[23] Ibid 157.

However a declaration will not be issued as of right on an unreasonable restraint of trade being made out. The remedy is discretionary.[24] Although it will be rare, the most likely reasons for a court in declining to issue a declaration is if it would serve no useful purpose, there is a delay in bringing the claim, third parties would be prejudiced, or on the broad concept of the 'overall justice' of the situation.[25] Also in conjunction with a declaratory judgment, a mandatory injunction will often be sought to prevent the governing body from continuing to apply the restraint.[26] Furthermore, if the restraint of trade is premised in a contract, the New Zealand courts by virtue of the Illegal Contracts Act (ICA) 1970 have a wider jurisdiction than at common law[27] to modify the restraint provision. Section 8 ICA 1970 provides that the courts may delete an objectionable provision and enforce the amended contract, or modify the provision so that it is in a form which would have been reasonable at the time that the contract was entered into and then give affect to the modified contract. But where any deletion or modification would alter the bargain between the parties in a way that it would be unreasonable to allow the contract to stand, the court may decline to enforce the contract.[28]

B. The Legal Framework Applied by the Courts in Determining an Unreasonable Restraint of Trade

The conventional[29] authoritative framework applied by the courts on analysing whether there is an unreasonable restraint dates from the 19th

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[24] Declaratory Judgments Act 1908s 10; see also, *Blackler v New Zealand Rugby Football League (Inc)* [1968] NZLR 547, 572 (per McCarthy J); *Stininato v Auckland Boxing Association (Inc)* [1978] 1 NZLR 1, 8 (per Richmond P) and 29 (per Cooke J); *Stevenage Borough Football Club v Football League Ltd* (1996) 9 Admin LR 109 where relief was refused.

[25] See: *Eastham v Newcastle United Football Club Ltd* [1963] 3 All ER 139, 159; *Stevenage Borough Football Club v Football League Ltd* (1996) 9 Admin LR 109.

[26] For example see *Buckley v Tutty* (1971) 125 CLR 353.

[27] J Burrows, J Finn & S Todd, *Law of Contract in New Zealand* (3rd ed, 2007), 434; LexisNexis, *The Laws of New Zealand: Contract, Part IX Illegal Contracts* (2008), [233]-[237]. At common law, the courts could only sever objectionable parts in a contract where this could be done without destroying the contract.

[28] J Burrows, J Finn & S Todd, *Law of Contract in New Zealand* (3rd ed, 2007), 434 – "the word "may" in subsection (1) is to be read meaning "shall" so that the Court must choose one of the three statutory options of - enforcement of the restraint, declining to enforce it, or modifying it and enforcing it as modified."

[29] Note that in *Stevenage Borough Footall Club v Football League Ltd* (1996) 9 Admin LR 109 the Court held, in relation to a challenge on the sports body's rules, that the plaintiff was

century House of Lords decision *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd.*[30] Lord Macnaghten held that a restraining practice would be deemed void unless it was justified that:

> the restraint is reasonable – *reasonable, that is, in reference to the interests of the parties* concerned and *reasonable in reference to the interests of the public*, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.[31] [Emphasis added].

As the doctrine is premised on public policy, it is difficult to ascribe strict rules when analysing whether a situation should warrant a finding that the restraint is unreasonable. The court has significant discretion and will typically perform a balancing act based on a range of competing subjective values.

1. Is there a restraint of trade?

A necessary preliminary point to consider is whether the matter in question is actually a restraint of trade. If so, then *prima facie* the restraint will be void.[32] The onus in establishing the restraint rests with the party affected – the player, club or other participant (also referred to in this article as the claimant).[33] It must be shown that the obligation prevents or limits their ability to earn a living through the sport.

(a) Is the claimant 'in trade?'

It is irrelevant whether the sporting body in question is engaged in trade, it is only necessary for a sportsperson to be so engaged.[34] This will clearly occur if the sportsperson is deemed to be a professional, in

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to establish that there was a restraint and that it did not operate reasonably in the interests of the public. The first limb of Lord Macnaghten's reasonableness test, (whether the restriction was in the interests of the parties) was omitted. This approach has not been adopted in any other cases to date, but has not expressly been overruled.

[30] [1894] AC 535.

[31] Ibid 565.

[32] Ibid; applied in *Blackler v New Zealand Rugby Football League (Inc)* [1968] NZLR 547, 555 and 569.

[33] *Hughes v Western Australian Cricket Association (Inc)* (1986) 69 ALR 660, 702.

[34] *Buckley v Tutty* (1971) 125 CLR 353.

that they receive payment from participation in a sport.[35] However it is not essential that their entire or even a substantial part of their income derives from the sport. A sportsperson will be considered a professional if they are part-time.[36]

In previous cases it has been argued that the doctrine ought not to apply to a claimant involved in amateur sport as they are not engaged 'in trade'. This argument must be accepted, as was illustrated in the Australian case *Skelton v Australian Rugby Union Ltd*,[37] where an amateur sportsperson complains that they are prevented from competing *as an amateur*. However a fine distinction needs to be drawn where an amateur sportsperson is restricted from embarking on a *professional career* because of a restraint which limits his or her ability to follow their chosen occupation. North P (for the majority) in *Blackler v New Zealand Rugby Football League (Inc)* appropriately held that an amateur player was 'in trade' in circumstances where they were refused clearance to play professional rugby league in Australia.[38] His Honour stated that:

> as a matter of principle, I can see no reason why the Court should be powerless to intervene in appropriate cases where a body administering an amateur sport takes to itself the power to prevent its players from seeking employment overseas as professional footballers without its consent.[39]

It is submitted that this expansive approach adopted by North P is correct. The doctrine ought not to apply restrictively to professional sportspersons. This can be justified on the basis that there is often a

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[35] M McDonagh, 'Restrictive Provisions in Players Agreements' (1991) 4 *Australian Journal of Labour Law* 126, 133. See also *Buckley v Tutty* (1971) 125 CLR 353.

[36] *Buckley v Tutty* (1971) 125 CLR 353, 371-372; *Hughes v Western Australian Cricket Association (Inc)* (1986) 69 ALR 660; *Barnard v Australian Soccer Federation* (1988) 81 ALR 51; *Avellino v All Australia Netball Association Ltd* [2004] SASC 56, [93].

[37] [2002] QSC 193, [12]. The court will need to determine that the reality of the situation is that the player participates for pleasure, not money.

[38] [1968] NZLR 547. See also: the Australian case *Hall v Victorian Football League* [1982] VR 64 where an amateur footballer was considered to be 'in trade' in circumstances where he wished to embark upon a professional career but was limited by the governing body's rules from doing so; *Barnard v Australian Soccer Federation* (1988) 81 ALR 51; and the English case *Gasser v Stinson* (Unreported, High Court Chancery, No Ch-88-G-2191, Scott J, 15 June 1988).

[39] *Blackler v New Zealand Rugby Football League (Inc)* [1968] NZLR 547, 545.

blurring of distinction between amateur and professional sport[40] and/or a real potential for a budding sportsperson to earn a living from the sport.[41] There are many 'amateurs' whose livelihoods would be affected if they were restricted from a sport or competition. For instance, it is possible that a restriction would impact on an amateur sportspersons reputation and therefore on his or her ability to continue to earn significant indirect financial reward through media contracts, sponsorship, or the like.[42]

(b) Does the obligation 'restrain' the claimant in his or her trade?

The second aspect which the claimant may be required to establish is that the obligation acts as a restraint on their trade. It is not necessary for a restraint to be absolute; it can be partial.[43] A restraint of trade can take various forms, the most obvious being when access to a particular sport or competition is denied (whether temporarily or permanently).[44] Other common restraints include labour market controls (such as transfer systems, internal player-draft schemes, zoning and residential rules, salary caps)[45] and specific contractual terms contained in player agreements.[46]

Often a restraint will be self evident with counsel agreeing from the outset that the particular obligation constitutes a restraint of trade.[47] Nevertheless on occasion the courts will be required to analyse the nature and extent of an obligation to determine if the claimant's ability

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[40] M McDonagh, 'Restrictive Provisions in Players Agreements' (1991) 4 *Australian Journal of Labour Law* 126, 133.

[41] For example see:*Hall v Victorian Football League* [1982] VR 64; *Hughes v Western Australian Cricket Association (Inc)* (1986) 69 ALR 660, 700.

[42] *Hughes v Western Australian Cricket Association (Inc)* (1986) 69 ALR 660, 700. See also: *Stininato v Auckland Boxing Association (Inc)* [1978] 1 NZLR 1, 12 (per Woodhouse J); and *Gasser v Stinson* (Unreported, High Court Chancery, No Ch-88-G-2191, Scott J, 15 June 1988).

[43] A Lewis & J Taylor, *Sport: Law and Practice* (2003). For example see:*Stevenage Borough Football Club v Football League Ltd* (1996) 9 Admin LR 109; *Greig v Insole* [1978] 3 All ER 449.

[44] See Part C (1) of this article.

[45] See below, n 83-87.

[46] See below, n 88.

[47] For example see: *Kemp v New Zealand Rugby Football League Inc* [1989] 3 NZLR 463; *Wickham v Canberra District Rugby League Football Club Ltd* [1998] SCACT 9, [49]; *Adamson v NSW Rugby League Ltd* (1991) 103 ALR 319.

to seek and engage in employment has been fettered. The courts have indicated that when a governing body's rules are under challenge, these have to be read in context with the nature of the game and with the body's constitution. "They are not to be read like a contract wholly reduced to writing".[48] This must be the correct approach as it enables the court to *practically*[49] consider whether there is a restraint. The restraint also need not operate on trade within the courts jurisdiction. The majority in *Blackler* held that "any restraint on employment whatsoever, whether it is intended to operate in New Zealand, or only overseas, or both, is *prima facie* void".[50]

2. Is the restraint justified – is it reasonable?

On the claimant making out that there is a valid restraint of trade, the onus will switch to the defendant (the sports governing body) to prove on the balance of probabilities that the restraint is reasonable and justified in the interests of the *parties*. If the defendant can establish this, the onus reverts back to the claimant who has the opportunity to prove that the restraint is not reasonable in the interests of the *public*. This is a question of law for the courts.[51] If the restraint is contained in a contract the reasonableness of the restraint is to be assessed at the time the contract was entered into. Similarly, the validity of rules is tested at the date of imposition.[52]

(a) Is the restraint reasonable having regard to the interests of the parties?

What is reasonable in the interests of the parties is the first limb of Lord Macnaghten's reasonableness test. A restraint of trade will be void unless the governing body can show that *firstly, the restraint is reasonably necessary to protect their interests* (or objectives) and *secondly, that the restraint does not impose on the claimant a greater degree of restraint than such reasonable*

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[48] *Wickham v Canberra District Rugby League Football Club Ltd* [1998] SCACT 9, [55].
[49] See: *Goutzioulos v Victorian Soccer Federation Inc* [2004] VSC 173, [18]; *Avellino v All Australia Netball Association Ltd* [2004] SASC 56, [84]; *Adamson v NSW Rugby League Ltd* (1991) 103 ALR 319, 345; *Buckley v Tutty* (1971) 125 CLR 353, 370.
[50] *Blackler v New Zealand Rugby Football League (Inc)* [1968] NZLR 547, 554-555 (per North P) and 569 (per McCarthy J).
[51] *Buckley v Tutty* (1971) 125 CLR 353, 377.
[52] *Adamson v NSW Rugby League Ltd* (1991) 103 ALR 319, 359 (per Gummow J) and 346 (per Wilcox J).

protection requires.[53] Typically this constitutes the substantive issues for the courts in determining whether any obligation is an unreasonable restraint of trade.

Inherent in the *first issue* is the necessity for the sports governing body to identify a legitimate interest requiring the court's protection. A legitimate interest lies at the heart of the justification of restraint of trade for if there are no interests worth protecting then the restraint in question will be unreasonable.[54] This task of identifying a legitimate interest can be difficult as sports governing bodies' constituent documents[55] and policy statements usually deal with welfare generalities not specific objectives in a "strict legal sense".[56]

Despite this, although it has sometimes been assumed,[57] the courts have recognised that sports bodies do have interests deserving of protection which would justify a reasonable restraint. This has included interests which: achieve a competitive balance between clubs to maximise spectator appeal (sporting equality),[58] ensure a club's continued existence,[59] protect the economic viability of a game or competition and protect its proper organisation and administration,[60]

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[53] See: *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, 565; *Buckley v Tutty* (1971) 125 CLR 353, 377-378. Note that in *Stevenage Borough Football Club v Football League Ltd* (1996) 9 Admin LR 109 Carnwath J claimed that the standard of unreasonableness should be the public law *Wednesbury* standard due to the nature of a sports body. This was a marked departure from *Nordenfelt*.

[54] J Carter & D Harland, *Contract Law in Australia*, (4th ed, 2002), 588 in C Davies, 'The Use of Salary Caps in Professional Team Sports and the Restraint of Trade Doctrine' (2006) 22 *Journal of Contract Law* 246, 247.

[55] Most sports governing bodies in New Zealand are incorporated under the Incorporated Societies Act 1908.Section 6(1)(b) requires the rules of the society to state the objects for which the society is established.

[56] B Ward, 'Fair Play: Professional Sport and Restraint of Trade' (1985) 59 *Law Institute Journal* 545, 546.See also dicta per Slade J in *Greig v Insole* [1978] 3 All ER 449, 496.

[57] See *Blackler v New Zealand Rugby Football League (Inc)* [1968] NZLR 547, 556 (per North P).

[58] This is usually the justification offered when restrictions limit the ability of players to move and in respect of rules which require transfer fees, drafts, and salary caps. For example see: *Buckley v Tutty* (1971) 125 CLR 353, 377; *Foschini v Victoria Football League* (Unreported, Supreme Court of Victoria, 9868/82, Crockett J, 15 April 1983); *Adamson v NSW Rugby League Ltd* (1991) 103 ALR 319.

[59] *Beetson v Humphries* (Unreported, Supreme Court of NSW, No 10950, Hunt J, 30 May 1980); *Adamson v NSW Rugby League Ltd* (1991) 103 ALR 319.

[60] *Greig v Insole* [1978] 3 All ER 449; *Hoszowski v Brown* (Unreported, Supreme Court of NSW, No 1667/78, Helsham CJ, 6 October 1968); *Eastham v Newcastle United Football Club*

aim to encourage new entrants,[61] maintain the strength of the game,[62] and ensure a workable and deterrent system to improve the quality of players from which the national team can be selected.[63]

Assuming a legitimate interest has been identified, the restraint imposed by the governing body must be reasonably related, in that it advances or protects that interest. It must not be inconsistent with it. This will depend entirely on the evidence adduced in each case. For example, in the recent Australian case *Avellino v All Australia Netball Association Ltd*[64] the Supreme Court of South Australia held that a residency rule for players was inconsistent with one of the legitimate objectives of the National Netball League to "produce an ongoing, strong, dynamic "national" competition". The rule did not advance Avellino's position. To the contrary it would "appear to restrict players worthy of selection... from being selected" in a national competition.[65]

The *second issue*, namely whether the restraint has gone beyond that which is considered reasonably necessary to protect the governing bodies legitimate interest, has received far more attention. Ultimately, this issue must be adjudged in light of the circumstances of the particular case. As Part C of this article will consider the reasonableness of specific types of restraints, it is desirable at this point to simply outline some general principles which the courts may apply.

An initial factor which may be relevant is the bargaining power of the parties. Specifically, the courts have indicated that a restraint of trade contained in a governing body's constitution or rules will be treated differently from a negotiated contractual restraint.[66] The distinguishing feature is that restraints in a sports body's rules are involuntarily imposed; there is no realistic opportunity for the claimant to negotiate. In contrast, there may be an opportunity to negotiate contractual restraints. Thus if a contractual agreement is reached through fair

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Ltd [1963] 3 All ER 139.

[61] *Adamson v NSW Rugby League Ltd* (1991) 100 ALR 479.

[62] *Kemp v New Zealand Rugby Football League Inc* [1989] 3 NZLR 463, 468-469.

[63] *Gasser v Stinson* (Unreported, High Court Chancery, No Ch-88-G-2191, Scott J, 15 June 1988); *Johnson v Athletics Canada* (1997) 41 OTC 95.

[64] [2004] SASC 56.

[65] Ibid [107].

[66] *Kemp v New Zealand Rugby Football League Inc* [1989] 3 NZLR 463. See also *Goutzioulos v Victorian Soccer Federation Inc* [2004] VSC 173.

bargaining, the courts justifiably are more likely to hold the restraint as reasonable between the parties.[67]

In determining whether the restraint goes beyond that which is reasonable it is necessary to analyse how wide or onerous the restriction is (for example, the duration of the restraint may be an important consideration). In doing this it is the restraint that must be looked at, not the way in which the restraint is applied or intended to apply.[68] Two questions may be of significant influence here: is there any evidence that the legitimate interests or objective of the governing body might be jeopardised if the restraint was not so drastic,[69] and could the legitimate interests be met through a less restrictive alternative means?[70]

Although Wilcox J in *Adamson v NSW Rugby League Ltd*[71] held that the primary question will always be the extent of a governing body's need for protection, it is inevitable that the court will also consider the effect (or potential effect) of the restraint upon the claimant. The harm caused to the affected party must not be out of proportion to the benefit secured by the sports governing body.[72] While the case law has unequivocally established that economic effects are relevant considerations, it is not yet clear whether non-economic considerations (such as the effects on one's personal life) will be relevant.[73] A

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[67] For support of this proposition see dicta per Gummow J in *Adamson v NSW Rugby League Ltd* (1991) 103 ALR 319, 363. His Honour also asserts that if the restraint is involuntarily imposed, that there should be a heavier burden on the governing body to prove that the obligation should be enforceable. See also: *Hawthorn Football Club v Harding* [1988] VR 39; *Bulldogs Rugby League Club Ltd v Williams* [2008] NSWSC 822, [46]-[47]; and A Humphreys, 'Sport, Restraint of Trade and the Australian Courts: *Adamson v New South Wales Rugby League Ltd*' (1993) 15 *Sydney Law Review* 92, 97.

[68] *Kemp v New Zealand Rugby Football League Inc* [1989] 3 NZLR 463. See also *Adamson v NSW Rugby League Ltd* (1991) 103 ALR 319, 360.

[69] *Buckley v Tutty* (1971) 125 CLR 353; *Adamson v NSW Rugby League Ltd* (1991) 103 ALR 319.

[70] *Adamson v NSW Rugby League Ltd* (1991) 103 ALR 319, 349-350.

[71] Ibid 341 (per Wilcox J) and 323 (per Sheppard J). Sheppard J agreed that the Court must have regard to the effects of the restriction on the sportsperson in question but considered that there may be cases in which the restraint is so "obviously unreasonable" (or drastic) that no examination of its effect is required in order to reach a conclusion.

[72] A Lewis & J Taylor, *Sport: Law and Practice* (2003), 175.

[73] Wilcox J in *Adamson v NSW Rugby League Ltd* (1991) 103 ALR 319, 341 held that "non-economic effects ought not to be disregarded. They may not be as easy to evaluate as economic effects but they may be just as significant, especially in the case of a restraint on a person's ability to choose an employer." In contrast Sheppard J (at 323) was

Humphreys convincingly argues that the whole argument of economic and non-economic effects, not only being a difficult distinction to maintain, seems to overlook the foundations of the restraint of trade doctrine.[74] The doctrine is essentially aimed at interferences with an individual's liberty of action. It is not based on any economic theory. Therefore it is completely justifiable, in this sense, for the doctrine to be concerned with wholly non-economic interests.

The courts, in deciding if a restraint of trade is unreasonable in the circumstances, have commonly favoured an approach of balancing the legitimate interests of the governing body on the one hand against the interests of the sportsperson on the other. Wilcox J succinctly stated that:

> [t]he very notion of reasonableness involves a *balancing of competing considerations*. The more onerous the restraint, the more difficult it is for the person seeking to enforce the restraint to satisfy a court that it was, in all of the circumstances, no more than was reasonably necessary for the protection of his or her interests.[75] [Emphasis added]

So if, for example, the restraint imposed was onerous, it would be difficult for the governing body to establish that the restraint was reasonable. The effect of the restraint on the claimant would have to be very minimal for the court to be able to conclude that the restraint was reasonable. However this approach was criticised by Gummow J in *Adamson*. His Honour asserted that while it was necessary to consider the position of the claimant the court is "not to undertake a balancing exercise with a comparative evaluation of the weight of the interests of organisers and players".[76] To do this, his Honour stated, would be to impermissibly lighten the burden of proof carried by the governing body.[77] Miles CJ in *Wickham v Canberra District Rugby League Football Club*

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undecided whether it was appropriate to take into account non-economic considerations.

[74] A Humphreys, 'Sport, Restraint of Trade and the Australian Courts: *Adamson v New South Wales Rugby League Ltd*' (1993) 15 *Sydney Law Review* 92, 97-98.

[75] *Adamson v NSW Rugby League Ltd* (1991) 103 ALR 319, 341. See also *Kemp v New Zealand Rugby Football League Inc* [1989] 3 NZLR 463, 469-470 where the Court approved of the balancing approach.

[76] *Adamson v NSW Rugby League Ltd* (1991) 103 ALR 319, 364.

[77] Ibid 365.

Ltd[78] seemed to favour this approach. While there is no recent authority in New Zealand as yet, it is in the interests of the claimant to argue that Gummow J's approach ought to be adopted.

(b) Is the restraint reasonable having regard to the interests of the public?

Secondly if the governing body can establish that the restraint is reasonable and justified in the interests of the parties, the claimant has one final opportunity to assert that the restraint is unreasonable in that it is inconsistent with or reasonably injurious to the public. This second limb of Lord Macnaghten's reasonableness test is not often considered by the courts as the governing body, in the majority of cases, is unable to make out the first limb.[79] Furthermore, A Buti correctly recognises that another reason why public interest factors have received less attention is because they are intimately connected with the determination of what is reasonable between the parties.[80]

Nevertheless the courts have on limited occasion cast their attention to various public interest or policy considerations when assessing restraints. The High Court of Australia in *Buckley v Tutty* observed that "it is contrary to the public welfare … that the public should unreasonably be deprived of the services of a man prepared to engage in employment".[81]Therefore it is not in the public's interest to be denied access to the pleasure of watching players of the highest skill play at representative level.[82] Even still, it will be very rare for a restraint that is reasonable between the parties to be invalidated specifically for the reason that it is injurious to the public.

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[78] [1998] SCACT 9, [49].

[79] For example see: *Blackler v New Zealand Rugby Football League (Inc)* [1968] NZLR 547, 572 (per McCarthy J); *Kemp v New Zealand Rugby Football League Inc* [1989] 3 NZLR 463; *Avellino v All Australia Netball Association Ltd* [2004] SASC 56, [115].

[80] A Buti, 'Salary Caps in Professional Team Sports: An Unreasonable Restraint of Trade' (1999) 14 *Journal of Contract Law* 130, 152.

[81] (1971) 125 CLR 353, 380.

[82] See: *Daley v New South Wales Rugby League Ltd* (1995) 78 IR 247; *Greig v Insole* [1978] 3 All ER 449, 503; *Hughes v Western Australian Cricket Association (Inc)* (1986) 69 ALR 660, 703, where Toohey J held that it is in the public's interest "in having every opportunity to see first class cricketers in action".

C. Application of the Restraint of Trade Doctrine: Denial of Access to a Sport or Competition

Now that the legal framework of the restraint of trade doctrine has been established, this article will turn to specific circumstances in which a claimant may be able to call upon the doctrine to hold a sports governing body to account. In doing this reference will be made to several contemporary situations in which a claim, if brought before the courts, *could* possibly succeed.

There are broadly three established categories of restraint of trade cases. Firstly, where a claimant is denied access to a sport or competition. Secondly, challenging a governing body's labour market controls (such as transfer rules within a league,[83] transfer rules outside of a league,[84] internal draft schemes,[85] zoning and residential rules,[86] and salary caps).[87] And thirdly, specific contractual terms contained in player agreements which act as a restraint.[88] Due to recent interest in the former category and extensive analysis of the latter categories,

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[83] For example see: *Eastham v Newcastle United Football Club Ltd* [1963] 3 All ER 139; *Buckley v Tutty* (1971) 125 CLR 353; *Foschini v Victorian Football League* (Unreported, Supreme Court of Victoria, BC8300014, 15 April 1983).

[84] For example see: *Blackler v New Zealand Rugby Football League (Inc)* [1968] NZLR 547; *Kemp v New Zealand Rugby Football League Inc* [1989] 3 NZLR 463.

[85] For example see: *Adamson v NSW Rugby League Ltd* (1991) 103 ALR 319; W Pengilley, 'Sporting Drafts and Restraint of Trade' (1994) 10 *Queensland University of Technology Law Journal* 89; W Pengilley, 'Restraint of Trade and Antitrust: A Pigskin Review Post Super League' (1997) 6 *Canterbury Law Review* 610.

[86] For example see: *Hall v Victorian Football League* [1982] VR 64; *Avellino v All Australia Netball Association Ltd* [2004] SASC 56; *Nobes v Australian Cricket Board* (Unreported, Supreme Court of Victoria, BC9102902, Marks J, 16 December 1991).

[87] See J Taylor & M Newton, 'Salary Caps - the Legal Analysis' (2003) 11 *Sport and the Law Journal* 158. For differing opinions as to whether salary caps are an unreasonable restraint of trade see A Buti, 'Salary Caps in Professional Team Sports: An Unreasonable Restraint of Trade' (1999) 14 *Journal of Contract Law* 130 (who argues that salary caps are unreasonable) and C Davies, 'The Use of Salary Caps in Professional Team Sports and the Restraint of Trade Doctrine' (2006) 22 *Journal of Contract Law* 246(who argues that salary caps are not unreasonable).

[88] See M McDonagh, 'Restrictive Provisions in Players Agreements' (1991) 4 *Australian Journal of Labour Law* 126. For example 'playing', 'media/marketing', or 'conduct' provisions may be an unreasonable restraint of trade. In *Beetson v Humphries* (Unreported, Supreme Court of NSW, No 10950, David Hunt J, 30 May 1980) an unreasonable restraint took the form of a prohibition on the content of journalistic articles published by rugby players. This was 'completely unnecessary for the protection of the Leagues interests'.

attention will solely be directed at the former. It is important to emphasise that these categories are by no means exhaustive. As the doctrine has progressively developed on public policy values, there is nothing to prevent a claimant applying the legal framework, as outlined above, to obligations which impose novel restraints on their trade.

A claimant can be disciplined and denied access to a sport or competition by virtue of a governing body's rules or more commonly the decision of a disciplinary committee or the governing body itself. Exclusion in the form of a ban or suspension constitutes a 'restraint'. Therefore, assuming the claimant is 'in trade', the issue for the courts is to determine the reasonableness of the restraint.

As mentioned briefly in the introduction, perhaps the most high profile current situation which *may* constitute an unreasonable restraint of trade is the stance adopted by various national cricket bodies (such as the England and Wales Cricket Board (ECB) and New Zealand Cricket (NZC)) who threatened to exclude those players that participated in the rebel Twenty20 ICL from playing all ICC sanctioned cricket matches under their authority. While this will be of little concern to many of the rebel league players who are in the twilight of their cricketing careers,[89] for others, especially New Zealand cricketers Hamish Marshall and Shane Bond,[90] this stance constitutes a severe restriction on their ability to earn a living from playing cricket full time. If this stance was maintained, firstly, Marshall and Bond would be unable to honour and benefit financially from United Kingdom county cricket contracts,[91] secondly, they would not be permitted to hold contracts to play for

[89] Namely New Zealand cricketers: Chris Cairns, Adam Parore, Nathan Astle, Chris Harris and Craig McMillan.

[90] Also Daryl Tuffey, Andre Adams and Lou Vincent may be adversely affected.

[91] Marshall signed a four year county cricket contract with Gloucestershire in 2007. Bond also signed for Hampshire for six weeks at the start of the season. Centrally contracted players require a 'no-objection certificate' from their national cricket board to compete overseas; non-contracted players do not need this. However the ECB (governing body of English Cricket which includes county cricket) under a clause in their rules, initially refused to register these players (and others, despite a no-objection certificate being obtained), preventing them from competing in the Country Cricket Competition, because of their involvement with the ICL. See: G Longley, 'Bond Defies ECB Ruling for County' (2008) *The Press Sport*, <http://www.stuff.co.nz/thepress/4472558a6429.html> at 10 April 2008.

their domestic State Championship teams in New Zealand, and thirdly, they would not be selected to play for the Blackcaps.[92]

This situation has significant parallels with Kerry Packer's 1977-1978 'unsanctioned' World Series Cricket (WSC) competition.[93] In similar fashion, the ICC declared that all WSC players would be banned from playing test cricket unless they rescinded their WSC contracts by a certain date. The ICC also recommended that national governing bodies take similar action in respect of their domestic game. This consequently prompted a resolution from the English Test and County Cricket Board (TCCB) that it would alter its rules to disqualify any player from county cricket that was subject to the ICC's test match ban. Three contracted WSC players Tony Greig, Michael Proctor, and John Snow sought to challenge the ICC and TCCB that these rules constituted an unreasonable restraint of trade.

Slade J, in the ensuing case *Greig v Insole*,[94] held that the rules were unreasonable, *ultra vires*, and therefore void. His Honour claimed that although the ICC and TCCB did have legitimate interests to protect,[95] neither the ICC or TCCB discharged the onus of showing that the retrospective ban on contracted WSC players was reasonable and justified. Slade J in analysing the extent of the ICC's need for protection arrived at the conclusion that while the WSC presented an immediate threat to the finances of Australian cricket, there was no serious threat to the other test playing nations.[96] Indeed the WSC competition could possibly even raise the profile and bring increased interest and financial benefit to the sport as a whole.[97] In the long term

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[92] The Blackcaps are New Zealand's national cricket team; R Boock, 'NZ Cricket Bans Six Rebels'(2007) *Sunday Star Times,* <http://www.stuff.co.nz/4340511a10133.html> at 30 December 2007.

[93] For a comprehensive overview of the WSC situation see: G Haigh, *Cricket War: The Inside Story of Packer's World Series Cricket* (1993).

[94] [1978] 3 All ER 449.

[95] Ibid 497. Namely, that it was in the public interest that cricket should be properly organised and administered.

[96] Ibid 501. It was argued that WSC was a grave threat to the economic viability of the game. WSC would diminish the income derived from test cricket and threaten the game as a whole by reducing the profits which would be passed either directly or indirectly to the lower levels of the game. The ICC therefore argued it was acting reasonably in aiming to prevent players from taking part in the WSC competition which could threaten the ICC's legitimate interest.

[97] Ibid.

however, the WSC could present a threat to test playing countries. But this, his Honour held, could have been adequately met by imposing a prospective disqualification on players who thereafter contracted with or played WSC.[98] While a prospective ban would *not necessarily be valid*, Slade J stated, it could be more easily justified than a retrospective ban which in this case was both a 'serious and unjust step to take.'[99] The Court therefore held that the benefits derived from the ban were highly speculative and did not outweigh the injustice of depriving WSC players of an important means of making their living. Furthermore the public would be deprived of a great deal of pleasure if they did not have the opportunity of watching the WSC players in official test matches.[100] Slade J then went onto hold that the TCCB's resolution to ban WSC players from county cricket was even more serious and therefore it was also an unreasonable restraint.[101]

Likewise, in the subsequent case ***Hughes v Western Australian Cricket Association (WACA) (Inc)***[102] the WACA sought to automatically ban cricketers from playing in Australia who had participated, or intended to participate in unauthorised cricket matches in South Africa without their written authority. Toohey J held that this rule went beyond a restraint reasonably related to the object of control and regulation of cricket in Western Australia for the following reasons: the disqualification was for an indefinite time, the rule imposed automatic disqualification, there was no right to appeal the ban, the rule precluded playing cricket overseas, and the rule applied retrospectively.[103] The totality of these considerations lead to Toohey J's finding which was reinforced by the fact that the restraint was contrary to the public's interest.

With the ICL situation being virtually analogous to the circumstances of *Greig* and also drawing on the authority in *Hughes*, it is submitted that

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[98] Ibid.
[99] Ibid 501 and 503.
[100] Ibid 503.
[101] Ibid 503-504. While test cricket presents a valuable opportunity for cricketers to supplement their income from time to time by playing in test matches, county cricket offers an opportunity to earn a living by playing full time cricket throughout the English summer. The denial of the opportunity to play in English county cricket is therefore a much more serious deprivation to players.
[102] (1986) 69 ALR 660.
[103] Ibid 703.

if national cricket bodies continue to maintain their stance in banning rebel league players from participating in ICC sanctioned events this is likely, if challenged before a court, to constitute an unreasonable restraint of trade. Even if a national cricket body imposed a prospective ban this should still be deemed unreasonable. Applying the commonly adopted balancing approach, the effect on the players of such an onerous obligation (it is difficult to think of a more onerous obligation) would outweigh any possible legitimate interest of the ban. On a 'fair and objective basis'[104] these players do not deserve such a sanction. It is no answer for the governing body to say that they 'might have expected it.'[105] Additionally the public would be denied access to watch some of the most talented players participate at the highest level in one-day and test matches. This would quite likely injure the sport.

Merely by NZC (or another national cricket body) overlooking a player for national selection (or as NZC officially stated 'that the selectors will be encouraged to consider other players' who have not played in the ICL) rather than impose an outright ban, does not avoid the issue.[106] What is important is the practical effect of the restraint on the players.[107] However as most of the New Zealand rebel league players have no desire or ambition to play for the Blackcaps again, perhaps of greater concern for them was the stance initially adopted by the ECB in denying them access from playing county cricket. Fortunately for Bond and Marshall they did not have to resort to challenging the legality of the ECB's initial position as the ECB eventually softened their stance and granted these players clearance.[108] This was a sensible move from the ECB.

Other situations associated with the ICL which may provoke cricketers to bring a restraint of trade claim in the future include: if a national cricket body refuses to release centrally contracted players[109] to

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[104] *Greig v Insole* [1978] 3 All ER 449, 503-504.
[105] Ibid.
[106] D Hopps, 'Bond's Choice of Indian League Opens a Legal Can of Worms'(2008) *The Guardian Sport* <http://sport.guardian.co.uk/cricket/story/0,,2233977,00.html> at 2 January 2008.
[107] See above, Part B (1)(b) of this article at n 49.
[108] The Press, 'English Officials Clear Bond, Marshall to Play' *The Press (Christchurch)* at 12 April 2008.
[109] A clause in national cricket contracts usually states that the national cricket body is to approve of any matches which the player plays in: The Press, 'Bond Spat has Parallels'

compete in the ICL when they are not required for their country[110] (or even the rival ICC sanctioned Twenty20 Indian Premier League (IPL) competition[111]); or if a national cricket body determines that it will not select a centrally contracted cricketer for the national team because of the fact that the cricketer has signed to play in the ICL at the conclusion of their contract.[112] While the first potential situation may not be *as likely* to constitute an unreasonable restraint of trade *if* the cricketer had the opportunity to negotiate their national contract and it was reached through fair bargaining, the latter situation, applying *Greig*, could well be considered unreasonable.

A claimant who is denied access to a sport or competition may also be able to successfully apply the doctrine in several other established factual scenarios. The courts have held a restraint to be unreasonable where: a sports governing body's rules were amended to impose a ban on sportspersons who played another sport,[113] a licence application was refused which was necessary to compete in a particular sport,[114] a governing body's rules excluded certain players from consideration for selection in all representative matches,[115] and where a winning sports

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The Press (Christchurch) at 19 January 2008.

[110] R Boock, 'Rebel, Rebel' *Sunday Star Times (NZ National)* at 2 March 2008. Note that Lou Vincent breached his NZC Contract when he signed and left to play for the ICL without even seeking the permission of NZC.

[111] See O Brett, 'England IPL Ban 'Will not Work" (2008) *BBC Sport,* <http://news.bbc.co.uk/sport2/hi/cricket/england/7338282.stm> at 9 April 2008. The ECB's present stance is to not allow centrally contracted English cricket players to play in the sanctioned IPL. If the ECB does not soften their stance it is possible that a claim could be brought. Although this is possible, it is very unlikely that the players will challenge the ECB, as they would be jeopardising their chances of being selected for England.

[112] The Press, 'Bond Spat has Parallels', *The Press (Christchurch)* at 19 January 2008. Shane Bond signed to play in the ICL in January 2008 at a time when he held a NZC contract. This contract was due to expire in May 2008. NZC did not wish to select him for the Blackcaps because of his future ICL involvement. In the end, Bond and NZC came to an arrangement that he would be released early from his contract and would not be selected for the Blackcaps.

[113] *Barnard v Australian Soccer Federation* (1988) 81 ALR 51. Here FIFA wished to not only control outdoor soccer but also indoor soccer. FIFA thereby amended its rules so that any person who played indoor soccer (for the rival governing body FIFUSA or an affiliate of FIFUSA) was banned from playing outdoor soccer.

[114] For example see:*Nagle v Feilden* [1966] 1 All ER 689; *Stininato v Auckland Boxing Association (Inc)* [1978] 1 NZLR 1. Note the possibility of raising an alternative action claiming that there is 'a right to work'.

[115] *Daley v New South Wales Rugby League Ltd* (1995) 78 IR 247.

club was denied promotion in a League on the basis that it did not meet the other admission criteria by a prescribed date.[116]

On the other hand, there have been certain situations where despite a participant being denied access to a sport or competition there has been a degree of reluctance from the courts in finding the restraint to be unreasonable. One situation is where a player is suspended for foul play.[117] The important distinction here is that the player is precluded by reason of his or her own past misconduct rather than by general regulation. The object of a suspension is to deter violence or other misbehaviour by players and to protect the reputation of the sport. The restriction on the claimant's freedom is merely incidental.[118] Therefore the courts have indicated that they will apply a similar standard as to the reasonableness of a suspension as is commonly found in a judicial review action. That is, that the suspension, at the least, must be unreasonable of a kind that no reasonable tribunal could have made such a decision.[119]

Another situation where the courts have shown reluctance is in relation to athletes that are suspended from a sport by virtue of committing a doping offence. In *Gasser v Stinson*[120] the English High Court held that although strict liability drug rules which imposed automatic blanket suspensions on athletes found to have prohibited substances in their body was a restraint of trade, this rule was proportionate and reasonable not only in the interests of the parties but also the public.[121] There is a need to eliminate and deter drug taking in sport. To permit an athlete to endeavour to establish their 'moral innocence' in such a

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[116] *Stevenage Borough Football Club v Football League Ltd* (1996) 9 Admin LR 109. Although Stevenage Borough finished top of the GM Vauxhall Conference they were denied promotion in the League on the grounds that it did not satisfy certain requirements relating to ground capacity and safety by December of the winning season. It would however, have been able to satisfy these requirements by the start of the new season. Carnwath J, stated (*obiterdicta)*, that this entry criterion was an unreasonable restraint of trade. A discretionary remedy was not granted though.

[117] *Skelton v Australian Rugby Union Ltd* [2002] QSC 193.

[118] Ibid [13].

[119] See above, n 53; See also *Jackson v Western Australia Basketball Federation Inc* (1990) 21 ADL 283, 288 applying *Shepherd v South Australian Amateur Football League Inc* (1987) 44 SASR 579, 586 (per Cox J).

[120] (Unreported, High Court Chancery, No Ch-88-G-2191, Scott J, 15 June 1988); see also *Wilander v Tobin* [1997] 1 Lloyd's Rep 195.

[121] A Lewis & J Taylor, *Sport: Law and Practice* (2003).

situation would be difficult to prove and lead to an opening of the floodgates.[122]

However in contrast, there is greater potential for a claimant to attack the length of a doping suspension for being unreasonable.[123] This is especially so in relation to a four-year or life ban from a sport, but even a two-year suspension may be an unreasonable restraint of trade in some circumstances.[124] This fear of challenge prompted the International Association of Athletics Federation (IAAF) in 1997 to halve the mandatory length of suspension to two years.[125] The new World Anti-Doping Code (WADC), effective as from 1 January 2009, may come under challenge in this respect as sanctions have been toughened to impose four-year bans for a greater number of offences.

As outlined in the introduction, a sports governing body's rule (such as BOA byelaw 25) which imposes a lifetime ban on sportspersons found guilty of a doping offence from competing in a particular competition (such as the Olympics), could well, and it is submitted should, constitute an unreasonable restraint of trade. The Olympics is the pinnacle event for any athlete. To be banned for life from competing in

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[122] *Gasser v Stinson* (Unreported, High Court Chancery, No Ch-88-G-2191, Scott J, 15 June 1988). For more detailed commentary see: A Greenhow, 'Anti-Doping Suspensions and Restraint of Trade in Sport' (2008) *Sports Law eJournal,* <http://epublications.bond.edu.au/slej/7>; A Mathieson, 'The World Anti-Doping Agency and the World Anti-Doping Code: Can the Right of an Athlete to Compete Freely and the Right of Sport to Regulate Competition be Reconciled?' (2006) 65 *The Commentator* 3; and T Buti & S Fridman, 'Drug Testing in Sport: Legal Challenges and Issues' (1998-1999) 20 *University of Queensland Law Journal* 153. Note that the new WADC (2009) provides greater flexibility to reduce sanctions from zero to two years for specified substances (lesser offences) where an athlete can establish there is no intention to enhance performance. This undermines the previous strict liability position: Yahoo, 'Athletics Stays Tough in the Face of Softer Sanctions'(2007) *Yahoo UK and Ireland Sport,* <http://uk.eurosport.yahoo.com/16112007/3/athletics-stays-tough-face-softer-sanctions.html> at 16 November 2007.

[123] See T Buti & S Fridman, 'Drug Testing in Sport: Legal Challenges and Issues' (1998-1999) 20 *University of Queensland Law Journal* 153.

[124] See *Robertson* v *Australian Professional Cycling Council Inc* (Unreported, Supreme Court of NSW, Waddell CJ, 10 September 1993). Also in May 1997 Katrin Krabbe was awarded damages by the German Athletics Federation after a German Court determined that a three year suspension was an unreasonable restraint of trade.

[125] Yahoo, 'Athletics Stays Tough in the Face of Softer Sanctions'(2007) *Yahoo UK and Ireland Sport,* <http://uk.eurosport.yahoo.com/16112007/3/athletics-stays-tough-face-softer-sanctions.html> at 16 November 2007.

such an event for an offence already served seems excessive and unjust. It places on the claimant a greater degree of restraint than such reasonable protection requires. It is extremely difficult to view that the BOA's legitimate interests in this rule (presumably to deter drug taking and to protect the country's reputation) would outweigh the economic and non-economic effects on an affected sportsperson. Further, it is quite possible that the legitimate interests of the BOA could be met through a less restrictive route, such as by providing a rule that drug offenders must not compete in the Olympics for a 'four-year Olympic cycle.'[126] A convincing argument could also be submitted that a ban of this nature would deny the public access to the pleasure of ever watching the banned athlete compete at the Olympics.

Conclusion

It is no exaggeration that restraint of trade, as a mechanism for challenge, is an extremely "powerful weapon".[127] As illustrated, the doctrine is highly accessible, flexible, and can apply to a broad spectrum of circumstances which unreasonably limit a player's, club's, or other participant's ability to earn a living. In this professional age of sport in which governing bodies are increasingly exercising greater control over the actions of participants, it is important for interested parties to be aware of the limits to this and the legal principles that will be applied upon bringing a challenge. A 'red' or 'yellow' card shown by a governing body to limit the actions of a participant need not always be accepted, and if challenged before a court of law, may well be deemed unenforceable.

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[126] This is the approach of the New Zealand Olympic Committee (NZOC). For example see The Herald, 'Cycling: Drugs Ban Comes Back to Haunt Yates' (2008) *The Herald News*, <http://www.nzherald.co.nz/topic/story.cfm?c_id=500833&objectid=10504615> at 17 April 2007.

[127] P Morris & G Little, "Challenging Sports Bodies" Determinations' (1998) 17 *Civil Justice Quarterly* 128, 140.

INTERNET DEFAMATION: COMPARATIVE APPROACHES TO JURISDICTION & SOME BEST PRACTICE GUIDELINES FOR NAVIGATING THE WORLD WIDE WEB

REBECCA ROSE*

Introduction

> New winds are blowing on old doctrines, the critical spirit infiltrates traditional formulas.[1]

Since becoming available for commercial and public use in the 1990s, the internet[2] has become an indispensible technology for numerous businesses.[3] Today, many firms exploit the internet's information collection, maintenance and dissemination properties to gain strategic advantage over their competitors. Indeed, firms' advertising of their products on websites and judicious targeting of particular customer groups (e.g. via email or pop-ups) have become commonplace means of increasing revenue.[4] Rapid growth in firms' reliance on online retailing as an everyday sales channel is also observable[5] and is largely

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[1] F Frankfurter, "The Early Writings of O.W. Holmes" (1931) 44 Harv. L.Rev. 717, 717.

[2] Consistent with general business usage and academic writings regarding internet defamation, throughout this article, the term "internet" is used to denote all forms of interactive, electronic communication. That the internet is just one of several electronic networks available to users, albeit the most popular, is acknowledged: W Byassee, "Jurisdiction of Cyberspace: applying real world precedent to the virtual community" (1995) 30 Wake Forest L.Rev. 197.

[3] In this article, the terms "business" and "firm" are used interchangeably to refer to any organisation which sells goods/services to consumers, i.e. any differentiation based on an entity's legal structure is unnecessary. It is acknowledged that in numerous instances no significant distinction will be able to be drawn between commercial and non-commercial entities (e.g. individuals; Government agencies) when assessing the scope of an actor's potential liability in defamation for material published via the internet. Accordingly, whilst many of the conclusions reached in this article will conceivably apply to a considerably broader range of entities, for clarity purposes this article focuses on the internet defamation liability of "firms" in the sense described above.

[4] Nielson Online, *NetRatings Report on E-Commerce* (2007), available at: <http://www.nielsen-online.com/resources.jsp?section=pr_netv&nav=1> last viewed 22 December 2008.

[5] S Lee, S Park and S Yoon, "RFID based ubiquitous commerce and consumer trust"

attributable to continuous developments in the sophistication of e-commerce technologies.[6]

Currently, no supranational institution or single tribunal exists to regulate the internet. Consequently, because the internet "does not respect geographic boundaries" and makes instantaneous global communication possible at almost negligible marginal cost,[7] internet defamation suffered and effected both intentionally and accidentally by firms has become a contentious global issue.

Dow Jones v Gutnick[8] marks the first final-level appeal decision internationally which deals with the issue of whether traditional defamation law analysis is applicable to allegations of online defamation. Particularly in terms of its conclusions regarding jurisdiction (i.e. a Court's authority to adjudicate on a dispute[9]) and the point at which publication of material made available online occurs, the Australian High Court's *Gutnick* decision revolutionised media law and internet business practices.[10]

Gutnick continues to generate much debate in courts and among commentators internationally.[11] However, prior to *University of Newlands v Nationwide News Pty Ltd*,[12] the New Zealand business

(2007) 107 IMDS 605, 605 – 606.

[6] F Soliman and M Yossef, "Internet-based e-commerce and its impact on manufacturing and business operations" (2003) 103 IMDS 546.

[7] *Barrick Gold Corp v Lopehandia* (2005) 71 OR (3d) 416, para [1] (Ont CA). In this context, "marginal cost" is used to denote the additional cost incurred by a publisher in communicating material to a single extra reader online: R Pindyck and D Rubinfeld, *Microeconomics* (5th ed, 2001), 80.

[8] *Dow Jones & Co Inc v Gutnick* (2002) 210 CLR 575. Hereafter "*Gutnick*".

[9] B Garner (ed), *Black's Law Dictionary* (8th ed, 2004), 867; *Gutnick*, ibid, para [10].

[10] The *Gutnick* decision also has important implications for a myriad of other equitable wrongs/possible torts (e.g. negligence; passing off; breach of confidence) which may result following a firm's publication of material on the internet. Such topics are, however, outside the scope of this article.

[11] See, for example, U Kohl, "Defamation on the Internet – Nice Decision, Shame About the Reasoning: *Dow Jones & Co Inc v Gutnick*" (2003) 52 ICLQ 1049; B Werley, "Aussie Rules: Universal Jurisdiction over Internet Defamation" [2004] Temple Int'l & Comp L.J 199.

[12] *University of Newlands v Nationwide News Pty Ltd* (2006) 18 PRNZ 70 (SC); *Nationwide News Pty Ltd v University of Newlands* (CA202/04, Glazebrook, Hammond and Panckhurst JJ, 9 December 2005); *University of Newlands v Nationwide News Pty Ltd* (2004) 17 PRNZ 206 (HC).

community had generally assumed that *Gutnick* would be expressly adopted (or at least endorsed) in New Zealand at the earliest opportunity. Subsequently, through reserving New Zealand's position on the issue, *Newlands* has maintained continued uncertainty for businesses vis-à-vis their potential online defamation liability. Accordingly, the purpose of this article is to help inform New Zealand firms' decision-making by analysing both the implications flowing from *Newlands* and the likely future direction of international internet defamation law. Therefore, Parts A and B of this article briefly outline the elements of the tort of defamation and the unique nature of the internet. Part C discusses various international approaches to the issues of publication and jurisdiction. Part D explains the *Newlands* litigation. Part E identifies some best practice recommendations for firms wishing to minimise their potential online defamation liability and/or vindicate their reputation following another person's publication of defamatory comments about them or their activities. Part F offers some concluding remarks and comment regarding the future direction of internet defamation law.

A. The Elements of Defamation: an Overview

> The tort of defamation is meant to remedy harms that cannot be quantified in terms of personal physical damage but that are more ethereal and social.[13]

Defamation laws differ across jurisdictions and can be complicated.[14] The essence of the tort, however, is relatively simple. Specifically, absent the defendant proving a defence to the action,[15] a "person"

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[13] W Prosser *et al.*, *Prosser and Keeton on Torts* (5th ed) (West Group Publishing, 1984), 771. Indeed, defamation law is predominantly focused on a person's standing in society; any personal affront caused is rarely dealt with, except notionally in the context of damages.

[14] Detailed discussion of what constitutes defamation and the availability of defences is outside the scope of this article. Useful writings on the subject, however, include: L McNamara, *Reputation and Defamation* (Oxford University Press, 2007); P Milmo and W Rogers (eds), *Gatley on Libel and Slander*(11th ed) (Sweet & Maxwell, 2008) ("*Gatley*"); D Rolph, *Reputation, Celebrity and Defamation Law* (Ashgate, 2008); M Collins, *The Law of Defamation and the Internet* (2nd ed) (Oxford, 2005).

[15] For example, "truth", "honest opinion", "innocent dissemination", "absolute privilege", or "qualified privilege". See Defamation Act 1992, ss 8 – 23. For comparative discussion of defamation defences and their application, see generally, A Kenyon, *Defamation: Comparative Law and Practice* (UCL Press, 2006).

(including both companies and individuals)[16] has an action in defamation where there is a "published" "statement" about them that is "defamatory".

In New Zealand, defamation is governed by the Defamation Act 1992 and the common law. Pursuant to s 6 of the Defamation Act 1992, a body corporate plaintiff cannot succeed in defamation unless it also proves actual or likely pecuniary loss as a result of the published statement at issue.[17]

Consensus on a satisfactory definition of "defamatory" is yet to be reached.[18] However, *Sim v Stretch* establishes that the "principal test"[19] is whether the relevant statement tends to "lower the plaintiff in the estimation of right-thinking members of society generally".[20] As Burrows explains, context is critical in any assessment; what is and is not defamatory can change with time and place.[21] Courts have adopted a very broad approach to communications constituting a "statement".

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[16] Companies Act 1993, s 15; *R v Murray Wright Ltd* [1970] NZLR 476, 484 (CA) and *Salomon v Salomon* [1897] AC 22 establish that a company is a legal person and may accordingly sue and be sued in its own name.For authority establishing this proposition in the defamation context, see *South Hetton Coal Co v North-Eastern Assn* [1894] 1 QB 133 (CA); *Atlantic Union Oil Co Ltd v Bodle* [1933] GLR 441.

[17] This is because bodies corporate (including trading and non-trading companies, incorporated societies and educational institutions) do not have feelings able to be injured: *Lewis v Daily Telegraph Ltd* [1964] AC 234, 262; *Mt Cook Group Ltd v Johnson Motors Ltd* [1990] 2 NZLR 488, 497 (HC).

[18] Other than to provide that it includes both libel (written) and slander (spoken) statements: Defamation Act 1992, s 2, no statute defines "defamation". Reference to case law is accordingly necessary. Note, however, comment of Neill LJ in *Berkoff v Burchill* [1996] 4 All ER 1008, 1011 (CA): "I am not aware of any entirely satisfactory definition of the word 'defamatory'".

[19] *Sim v Stretch* [1936] 2 All ER 1237, 1240 (HL) per Lord Atkin. As alternatives to the "principal test", a communication will also be found "defamatory" if it: (1) "tends to make the plaintiff be shunned and avoided": *Youssoupoff v Metro-Goldwyn Mayer* (1934) 50 TLR 581 (CA), 584 and 587 per Scrutton and Slesser LJJ respectively; or (2) exposes or subjects a person to hatred, contempt or ridicule: *Parmiter v Coupland* (1840) 151 ER 340, 342 per Parke B.

[20] For international acceptance of this test and its alternatives, see: J Burrows and U Cheer, *Media Law in New Zealand* (5th ed) (OUP, 2005), 11-12; D Butler and S Rodrick, *Australian Media Law* (2nd ed) (LBC, 2004), 34 – 35; and *Gatley*, above n 14, para [1.5].

[21] J Burrows, "Defamation" in S Todd (ed) *The Law of Torts in New Zealand* (3rd ed) (Brookers, 2001), 809 – 819.

All words, gestures, pictures, visual images, and other methods of conveying meaning consequently have potential to be defamatory.[22]

Proof that a defamatory statement was "published" to some person other than the plaintiff is sufficient to secure success in an action for defamation.[23] Publication occurs by every person who "intentionally or negligently plays any role in the publication process", i.e. directly or indirectly authorises or communicates a statement.[24] Importantly, unlike the United States, New Zealand has no "single publication rule"[25] whereby a series of defamatory publications (eg material appearing in a broad-circulation newspaper) is taken to constitutea single tort. Rather, each publication is a separate tort giving rise to separate liability against a defendant.[26] It is well-settled that publication of defamatory statements can occur via the internet.[27] In this context, examples of actionable publication formats include webpages, email, bulletin boards or Usenet groups,[28] hyperlinking[29] and internet relay

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[22] *Sim*, above n 19; *Youssoupoff*, above n 19.

[23] *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524, 527, 529 – 530.

[24] M Gillooly, *The Law of Defamation in Australia and New Zealand* (Federation Press, 1998), 75; *Gatley*, above n 14, para [6.3]. For additional description of this general rule, see *Webb v Bloch* (1928) 41 CLR 331, 363 – 366.

[25] *Webb*, ibid; *Loutchansky v Times Newspaper Ltd (Nos 2 – 5)* [2002] QB 783, para [57]. In the United States, the Restatement (Second) of Torts, § 577A(4) (1977) deals with the single publication rule, providing:

> As to any single publication:
> (a) only one action for damages can be maintained;
> (b) all damages suffered in all jurisdictions can be recovered in the one action; and a judgment for or against the plaintiff upon the merits of any action for damages bars any other action for damages between the same parties in all jurisdictions.

For discussion of the single publication rule, see generally D Cohen, "The Single Publication Rule: One Action, Not One Law" (1996) 62 Brooklyn L.Rev. 921 and M Collins, above n 14, para [13.22].

[26] *Duke of Brunswick v Harmer* (1849) 14 QB 185. *Duke of Brunswick* involved a newspaper publication. However, prior to *Gutnick's* holding that the "multiple publication" rule applied to the internet, the rule had been extended to new media forms, e.g. books, television, movies and radio, as these emerged: *Berezovsky v Michaels* [2000] 1 WLR 1004 (HL); *Harris v Perkins* [2001] NSWSC 258.

[27] *O'Brien v Brown* [2001] DCR 1065 marks the first New Zealand case considering application of traditional defamation laws to the internet. In this article, the terms "online" and "internet" defamation are used interchangeably.

[28] *Godfrey v Demon Internet Ltd* [2001] QB 201.

[29] *Hird v Wood* (1894) 38 SJ 234 (CA) – establishing that the act of drawing attention to another person's defamatory statement can render the attention-drawer liable in defamation.

chat.[30] Contrary to the jury-determined[31] issue of whether a communication bears defamatory meaning, publication is a question of law for the Judge.[32]

B. The Unique Nature of the Internet

> The Internet represents a communications revolution. It makes instantaneous global communication available cheaply to anyone with a computer and an Internet connection. It enables individuals, institutions and companies to communicate with a potentially vast global audience. It is a medium which does not respect geographic boundaries. Concomitant with the utopian possibility of creating virtual communities, enabling aspects of identity to be explored and heralding a new and global age of free speech and democracy, the Internet is also potentially a medium of virtually limitless international defamation.[33]

This Section does not review all the technological aspects of computers and the architecture of the internet, as others have done elsewhere at length.[34] Rather, continuing Section A's discussion intended to provide context for analysis contained in later Sections, this Section's purpose is restricted to briefly describing key aspects of the internet's operation necessary for understanding how defamatory material may be published by or about firms. Important similarities and differences that the technology shares with more traditional means of communication are highlighted. Comment is also offered on why and how utilisation of the internet has become critical for contemporary New Zealand firms.

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[30] D Harvey, *internet.law.nz: selected issues* (2nd ed) (LexisNexis, 2005), 463 – 465.

[31] Section 19A(5) of the Judicature Act 1908 allows for election of a jury trial by either party where damages exceeding $3000 are the only remedy claimed. A jury trial will be denied where the opposing party satisfies a Court that the case predominantly involves either difficult technical matters (e.g. examination of accounts) or difficult points of law: *News Media (Auckland) Ltd v Young* [1989] 2 NZLR 173 (CA).

[32] *TVNZ Ltd v Prebble* [1993] 3 NZLR 513 (CA). Likewise, the prior question of whether the particular communication is capable of bearing a defamatory meaning is a question of law for the Judge.

[33] *Barrick*, above n 7, para [1].

[34] See generally, for example, C McTaggart, "A Layered Approach to Internet Legal Analysis" (2003) 48 McGill L.J. 571. For international judicial discussion, see *Godfrey*, above, n 28, 204 – 205; *Zippo Manufacturing Co v Zippo Dot Com Inc* 952 F.Supp 1119, 1123 – 1124 (WD Pa, 1997); and *Braintech Inc v Kostiuk* (1999) 171 DLR (4th) 46 (BCCA).

Developed as the result of an experimental US military project in 1969,[35] the internet is essentially a decentralised, self-maintained "network of networks",[36] which facilitates instantaneous, long-distance communication.[37] The infrastructure operates through a series of non-proprietary standards (known as data transfer protocols) for the identification of sites and transmission of data.[38] Once connected to the online network, the internet allows computers (or any other device offering digital communication, e.g. modern cellphones) to communicate and share information internationally with any other computer or digital communication device. In this sense, the internet represents an important development for free speech.[39] On the world-wide-web, hyperlinks[40] enable users to move between webpages and documents.

Email and the world-wide-web are the internet's most popular applications.[41] Email is a "store and forward system" that allows messages to be transmitted to particular individuals' electronic mail boxes.[42] Because, like ordinary letter mail, emails must be sent to a predetermined address, intentional publication of email communications to the world at large rarely occurs.[43] Nevertheless,

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[35] Then known as "ARPANET": *American Civil Liberties Union vReno* 929 F. Supp 824, paras [5], [33] – [37].

[36] *Reno*, ibid, 830.

[37] M Collins, above n 14,3; *Reno*, ibid, paras [1] – [123].

[38] G Takach, "Internet Law: Dynamics, Themes and Skill Sets" (1999) 32 CBLJ 1, 6.

[39] E Barendt, "Jurisdiction in Internet Libel Cases" (2006) 110 Penn. State L. Rev. 727, 736.

[40] Including "shallow links" whereby users are transported to the homepage of another website; "deep links" through which users are transported to a page other than the homepage of another website; and "framing" which, upon following a hyperlink, results in content of another website being displayed within a frame on the original website. Hyperlinks frequently blur the boundaries between where one publication ends and another begins. Additionally, hyperlinks cross-referencing other published material have potential to turn an otherwise innocuous website/email into a defamatory publication: M Collins, above n 14, paras [2.41] – [2.45], [3.11] – [3.12] and [5.25] – [5.28]. For recent Canadian authority to this effect, see *Crookes v Wikimedia Foundation Inc* [2008] BCSC 1424, paras [4] – [7] and [19] – [34].

[41] O Bigos, "Jurisdiction over Cross-Border Wrongs on the Internet" (2005) 54 ICLQ 585, 588. For this reason, this article focuses on defamation suffered/effected in these formats.

[42] G Takach, above n 38, 6 – 7.

[43] *Reno*, above n 35, 834; D Harvey, above n 30, para [6.5.1]; and A Spencer, "Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts" [2006] U.Illinois L.Rev. 71, 96.

recipient individuals may increase an email's audience by forwarding the communication to others.[44]

By contrast, subject only to ISP-imposed content restrictions,[45] webpages/websites[46] hosted on the world-wide-web potentially allow communication of any uploaded[47] material to a vast global audience. Critically in terms of comparisons with more traditional media formats, world-wide-web publications do not generally occur at a single point in time or at a single location. Additionally, publishers are able to exert far less control over the locations where copies of their publications are made available.[48] Consequently, whilst historically the lynchpin of private international law, States' territorial boundaries are frequently rendered an arbitrary concept.[49] Certainly, firms and publishers may fully or partially restrict their website's accessibility (i.e. internet users' ability to download[50] uploaded content) by, for example, requiring subscriptions or limiting access to particular company-associated personnel. However, beyond these relatively rudimentary techniques, affordable technologies allowing effective exclusion of potential viewers on grounds such as geographic location remain unavailable.[51]

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[44] Similarly, as the Court explained in *Reno*, above n 35, 834, unless encrypted, there is potential for an email's viewing audience to extend beyond original addressees where the email is accessed on an intermediate computer between its recipient and sender.

[45] ISPs (Internet Service Providers) effectively "establish the connection between people and content on the internet". ISPs "provide access to the World Wide Web, and allow users to store and publish content". Additionally, ISPs also provide hosting and searching services: J Bayer, *Liability of ISPs for Third Party Content* (InternetNZ, 2007), 1 – 3; *Gutnick*, above n 8, para [84]. Examples of content frequently blocked by ISPs includes child pornography and other sexually inappropriate material.

[46] "Websites are comprised of a collection of webpages. Websites are usually maintained on a "webserver". Webservers are generally controlled by the relevant website publisher or a party contracted to do so by the publisher": *Gutnick*, above n 8, para [15].

[47] "Uploading" involves placing the relevant document/webpages in a storage area managed by a webserver: *Gutnick*, above n 8, para [16].

[48] D Bainbridge, "Defamation and the Internet – Some Issues" (2003) 8 IP & IT Law 3, 3.

[49] M Whincop and M Keyes, *Policy and Pragmatism in the Conflict of Laws* (Ashgate, 2001), 192.

[50] "Downloading" denotes a process by which the relevant webserver delivers a document to a requesting internet user who has nominated a "uniform resource locator" ("URL") to identify the requested document's location. Each webpage has its own URL. Webpage URLs will usually begin with the prefix "http://www": *Gutnick*, above n 8, para [16]; M Collins, above n14, para [2.46].

[51] *Gutnick*, above n 8, paras [84] – [87]; *Yahoo! Inc v La Ligue Contre le Racisme et L'Antisemitisme* ("*LICRA*"): 169 F. Supp 2d 1181 (ND Cal, 2001), reversed 379 F. 3d

Similarly, unlike magazines, newspapers, and television or radio broadcasts where audiences are generally aware of a publication's origin, caching[52] and the absence of any country code requirement for URLs create difficulties for internet users attempting to distinguish between foreign and domestically-created speech.[53] Consequently, regardless of whether a firm's website is capable of transacting electronically (i.e. taking orders and handling payments), where a decision is made to have an online presence,[54] compliance with domestic defamation laws is rarely sufficient to secure limited exposure to legal risk.

By international standards, New Zealand has a comparatively high rate of internet usage. Indeed, 2008 statistics reveal a penetration rate of 80.5% (i.e. 3.36m users), which is second only to Canada at 84.3% and well above the "Top-20 world average" of 25.4%.[55] Congruent with this strong penetration rate, recent New Zealand business surveys highlight broad and growing adoption of e-business strategies. Indeed, between 2000 and 2008, New Zealand firms' internet usage grew by approximately 300%.[56] More specifically, a majority of New Zealand businesses today operate a website and some level of email usage by

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1120 (9th Circ, 2004), rehearing granted, No. 01-17424, 2005 US App. LEXIS 2166 (9th Circ, Feb 10, 2004) (en banc).

[52] "Caching" is a process whereby, largely for cost and speed reasons, an automatic temporary copy of material passing through a domestically-located caching server is made and stored for later retrieval and sending to requesting receivers. Caching servers usually discard stored material once demand for the information weakens: *Reno*, above n 35 at 848-849; M Collins, above n 14, para [2.47]. Note also Electronic Commerce (EC Directive) Regulations 2002, reg 18.

[53] *Reno*, ibid, 848.

[54] For authority affirming that a company may be held vicariously liable for the actions of its employees/others acting on its behalf within their authority, see *Dollars & Sense Finance Ltd v Nathan* [2008] 2 NZLR 557 (SC); *Dairy Containers Ltd v NZI Bank Ltd* [1995] 2 NZLR 30 (CA).

[55] Miniwatts Marketing Group, *Internet World Stats*: "Internet Usage and Population Statistics for Oceania" (June 2008); "Top 20 Countries with the Highest Number of Internet Users" (June 2008), respectively available at: <http://www.internetworldstats.com/stats6.htm> and <http://www.internetworldstats.com/top20.htm> last viewed 12 December 2008.

[56] Miniwatts Marketing Group, ibid. Compare: Deloitte Touche Tohmatsu, *Deloitte E-Business Survey* (2001); University of Waikato Management School, *Net Readiness in New Zealand Industries: Empirical Results* (August 2001); New Zealand Institute for the Study of Competition and Regulation, *The State of E-New Zealand: 12 Months On* (November 2001).

firms is virtually ubiquitous.[57] Hence, in addition to their own potential to defame via the internet, firms must be alive to the possibility that they may unwillingly become embroiled in defamation litigation through publication of comments about them by other internet users, e.g. competitors or members of the public. Indeed, whilst frequently a lengthy, inconvenient and expensive process, in some cases litigation is the only means by which a firm can sufficiently restore its reputation, deter future occurrences of similar comments, and regain the level of supplier and consumer confidence necessary for long-term survival.[58]

C. Publication and Jurisdiction: Selected International Approaches

Broadly speaking, jurisdiction disputes are determined by one of two rules: the place where the harm or damage is suffered or the place where the wrong is committed. Traditional principles instruct that tort liability is determined by the narrower of these two approaches, specifically the law of the location where harm is suffered.[59]

Whilst firms have previously rarely been required to consider discrepancies in the stringency of different States' defamation laws (i.e. the premium afforded to free speech) in their everyday business decisions, recent judicial interpretations in international internet defamation cases have created an expanding divide between the two approaches. Central to this growing divide and a firm's ability to avoid liability or recover damages in its chosen Court, is the deemed geographic locale of defamatory publications. This Section therefore provides a comparative overview of similarities and differences in developments and current approaches to issues of publication and jurisdiction by courts in Australia, Canada, England and Wales, the United States and European Union.[60]

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[57] Miniwatts Marketing Group, ibid.
[58] As was the case in *Barrick*, above n 7.
[59] O Bigos, above n 43, 589 – 590; D Bainbridge, above n 50, 7.
[60] Detailed discussion of variants in the elements of States' defamation laws and particular interpretations of these is outside the scope of this article.

1. Australia

Although delivered some three years after the first English[61] and Canadian[62] decisions dealing directly with private law aspects of the internet, *Dow Jones & Co Inc v Gutnick*[63] arguably remains the most important common law decision regarding publication and jurisdiction.[64]

The *Gutnick* litigation stemmed from an exposé entitled "Unholy Gains" published by Dow Jones[65] in its *Barron's Online* magazine in October 2000. The article alleged tax and money laundering irregularities in the business dealings of Victorian resident, Mr Gutnick. Mr Gutnick had a prominent reputation in Australian religious, philanthropic and sporting circles. His business activities also extended to the United States. *Barron's Online* was primarily a subscription news website. The magazine had a large circulation in the United States, but only around 1700 Australian subscribers.[66] Material available on *Barron's* website[67] was uploaded from Dow Jones' editorial office in New York and stored on the company's webservers maintained in New Jersey.[68]

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[61] *Godfrey*, above n 28. Importantly, *Godfrey* primarily focused on ISP liability – a broad and contentious issue outside the scope of this article. For recent New Zealand discussion on the topic, however, see J Bayer, above n 45 and M Collins, above n 14.

[62] *Braintech*, above n 34, leave to appeal to Supreme Court refused: (1999) 182 DLR (4th) vi. Significantly, *Braintech* deals only with the relatively narrow issue of foreign judgment enforceability vis-à-vis posting of defamatory material on electronic bulletin boards.

[63] (2002) 210 CLR 575.

[64] E Barendt, above n 39, 728.

[65] Dow Jones is a New York-based media company that specialises in business and financial reporting.

[66] Oral evidence was that the magazine had a total subscription base of approximately 550,000 customers and that *Barron's Online* was not targeted at Australian readers: *Transcript of Proceedings* (28 May 2002), available at: <http://www.austlii.edu.au/au/other/hca/transcripts/2002/M3/2.html> last viewed 10 November 2008. Of the 1700 Australian subscribers, 300 were estimated to reside in Victoria.

[67] *Barron's Online* and the *Wall Street Journal* (also published by Dow Jones) are respectively available at: <http://online.barrons.com/public/main> and <http://online.wsj.com/public/us> last viewed 20 December 2008.

[68] *Gutnick*, above n 8, paras [1] – [3] and [17] per Gleeson CJ, McHugh, Gummow and Hayne JJ (hereafter "joint reasons") and [169] – [172] per Callinan J. The case's facts are discussed in additional detail by Hedigan J at first instance: *Gutnick v Dow Jones & Co Inc* [2001] VSC 305, paras [1] – [12], upheld on appeal: *Dow Jones & Co Inc v Gutnick* [2001] VSCA 249 per Buchanan JA and O'Bryan AJA.

The central issue in *Gutnick* was whether publication of *Barron's Online* occurred in the United States when its content was uploaded or in Australia when downloaded by subscribers.[69] Hence, in practical terms, the Court was required to decide whether businesses publishing online were obliged to comply with the defamation laws in *all* countries where they have customers or simply those of the location where their publication *originates*.

In four concurring opinions, the High Court dismissed Dow Jones' application to set aside or stay the proceeding.[70] Upholding Hedigan J's first instance decision, their Honours rejected Dow Jones' contention[71] that the internet required modification of traditional principles developed for the broadcasting media and press.[72] Drawing on international authority, their Honours reasoned that, as a matter of principle, the "substance" of where a tort occurs must remain determinative.[73] Consequently, in locations where a plaintiff has a reputation, "damage" to that reputation (i.e. the "essence" of the tort) occurs when defamatory material is "available in comprehensible form".[74] In cases involving the internet, material is not "comprehensible" until downloaded/"pulled" from a webserver.[75] Affirming continued application of the multiple publication rule, albeit in need of legislative reform at least in Australia,[76] the Court concluded

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[69] *Gutnick*, above n 8, paras [4], [18] – [24] and [44] per joint reasons and [108] – [110] and [139] – [152] per Kirby J.

[70] Adjudication on the case's particular merits was reserved for a later occasion.

[71] *Dow Jones*' arguments are summarised in the Court's joint reasons: paras [18] – [24].

[72] *Gutnick*, above n 8, paras [38] – [39] per joint reasons and [184] – [186] per Callinan J. Compare comments Kirby J, paras [84] and [125]. Indeed, whilst the Court's four judgments essentially reflect differing attitudes to the extent the internet challenges application of traditional defamation law principles, it is only Kirby J who departs from the Court's general view that the internet constitutes more than simply another new communications medium.

[73] Ibid, paras [43] per joint reasons and [139]. [143] and [149] per Kirby J. See similar statement of principle articulated in M Whincop and M Keyes, above n 51, 196.

[74] *Gutnick*, ibid, paras [26] and [44] per joint reasons, [56] per Gaudron J and [184] per Callinan J.

[75] Ibid, para [44] per joint reasons.

[76] Ibid, paras [29] – [37] per joint reasons, [56] – [58] per Gaudron J, [122] – [132] per Kirby J and [197] – [200] per Callinan J: any adoption of a single publication rule would be to "impose upon Australian residents … an American legal hegemony in relation to Internet publications".

that material accessible online was "published"[77] whenever downloaded by a reader.

On the issue of jurisdiction, the Court declined to impose a physical connection requirement between the place of publication and the alleged tortfeasor. Instead, the Court held that, ordinarily, the locale of each download is the place where the tort is committed.[78] Having found jurisdiction, any *lex loci* (i.e. choice of substantive laws a Court must apply) and *forum non-conveniens* (i.e. convenient forum) disputes remain separate and distinct issues.[79] In choice of law disputes, the place of publication is, however, a relevant and connecting factor.[80]

In reaching its conclusions, the Court acknowledged that a likely and possibly troubling outcome of its reasoning was that online publishers would become subject to extensive and uncertain defamation liability as a result of publishing in numerous States.[81] Nevertheless, ostensibly considering firms' ability to profit from their internet activities a weighty factor, to varying degrees, all members of the Court suggested that "global" exposure to defamation laws was simply a corollary of firms' decisions to have an online presence and enjoy the benefits of wider circulation of published content.[82] Notwithstanding this view,

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[77] The distinction between the act and fact of publication is emphasised in the Court's joint reasons at para [11].

[78] *Gutnick*, above n 8, paras [44] – [45] per joint reasons, [56] per Gaudron J, [93] – [104] per Kirby J and [198] per Callinan J.

[79] Ibid, paras [105] – [110] per Kirby J. Choice of law and *forum non conveniens* issues are each broad and complex topics in their own right. As such, detailed discussion of these issues is outside the scope of this article. For where differences in the stringency of Australian and other Commonwealth countries' *forum non conveniens* tests become important in a dispute, see generally: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538, 552 – 566 and compare *Spiliada Maritime Corp v Cansulex* [1987] AC 460. In New Zealand, *Spiliada* was adopted in *Club Mediterranee NZ v Wendell* [1989] 1 NZLR 216 (CA).

[80] *Gutnick*, ibid, paras [44] per joint reasons and [105] – [107] per Kirby J. In Australia, *Regie National des Usines Renault SA v Zhang* (2002) 187 ALR 1 establishes that where a publication is found to have occurred outside Australia, the law of the location where the publication occurred (i.e. the downloaded-to State) will apply. However, application of the foreign law must be expressly pleaded by the parties and must not offend Australian public policy if it is to govern the dispute.

[81] *Gutnick*, ibid, paras [49] – [54] per joint reasons and [152] per Kirby J.

[82] Ibid, paras [39] per joint reasons, [134] per Kirby J and [162] and [182] per Callinan J. Significantly, the Court did not consider differences in the resources/profit potential of large corporations and individuals or small business; the gist of para [39] arguably suggests firms' only option for avoiding liability is to refuse to go online.

rather pragmatically, their Honours also reasoned that any unsatisfactory exposure for firms was significantly lessened by the judgment enforceability difficulties plaintiffs frequently encounter outside their home States.[83] Certainly, that conclusion is regrettable from a comity standpoint.[84] Likewise, it is acknowledged that there is force in complaint consistent with Kirby J's comment that:[85]

> ... providing jurisdiction based upon the mere happening of damage within a jurisdiction conflicts with the ordinary principle of public international law obliging a substantial and bona fide connection between the subject matter of a dispute and the source of jurisdiction of a national court over its resolution.

However, from a business perspective, it is the fact that the *Gutnick* Court did not ground its conclusions in Dow Jones' *knowing acceptance* of Australian subscribers which is perhaps most important. Indeed, by basing its decision on the website's *accessibility* per se, the business risks flowing from the Court's judgment apply irrespective of whether a firm's website has open or carefully restricted access, and/or operates passively or has been deliberately targeted or "pushed" toward a particular audience.

2. Canada

Canada's Supreme Court is yet to rule substantively on the issues of publication and jurisdiction vis-à-vis the internet.[86] Nevertheless, an

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[83] Ibid, paras [20] and [53] – [54] per joint reasons and [88], [121] and [164] – [165] per Kirby J. Judgment enforceability difficulties are well-illustrated by the tumultuous *LICRA* above n 51, litigation. For discussion of *LICRA*'s facts, case history and issues, see, H Hestermeyer, "Personal Jurisdiction for Internet Torts: Towards and International Solution?" (2006) 26 Nw.J.Int'l L.&Bus. 267, 269 – 275 and B Earle and G Madek, "International Cyberspace: From Borderless to Balkanized???" (2003) 31 GA J.Int'l & Comp.L. 225, 228 - 251.

[84] "Comity" refers to the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws". Comity is "neither a matter of absolute obligation … nor mere courtesy": *Black's Law Dictionary*, above n 9, 284.

[85] *Gutnick*, above n 8, para [101], citing *Compania Naviera Vascongado v SS Cristina* [1938] AC 485, 496 – 497; *Tolofson v Jensen* [1994] 3 SCR 1022, 1047; *Zhang*, above n 80, paras [105] – [106] and *Zippo*, above n 34, 1122.

[86] That leave to appeal to the Canadian Supreme Court was refused in *Bangoura v Washington Post* [2006] SCR 113 and *Braintech*, above n 34, is acknowledged.

analysis of authorities reveals that the present Canadian position is broadly consistent with the approaches adopted in Australia[87] and England and Wales.[88]

In terms of particular similarities with Australia's approach, recent Canadian authority affirms that, in cases involving the internet, "publication" of defamatory material occurs at the location where the relevant material is accessed or downloaded, and that publication is an important determinant of where the tort at issue is committed.[89] Like Kirby J in *Gutnick*,[90] Canadian courts also acknowledge the importance of not conflating issues of appropriate forum and jurisdiction.[91] Viewing the United States' *Sullivan*[92] decision as a reflection of "deeply-ingrained" Constitutional principles and considering English defamation law no less civilised than American,[93] courts similarly agree that *Gutnick* rightly maintained continued application of the multiple publication rule.[94] However, Canadian courts will only find jurisdiction over a foreign defendant where there is a "real and substantial connection" to the forum.[95] Hence, courts' jurisdictional scope is much

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[87] See discussion in Section IV(A) above. Notably, both *Kitakufe v Oloya Ltd* (1998) 67 OTC 315 and *Braintech*, ibid, were cited in *Gutnick*, above n 8.

[88] See Sections IV(A) and IV(C).

[89] See, for example, *Crookes v Yahoo!* (2008) 77 BCLR (4th) 201 (BCCA); *Timberwest Forest Corp v United Steel Workers* [2008] BCSC 388, paras [27] – [30]; *Burke v NYP Holdings Inc* [2005] BCSC 1287, para [22]; and *Imagis Technologies Inc v Red Herring* [2003] BCSC 366, para [22].

[90] *Gutnick*, above n 8, para [105] per Kirby J.

[91] *Burke*, above n 89, para [24]; *Wiebe v Bouchard* (2005) 46 BCLR (4th) 278, paras [17] – [22] (BCSC).

[92] *New York Times v Sullivan* 376 US 254 (1964).

[93] *Hill v Church of Scientology* [1995] 2 SCR 1130, 1187 – 1188 per Cory J.

[94] *Burke*, above n 89, para [22], citing *Bangoura v Washington Post* (2004) 235 DLR (4th) 564, para [19] (Ont SCJ).

[95] *Burke*, ibid, para [24] and *Bangoura*, ibid, para [19]. *Morguard Investments Ltd v De Savoye* [1990] 3 SCR 1077 and *Muscutt v Courcelles* (2002) 60 OR (3d) 20, paras [75] – [79] (CA) establish and refine the eight factors relevant to this factual assessment. As briefly stated in *Bangoura*, para [21], the eight factors relevant to determining "jurisdiction simpliciter" are: "(1) The connection between the forum and plaintiff's claim; (2) the connection between the forum and the defendant; (3) Any unfairness to the defendant in assuming jurisdiction; (4) Any unfairness to the plaintiff in not assuming jurisdiction; (5) The involvement of other parties in the suit; (6) The Court's willingness to recognise and enforce a judgment rendered on the same jurisdictional basis; (7) Whether the case is interprovincial in nature; (8) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere".

narrower than that conferred on their counterparts in Australia by *Gutnick*.

Bangoura v Washington Post and *Burke v NYP Holdings Inc*[96] provide the leading statements of authority on internet defamation generally and, in particular, on what constitutes a "real and substantial connection". In *Bangoura*, the defendant newspaper published two articles on its website which the plaintiff alleged were defamatory in their questioning of his conduct as a United Nations representative to Kenya. At the time the articles were published, the plaintiff was not a Canadian resident and the Washington Post had only seven Canadian subscribers. When the plaintiff moved to Ontario some three years later, the articles were no longer freely available but could still be accessed through a paid archive. The evidence, however, was that only the plaintiff's lawyer had accessed the articles prior to trial.[97] At first instance, the Court noted that the plaintiff would have a juridical advantage in Ontario and that the "real objective" of most defamation suits is "character vindication, not money".[98] Reasoning that the Washington Post (being "a major newspaper in the world's most powerful country … made figuratively smaller by, inter alia, the Internet") should have "reasonably foreseen that the story would follow the plaintiff wherever he resided",[99] Pitt J held it appropriate for the Ontario Court to assume jurisdiction.[100] The Court of Appeal, however, had no difficulty concluding the connection between Ontario and the plaintiff's claim was "minimal at best" and that, because Mr Bangoura had therefore not suffered any damage in Ontario, the appeal should be dismissed.[101] Perhaps significantly from a future directions perspective, the Court also recorded that it found the Intervener Media Coalition's submissions regarding four alternative approaches to jurisdiction[102] particularly interesting.[103]

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[96] *Bangoura*, above n 94, reversed on appeal: (2005) 258 DLR (4th) 341 (Ont CA) and *Burke*, above n 89.
[97] *Bangoura*, ibid, paras [1] – [15].
[98] Ibid, para [21].
[99] Ibid, para [19.2].
[100] Ibid, para [28].
[101] Ibid, paras [22] – [23].
[102] Namely: (1) Targeting Approach; (2) Active/Passive Approach; (3) Country of Origin Approach; and (4) Foreseeability and Totality of Circumstances Approach. For further explanation of these approaches, see *Bangoura*, ibid, para [48].
[103] Ibid, paras [48] – [49].

Arguably also turning on the issue of foreseeability,[104] ***Burke*** similarly deals with a newspaper's online accessibility. In ***Burke***, the NYP published an allegedly defamatory article about the plaintiff's involvement in a Vancouver hockey game incident. The defendant gave evidence that it had "no method" of determining the geographic origin of its website hits or the geographic location of any individual directing their browser to access its website.[105] Citing ***Gutnick*** and quoting extensively from ***Bangoura***,[106] the Court ruled a "real and sufficient connection" established based on NYP's article being "accessible" and "of interest" to British Columbia residents.[107]

From a damages or relief standpoint, the Ontario Court of Appeal's decision in ***Barrick Gold Corp v Lopehandia***[108] is also important. In ***Barrick***, the plaintiff firm was a large gold producer. The defendant was a businessman with involvement in mining who had become dissatisfied with Barrick's operations.[109] The defendant embarked on a "malicious", "high-handed", "unremitting" and "tenacious" internet campaign against Barrick, posting a "blizzard of messages" on bulletin boards and various websites relevant to those involved in the gold-mining industry.[110]

At first instance, the Court awarded Barrick $15,000 in general damages and dismissed its application for a permanent injunction restraining the plaintiff from publishing any further defamatory comments about Barrick on the internet.[111] On appeal, the Court recorded that it was always important to "balance freedom of expression" and "not inhibit the free exchange of information and ideas on the internet by damages awards that were too stifling".[112] Nevertheless, the Court held a $50,000 punitive damages award was necessary in order to signal that

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[104] ***Burke***, above n 89, para [29].
[105] Ibid, para [4].
[106] ***Burke***, above n 89, paras [21], [22] and [34].
[107] Ibid, paras [29] – [31].
[108] (2005) 71 OR (3d) 416 (Ont CA) (per Doherty and Blair JJA for majority, Laskin JA dissenting in part regarding quantum, but not availability, of general damages).
[109] As such the case provides a pertinent example of a situation where a firm may need to pursue litigation in order to vindicate/prevent further harm to its reputation due to the actions of another person (e.g. a dissatisfied customer, competitor or other stakeholder).
[110] ***Barrick***, above n 7, paras [13] – [14] and [65].
[111] Ibid, paras [36] and [69].
[112] Ibid, paras [65].

courts "would not countenance" use of the internet for similar defamation campaigns.[113]

Regarding the request for injunctive relief, the Court observed that the "highly transmissible nature of the tortious misconduct" was a weighty factor in determining whether a permanent injunction should be granted.[114] However, finding such an order appropriate, the Court opined that, in addition to potentially being enforceable in the location where the plaintiff resided, an order would operate to prevent an ISP from continuing to post the defamatory messages.[115]

In terms of comparisons with Australia's approach, *Barrick's* comments regarding the unique nature of the internet are also significant.[116] In particular, *Barrick* identifies the "mode and extent" the internet makes publications available as a particularly relevant factor differentiating the medium from other communications formats.[117] Indeed, as the Court states:[118]

> Communication via the Internet is instantaneous, seamless, interactive, blunt, borderless and far-reaching. It is also impersonal, and the anonymous nature of such communications may itself create a greater risk that defamatory remarks are believed.

Additionally, the *Barrick* Court reasons that the internet is a medium "more pervasive than print" where "speed takes precedence over all other values" and hyperbole and venting are at least as common as careful, considered argument.[119] Emphasising that "traditional approaches attuned to 'the real world'" often fail to adequately address realities of the internet world, the Court ultimately concludes that the

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[113] Ibid, paras [65]. Notably, the Court of Appeal also increased the lower Court's general damages award to $75,000. Regarding the "standard factors" relevant in defamation damages claims, at para [30] the Court affirmed the factors summarised in *Church of Scientology*, above n 95, 1203.

[114] *Barrick*, above n 7, paras [76].

[115] Ibid, paras [77] and [83], citing *McMillan Bloedel Ltd v Simpson* [1996] 2 SCR 1048; *Morguard*, above n 95; and G Castel and J Walker, *Canadian Conflict of Laws* (5th ed) (looseleaf), 14 – 31.

[116] *Barrick*, above n 7, paras [29] – [5] and [45] – [46].

[117] Ibid, paras [32] and [34] – [35]. Note also similar suggestion by British Columbia Court of Appeal in *Braintech*, above n 34.

[118] *Barrick*, above n 7, para [32]. Note also *Vaquero Energy Ltd v Weir* [2004] ABQB 68.

[119] Ibid, para [33].

internet is properly distinguished from traditional communication forms.[120] In this respect, *Barrick* essentially disagrees with *Gutnick*.[121]

3. England & Wales

England and Wales' approach to internet defamation is similar to that applied in Canada.[122] Indeed, as recently stated in *Richardson v Schwarzenegger*,[123] it is "well-settled" that "an internet publication takes place in any jurisdiction where the relevant words are read or downloaded" and that no single publication rule applies to trans-national defamation.[124] Importantly, foreseeability has also emerged as the critical test for determining jurisdiction, with courts frequently affirming that "no warrant" exists for drawing a distinction between:[125]

> ... those who deliberately publish or put matters on the World-Wide-Web as part of their business and those who do so incidentally, and without intending to target any particular jurisdiction.

Consistent with both Australia and Canada's positions, English courts demonstrate a commitment to ensuring that jurisdiction and forum issues remain separate and distinct in principle. However, like Canada, English courts appear less convinced than their Australian counterparts that strict application of traditional legal principles to the internet is not problematic.[126] Arguably for this reason, England and Wales' law imposes a *de minimis* "minimum contacts" test for internet defamation disputes. Whilst this test is very similar to Canada's "real and substantive connection" test, the English test falls for consideration as a forum issue,[127] rather than being part of a Court's "jurisdiction

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[120] Ibid, para [35].
[121] *Gutnick*, above n 8, paras [12] – [17] and [38] – [44] per joint reasons.
[122] *Bangoura*, above n 96, para [19].
[123] *Richardson v Schwarzenegger* [2004] EWHC 2422, para [19].
[124] For authority rejecting application of the single publication rule in England, see *Loutchansky*, above n 25, paras [51] – [76]; *Harrods v Dow Jones* [2003] EWHC 1162, para [38]; *Lewis v King* [2005] EMLR 4, paras [28] – [32] (CA), citing *Gutnick*, above n 8, paras [39], [181] and [192] per joint reasons and Callinan J; and *Berezovsky v Michaels* [2000] 1 WLR 1004, 1012 per Lord Steyn and 1024 – 1026 per Lord Hoffmann and Lord Hope (dissenting) (HL).
[125] *Schwarzenegger*, above n 125, para [31]; *Lewis*, ibid, paras [33] – [34].
[126] See, for example, *Godfrey*, above n 28; *Berezovsky*, above n 124; *McManus v Beckham* [2002] 1 WLR 2982 (CA); and *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 (CA).
[127] Appropriate forum (i.e. *forum conveniens*) issues are generally outside the scope of this

simpliciter" determination.[128]

Perhaps as a consequence of the courts' acceptance of *Gutnick* and the Law Commission's view that *Gutnick's* "global risk" issues are not easily solved,[129] *Berezovsky v Michaels*[130] and *Lewis v King*[131] remain England and Wales' leading statements of authority. For their contribution to this article's attempt to place States on some sort of continuum in terms of litigation favourability for firms in internet defamation claims, several aspects of these decisions justify further discussion.

In *Berezovsky*, the Court (in a 3:2 majority decision) assumed jurisdiction over United States-based defendant, Forbes magazine, regarding an exposé it had published in England and elsewhere alleging that the two Russian-citizen plaintiffs were involved in organised crime in Russia. Interestingly, whilst Mr Berezovsky had a "truly international reputation" as the result of his business activities in Russia, both plaintiffs arguably had only rather "tenuous" connections with England. In dissent, Lord Hoffmann emphasised that a person's connections with a State and their reputation therein were not the same thing.[132] The majority accepted that the article had a much smaller number of website hits in England than the United States and that the plaintiffs were "forum shoppers in the most literal sense".[133] However,

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article. However, due to England and Wales' slight difference in approach, some limited discussion of the topic vis-à-vis the minimum contacts test has been considered useful in order to properly identify similarities and differences in international jurisdiction interpretations.

[128] See generally, *Schwarzenegger*, above n 123, para [23]; *Lewis*, above n 124, para [25] and compare, for example *Bangoura*, above n 96, paras [13] – [18].

[129] Law Commission (UK), *Defamation and the Internet: A Preliminary Investigation* (Scoping Study No 2, December 2002), para [4.5.2]: "Although we have some sympathy with the concerns expressed about the levels of "global risk", any solution would require an international treaty, accompanied by greater harmonisation of the substantive law of defamation. We do not think that the problem can be solved within the short or medium term. We do not therefore recommend reform in this area at the present time."

[130] [2000] 1 WLR 1004 (HL).

[131] [2005] EMLR 4 (CA).

[132] *Berezovsky*, above n 124, 1022 – 1024 per Lord Hoffmann. In the case of Mr Berezovsky, his Lordship stated that the plaintiff's reputation was "merely an inseparable segment of his reputation worldwide". Numerous commentators have agreed with this view, e.g. A Briggs, "Private International Law" (2000) 71 British Yearbook of International Law 435, 442.

[133] *Berezovsky*, ibid, 1006 – 1026. The evidence was that Forbes had approximately 785,000 subscribers in the United States and Canada, 1900 in England and 13 in Russia.

because both plaintiffs had "acquired" at least a business reputation in England,[134] their Lordships held they must be entitled to sue for damage to their English reputations.

Similarly, *Lewis* required the Court to determine whether corruption allegations contained in two articles proved to have been downloaded in England allowed English courts to assume jurisdiction over a defendant principally resident in New York. The Court noted that the plaintiff was a US citizen.[135] However, holding that he was a "world-renowned" boxing promoter and "well-known" in England, the Court found Mr King had a reputation in England that he was entitled to protect.[136]

The effect of *Berezovsky* and *Lewis* is that people and companies may well take their business and/or political[137] reputations with them wherever they go.[138] Individuals wishing to sue outside their home State will almost certainly need to demonstrate that they are known or well-known in the relevant foreign country.[139] However, where businesspeople, firms or international celebrities have just tenuous geographic connections with a State and plead only local damage to reputation, it is unlikely they will have their actions stayed.

From a "minimum contacts" and damage to reputation standpoint, the Courts' conclusions in *Brisard*,[140] *Jameel*,[141] and *Harrods*,[142] are also

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Together with website hits, it was estimated a total of 6,000 people had read the article in England.

[134] Compare *Bangoura*, above n 96 where, at the time of the relevant publication Mr Bangoura had no reputation in Ontario, his reputation there instead being acquired some three years later after relocation from Kenya.

[135] *Lewis*, above n 124, paras [3] – [10].

[136] Ibid, paras [40] – [45].

[137] On this point, Lord Hoffmann's reference to President Yeltsin is noted.

[138] See *Bangoura's* comments to this effect, above n 96.

[139] Compare comments of the Court in *Gutnick*, above n 8, para [54] per joint reasons, suggesting that a plaintiff's domicile will often determine the scope of a potential defendant's liability.

[140] *Al Amoudi v Brisard* [2007] 1 WLR 113 (HC).

[141] *Jameel (Yousef) v Dow Jones & Co Inc* [2005] QB 946 (CA) – not to be confused with the *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359 ("*Jameel v WSJ*") case that went to the House of Lords and, very recently, the European Court of Human Rights: *Wall Street Journal Europe Sprl v The United Kingdom* [2009] ECHR 471 (10 February 2009, App No 28577/05). *Jameel v WSJ* focused on the two issues of (a) whether corporations such as the WSJ could recover damages without pleading or proving special damages and (b) the

important. Whilst *Brisard* concerned an open-access website, both *Harrods* and *Jameel* involved website publications of defamatory material to only a "very small number of subscribers".[143] Although all courts accepted that English law contained a presumption of damage upon publication, both *Jameel* and *Brisard* concluded that the presumption was "not irrebuttable".[144] Accordingly, in the case of open-access websites, or bulletin boards or hyperlinks to a defamatory publication from a subscription site, English courts will not simply infer that publication has occurred. Rather, claimants must produce evidence that the relevant defamatory material was in fact downloaded by more than a *de minimis* number of readers.[145] As to the number of downloads required to cross this threshold, *Jameel* establishes that assertion of jurisdiction where material is published to just two neutral subscribers would be an abuse of process; *Harrods* suggests that 10 publications may be sufficient.[146]

Likewise, *Schwarzenegger*[147] and *Bunt v Tilley*[148] justify brief mention for their respective suggestions that English courts are unlikely to grant permanent injunctions in internet defamation cases and that website publishers may be able to escape liability for unchecked defamatory content that is removed quickly once brought to their attention.

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scope and application of what has come to be called "*Reynolds* privilege" – an important form of qualified privilege available in the United Kingdom but currently unavailable in New Zealand. In the Court of Appeal: [2005] QB 904, directions were given by Lord Phillips MR (para [6]) to hear the "presumption of damage point" and two applications in relation to presumption of falsity at the same time as the *Jameel (Yousef) v Dow Jones & Co Inc* case analysed in this article.

[142] *Harrods*, above n 124.

[143] *Brisard*, above n 140, para [1]; *Jameel*, above n 141, paras [10] and [61]; and *Harrods*, ibid, para [4].

[144] *Harrods*, ibid, para [39]; *Jameel*, ibid, paras [27], [32] and [37] – [41]; and *Brisard*, ibid, paras [32] – [37]. Notably, all courts cited *Shevill v Presse Alliance* SA [1996] AC 959 as authority for the existence of the presumption per se. Thus, to the extent any legislation differences are important in relation to this point, *Shevill* followed litigation by the parties in the European Court of Justice: [1995] 2 WLR 499, and was determined under the Brussels Convention regulating jurisdiction between EC countries.

[145] *Brisard*, ibid, paras [34] – [37].

[146] *Jameel*, above n 141, paras [17] and [70] and *Harrods*, above n 124, para [4]. In *Jameel*, the evidence was that five subscribers had downloaded the offending material. Three of these, however, were connected to the plaintiff's legal team.

[147] Above n 123, para [30].

[148] [2007] 1 WLR 1243, paras [21] – [23], [36] – [37] and [77] – [79] (HC).

4. United States

Perhaps as a consequence of "personal jurisdiction analysis [having] yet to be reconceived and rearticulated by the Supreme Court",[149] United States' defamation law currently evidences a rather confused approach to jurisdiction[150] in internet cases.

Generally speaking, early internet defamation cases apply an "effects"–based jurisdiction test[151] similar to that presently applied in other common law countries, i.e. a standard focused on the domicile of the plaintiff and the location of his or her harm.[152] More recently, however, with the exception of a few aberrant decisions,[153] Circuit courts have ostensibly been charmed by the view that the internet is a very different new communications medium that necessitates departure from traditional defamation law principles[154] in order to ensure State sovereignty is not eviscerated.[155] The heretical presumption that

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[149] *ALSScan Inc v Digital Serve Consultants Inc* 293 F. 3d 707, 713 (4th Circ, 2002). See also, *Gator Com Corp v LL Bean Inc* 341 F. 3d 1072, 1077 (9th Circ, 2003): "No Supreme Court cases ... have addressed the issue of when and whether general jurisdiction may be asserted over a company that does business on the internet".

[150] As P Borchers explains, United States' jurisdictional principles are "judicially created but limited by the Constitution's due process clauses" contained in the Fifth and Fourteenth Amendments: "Tort and Contract Jurisdiction via the Internet: The Minimum Contacts' Test and the Brussels Regulation Compared" (2003) NILR 401, 402. See also explanation offered in *Burger King Corp v Rudzewicz* 471 US 462 (1985), 471 – 472. Due Process compliance under the Constitution requires courts to be satisfied that defendants have "certain minimum contacts with [the forum state] such that maintenance of the suit does not offend traditional notions of fair play and substantial justice": *International Shoe Co v Washington* 326 US 310 (1945), 316.

[151] Specifically, that articulated by the Supreme Court in the non-internet case of *Calder v Jones* 465 US 783 (1984), 788 – 789, citing *World-Wide Volkswagen* 444 US 286 (1980), 297 – 298. As D Kidd explains, the *Calder* test requires courts to satisfy themselves that that: "the defendant performed (1) an intentional act, (2) aimed at the forum, (3) causing foreseeable harm in the forum": "Casting the Net: Another Confusing Analysis of Personal Jurisdiction and Internet Contacts in Telco Communications v An Apple a Day" (1998) 32 U. Rich. L. Rev. 505, 517.

[152] Compare, for example, *Gutnick*, above n 8; *Bangoura*, above n 96 and *Lewis*, above n 124.

[153] Such as *Inset Systems Inc v Instruction Set Inc* 937 F. Supp 161 (D. Conn, 1996) – broadly holding where websites are published on the internet, a finding of "purposeful availment" is permissible in all locations where the website is accessible. Since *Zippo*, above n 34, *Inset* has received little attention from United States Courts.

[154] As articulated in, for example, *International Shoe Co*, above n 150; *Calder*, above n 151; and *Asahi Metal Industries v Superior Court* 480 US 102 (1987).

[155] See, for example, *American Libraries Association v Pataki* 969 F. Supp 160 (SDNY, 1997),

website publications are aimless and targeted at no one has also been given surprising weight.[156] Consequently, consistent with the country's unparalleled free speech protections afforded to publishers under the country's Constitution as a matter of substantive law,[157] America's approach to jurisdiction in internet cases now differs markedly from most other countries. Importantly for firms concerned about their exposure to liability when trading abroad, America's general approach heavily favours potential defendants.[158] Additionally, United States' tests for jurisdiction tend to be formulated without particular reliance on the issue of publication.[159]

Regarding particulars of its contemporary approach, like Canada and England and Wales, America requires satisfaction of a foreseeability test, i.e. a sufficient connection between the proposed forum and *claim*. However, unlike its common law counterparts, America also requires proof of a sufficient connection between the proposed forum and *defendant* in the form of "purposeful availment".[160] Hence, America's

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169: "Typically states' jurisdictional limits are related to geography; geography, however, is a virtually meaningless construct on the Internet"; ***ALS Scan***, above n 149, 713 – 714. Compare comments Callinan J in ***Gutnick***, above n 8. In this sense, the United States' view is somewhat aligned with that in Canada, and to a lesser extent, England and Wales, but out of step with Australia.

156 ***Zippo***, above n 34,was the first Court to formulate a distinction between "interactive" and "passive" websites on this basis. ***Barrett v The Catacombs Press*** 44 F. Supp 2d 717 (ED Pa, 1999) aligns the posting of messages on discussion/bulletin boards with the maintenance of passive websites. See comments of A Spencer, above n 43, 74 and 97 also to this effect.

157 See ***New York Times v Sullivan***, above n 92, 279 – 280 and ***Curtis Publishing Co v Butts*** 288 US 130 (1967), 155.

158 By contrast, if looking to sue in the United States for defamation suffered, New Zealand firms should note the Supreme Court's statement in ***Piper Aircraft Co v Reyno*** 454 US 235 (1981), 255 – 256 that foreign plaintiffs are entitled to "less deference" in ***forum non conveniens*** assessments.

159 V Black and M Deturbide, "***Braintech Inc v Kostiuk***: Adjudicatory Jurisdiction for Internet Torts" (2000) 33 C.B.L.J. 427, 436. For an historical account of the United States' various tests, see S Tita and G Seamby, "The 'Effects Test': Unifying Personal Jurisdiction Case Law in Internet Defamation Cases" (2000) 33 L.T.J. 1.

160 See generally, ***International Shoe Co***, above n 152; ***Cybersell Inc v Cybersell Inc*** 130 F. 3d 414 (9th Circ, 1997) – websites simply advertising or soliciting sales held unable to support finding of jurisdiction without "something more"; ***Toys R Us Inc v Step Two SA*** 318 F 3d 446, 454 (3rd Circ, 2003); and ***Young v New Haven Advocate*** 315 F. 3d 256, 261(4th Circ, 2002), leave to appeal to Supreme Court denied: 538 US 1035 (2003): "In determining whether specific jurisdiction exists, we traditionally ask (1) whether the defendant purposefully availed itself of the privileges of conducting activities in the forum state, (2)

"minimum contacts"[161] approach is frequently summarised as being one of "effects plus targeting".[162]

Young v New Haven Advocate[163] is the dominant authority presently applied by courts required to decide jurisdiction in internet defamation cases. In *Young*, a Connecticut newspaper posted allegedly defamatory articles on its website regarding a prison warden resident in Virginia. In a manner consistent with *Zippo*'s "sliding-scale" model (whereby the constitutionality of a Court's assertion of personal jurisdiction "is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet"),[164] the Court carefully examined the nature and extent of the defendant's activities in Virginia. Specifically, the Court noted that the defendant had no offices, personnel or subscribers in Virginia; that it derived no "substantial" revenue from activities in Virginia; and did not "regularly" solicit or do business there.[165] The Court accepted that the offending articles had been downloaded in Virginia. However, ultimately declining to assert jurisdiction, the Fourth Circuit concluded that the defendant had not manifested "an intent to aim [its] websites or the posted articles at a

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whether the plaintiff's claim arises out of the defendant's forum-related activities, and (3) whether the exercise of personal jurisdiction over the defendant would be constitutionally reasonable."

[161] *World-Wide Volkswagen*, above n 151, 291 – 292; *International Shoe Co*, above n 150.

[162] M Greenberg, "A Return to Lilliput: The LICRA v Yahoo! case and the Regulation of Online Content in the World Market" (2003) 18 Berkeley Tech.L.J. 1191, 1193.

[163] Above n 160. Interestingly, *Young* was delivered just three days after *Gutnick*, above n 8.

[164] In *Zippo*, the Court distinguished between what it called "active", "passive" and "interactive" websites, stating (in a now widely-cited passage) at 1124: "At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in the foreign jurisdiction. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise of personal jurisdiction. The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site."

[165] *Young*, above n 160, 260.

Virginian audience", i.e. the defendant had not sufficiently *targeted* Virginia.[166]

Acknowledging that the meaning of "targeting" is yet to be categorically defined,[167] the effect of *Young* for New Zealand firms operating "commercially interactive" websites is that they are unlikely to be "hauled" to account for defamatory material accessible in America unless they have *both* targeted their website at the particular forum state *and* evidence an express intent to interact with its residents.[168] However, where firms' website content is accessible in States whose appeals are determined by the Third Circuit,[169] firms should be aware that the jurisdiction test is somewhat less difficult for potential plaintiffs to satisfy. Indeed, in contrast to *Young's* cumulative test, the Third Circuit has articulated its factors as *alternatives*:[170]

> [T]he mere operation of a commercially interactive website should not subject the operator to jurisdiction anywhere in the world. Rather, there must be evidence that the defendant "purposefully availed" itself of conducting activity in the forum state by directly targeting its website to the state, knowingly interacting with residents of the forum state via its website, or through sufficient other related contacts.

Consequently, firms may find themselves required to account in defamation if they *either* target the foreign forum *or* interact with

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[166] Ibid, 258 – 259, citing *ALS Scan*, above n 149. Importantly, in *ALS Scan*, the Court stated that it was "adopting and adapting the *Zippo* [sliding-scale] model": at 714.

[167] See, for example, *Catacombs Press*, above n 156, and *Northwest Healthcare Alliance Inc v Healthgrades.Com Inc* 538 US 999 (9th Circ, 2003) – considering assertion of jurisdiction appropriate and holding that by offering Washington residents healthcare information that was of interest to them via its website, the defendant had "purposely interjected itself" into the Washington market.

[168] *Young*, above n 160, currently appears to be applied by at least the Fifth and Sixth Circuits: *Revell v Lidov* 317 F.3d 467, 475 (5th Circ, 2002); *Neogen Corp v Neo Gen Screening Inc* 282 F.3d 883, 890 (6th Circ, 2002). States whose appeals are governed by these Courts are: 5th Circuit – Los Angeles, Massachusetts and Texas; 6th Circuit – Kentucky, Michigan, Ohio and Tennessee.

[169] Namely Deleware, New Jersey and Pennsylvania.

[170] *Toys R Us*, above n 160, 454. In declining to exercise jurisdiction on the ground that the defendant had not targeted New Jersey, the Court considered it particularly significant that the defendant's advertised product could only be shipped to Spanish addresses and that the cost of items was given only in Pestas and Euro. The Third Circuit's approach appears to be followed by at least the Seventh Circuit (covering Illinois, Indiana and Wisconsin): *Jennings v AC Hydraulic* 383 F.3d 546 (7th Circ, 2004).

residents.[171] Hence, particularly as technologies further develop, firms wishing to minimise their potential online defamation liability should carefully review the technical "interactivity" of any advertisement or information they wish to make available on the Internet as well as the extent to which they are "actually and deliberately us[ing] their website to conduct commercial transactions or other activities with residents of the forum". Where any doubts over content's defamatory nature exist and publication cannot be delayed, it may be that the most "passive" means of communication available should be preferred[172] and, if possible, directed only to a limited number of locations.[173]

5. European Union

By acting to harmonise its Member States' laws, the European Union has become an important powerbroker in many international issues.[174] As such, brief comment on EU developments vis-à-vis jurisdiction and choice of law in defamation cases is perhaps instructive for firms looking to assess both their current and likely future online trading risks.

In terms of jurisdiction, with the exception of Denmark, all Member States are today governed by the "Brussels I" Regulation.[175] Brussels I

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[171] *Fairbrother v Am Monument Found LLC* 340 F. Supp 2d 1147, 1156 (D Colo, 2004). Whilst Circuit Courts governing appeals in other States are yet to address the issue in detail, District Court decisions in these States suggest that firms providing merely "passive" information websites will not be found to have "purposefully availed" themselves of the "privileges of conducting activities in the forum state".

[172] See, however, best practice recommendations below: Section VI(A). Indeed, the most prudent level of "interactiveness" may well turn on whether the material is an isolated or regular communication.

[173] See comments of P Borchers, above n 150, 410 suggesting that, whilst generally imprecise, the "two ends of the [jurisdiction] spectrum" are "fairly clear": if statements are targeted primarily to persons within the forum, jurisdiction exists; if primarily targeted to persons outside the forum, minimum contacts are lacking. However, if a person's reputation is regional or national, it is unclear whether jurisdiction is properly asserted throughout the region or State or at only a single location.

[174] In addition to its 27 current Member States, the European Union includes three legislative bodies, namely the European Commission, the European Parliament and the Council of the European Union. It is these legislative bodies which are collectively responsible for the continued harmonisation of disparate Member State laws: <http://europa.eu/index_en.htm> last viewed 4 January 2009. As to harmonisation of laws obligations, see also Treaty on European Union, 29 July 1992, 1992 O.J. (C 191) 5.

[175] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the

updates the Brussels Convention 1968[176] and regulates all civil and commercial cross-border disputes.[177] Pursuant to Art 5(3), tort litigation such as defamation is decided by courts in the place where the "harmful event occurred or may occur". Whilst Brussels I does not apply to non-Member State defendants unless the parties have agreed otherwise in writing,[178] where an EU plaintiff sues a defendant resident outside the EU, Art 4 provides that the jurisdiction rules of the plaintiff's State apply. Applied to firms' internet publications, where EU plaintiffs[179] wish to sue in defamation outside the EU, they can invoke the benefit of their own national or place of domicile rules. However, consistent with America's privileging of its own plaintiffs,[180] where New Zealand-resident firms attempt to sue for defamation committed against them in the EU, the dispute will be governed by the general rules formulated for the European Community.[181]

Regarding choice of law procedures, in its recent Rome II negotiations[182] on the law applicable to non-contractual obligations,[183]

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recognition and enforcement of judgments in civil and commercial matters ("Brussels I"). Brussels I entered into force on 1 March 2002. A full text version of Brussels I is available at: <http://curia.europa.eu/common/recdoc/convention/en/c-textes/2001R0044.htm> last viewed 4 January 2009.

176 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. Denmark has continued to follow this Convention.

177 Denmark follows the Brussels Convention 1968.

178 Brussels I, Arts 3, 22 and 23.

179 Importantly, because Brussels I applies to parties on the basis of "domicile" and not nationality, New Zealand-incorporated firms or subsidiaries resident in the EU may also be able to avail themselves of the Regulation's benefits: Brussels I, Art 2.

180 See *Piper Aircraft*, above n 158.

181 For additional discussion on this point and Brussels I generally, see C Kotuby, "International Developments and External Effects: The Federalization of Private International Law in the European Community and its Consequences for Transnational Litigants" (2002) 21 J.L.& Com 157, 166.

182 For discussion of defamation issues under Rome II, see generally, A Warshaw, "Uncertainty from Abroad: Rome II and the Choice of Law for Defamation Claims" (2007) 32 Brook.J.Int'l L. 269.

183 Rome II is an extension of the Rome Convention 1980 ("Rome I"). Rome I governs contractual disputes and applies regardless of whether parties are resident in an EU Member State: Art 1. Significantly, under Rome I, the choice of law applicable to contractual claims is "the law of the country with which it is most closely connected": Art 4(1). This approach is very similar to America's defamation standard. Rome II does not interfere with the E-Commerce Directive, which provides that in commercial cross-border disputes, the applicable law is that of the country of origin: Council Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of the Information Society

the EU expended much effort attempting to formulate a rule for online publishing that was satisfactory to both the media and defamation plaintiffs.[184] Whilst significant debate was had over various "place-of-harm" and "place-of-publication" drafts, EU Members and the European Parliament and Commission were unfortunately unable to reach consensus. Consequently, despite the Commission being mandated to produce a further Report on applicable law in defamation disputes,[185] a significant gap has been left in the adopted version.[186] Accordingly, if nothing else, Rome II's failure regarding online publishing emphasises the tremendous difficulties likely to be encountered in any attempt to secure an international treaty governing internet defamation law.

D. *Newlands* & the New Zealand Position

The *Newlands* litigation[187] arose out of a generally-accessible article entitled "Wannabe Unis" made available on the defendant newspaper's website in 2002.[188] The article included a list of "degree mills" that offered "to confer degrees based on life experience". University of Newlands – a New Zealand company in the process of creating an

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Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178) 4.

[184] See Art 3(2) of Rome II's first draft: Justice and Home Affairs, *Consultation on a Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-contractual Obligations* (2002), available at: <http://www.eadp.org/main7/position/RomeII ConsultationPrelimDraft030502.doc> last viewed 24 August 2009. Compare Art 3(1) of the second draft: *Commission of the European Communities Proposal for a regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations*, presented on 27 July 2003; COM (2003) 427 and Final Proposal: *Final Report on the Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Non-contractual Obligations* (June 2005), both available at: <http://ec.europa.eu/prelex/detail_dossier_real.cfm?CL=en&DosId=184392# 383447> last viewed 24 August 2009.

[185] The adopted Rome II mandates this Study be furnished no later than 31 December 2008. However, at the time of this article's writing, a published version of the Commission's findings did not appear to be available.

[186] *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).* Rome II was finally adopted on 11 July 2007 and comes into application on 11 January 2009. The Regulation applies to all damage occurring after 20 August 2007: European Commission, *The Rome II Regulation*, available at: <http://eur-lex.europa.eu/LexUriServ/site/en/oj/2007/l_199/l_199200 70731en00400049.pdf> last viewed 24 August 2009.

[187] *University of Newlands v Nationwide News Pty Ltd*, above n 12.

[188] www.theaustralian.news.com.au.

internet-based University, alleged that its inclusion in the list of "degree mills" was defamatory and likely to cause the company pecuniary, professional and academic harm. The Australian defendant did not have a place of business in New Zealand. The webserver that controlled its website (www.theaustralian.news.com.au) was also located and operated in Australia. The defendant protested against the Court's jurisdiction and applied to have the proceeding stayed or dismissed.[189]

In the High Court, Gendall AJ considered New Zealand's assumption of jurisdiction appropriate. In reaching this decision, His Honour affirmed *Gutnick's* conclusions that publication and the tort of defamation occur at the location where the defamatory material is downloaded.[190] His Honour held that that *Gutnick's* conclusions were not restricted to subscription websites.[191] Additionally, Gendall AJ recorded that a decision to upload material on the internet carried with it an associated risk of being sued abroad for defamation.[192]

In the Court of Appeal, the case's focus shifted slightly based on the Court's view that the issue of where "publication" had occurred was "but one" factor in the overall assessment of whether a plaintiff had a "good arguable case" on the merits[193] that justified assumption of jurisdiction.[194] Opining that the determinative "good arguable case" issue was the appellant's ability to prove any sort of publication in New Zealand, the Court considered it appropriate to "proceed on the basis, without deciding, that *Gutnick* states the law in [New Zealand]".[195] The Court noted the absence of evidence confirming anyone other than the plaintiff had downloaded the offending material. Viewing this aspect significant in terms of the plaintiff's ability to show loss as required by s 6 of the Defamation Act,[196] the Court considered it inappropriate to assert jurisdiction and accordingly dismissed the proceeding.[197]

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[189] High Court decision, paras [2] – [4]; Court of Appeal decision, paras [1] – [11].
[190] At para [30].
[191] At paras [31] – [34]. On this point Gendall AJ disagreed with the obiter comments expressed by the Court in *Macquarie Bank Ltd v Berg* [2002] NSWSC 1110.
[192] At para [35].
[193] As per requirement under High Court Rules, r 219(a).
[194] Court of Appeal decision, para [31].
[195] At para [22].
[196] At paras [48] – [51]. The fact that the plaintiff company's name change from University of Newlands to University of Newlands Ltd potentially created difficulties in

Declining the University's application for leave to appeal,[198] the Supreme Court affirmed that the Court of Appeal was correct to hold that the case did not turn on the issue of the "circumstances in which defamation occurs in New Zealand as a result of material being available on the internet".[199] Significantly, however, the Court also recorded that its decision did not rule out the possibility of revisiting *Gutnick's* application in an appropriate case.[200] Consequently, whilst internet publications can certainly give rise to defamation liability in New Zealand,[201] the scope of *Gutnick's* application and New Zealand's position on associated issues arising since is far from clear.

E. Best Practice Recommendations[202]

In light of the uncertainties left unresolved by *Newlands*, this section draws together key themes and issues identified in the discussion above and sets out some practical best practice recommendations for New Zealand firms seeking to:

> (a) minimise their risk of being required to account for internet defamation in a foreign Court; and/or
> (b) maximise their chances of litigation success where persons publish defamatory comments against them online.

The existence of proposals offering theoretical solutions in this area (e.g. development of an international treaty, dispute resolution via international arbitration, abandonment of the *Gutnick* model in favour of a place of origin or minimum contacts test or elimination of internet

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terms of it having a "reputation" able to be harmed was also noted: paras [44] – [47].

[197] At paras [52] – [53].

[198] It is noted that the s 13 of the Supreme Court Act 2003 imposes relatively stringent requirements for the granting of leave to appeal. Specifically, the Supreme Court must not grant leave unless the applicant shows that: "(a) the appeal involves a matter of general or public importance; or (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard; or (c) the appeal involves a matter of general commercial significance".

[199] Supreme Court decision, para [3].

[200] At paras [4] – [6].

[201] See, for example, *O'Brien v Brown* [2001] DCR 1065.

[202] The usual disclaimers fully excluding liability apply to this article. Consultation with appropriate professionals should therefore be sought before any action is taken on any content/recommendations contained in this article.

defamation, etc.) is acknowledged. However, whilst perhaps offering the most effective means of achieving long-term resolution of the debate presently occurring between nation States in this area, such proposals are of little assistance to New Zealand firms wishing to protect themselves from liability under current laws. Accordingly, this section's focus is on concrete, practical guidelines which firms can utilise to protect themselves today. To this extent, nine steps emerge as useful considerations for firms with respect to (a). Under (b), three factors are identified as particularly crucial. Each factor is briefly explained below.

1. "Afghanistan to Zimbabwe": how to limit exposure to the "spectre of 'global' liability"[203]

(a) Become familiar with foreign defamation laws

Complexities and disparities in countries' various substantive laws can render this step an arduous task.[204] However, firms can restrict the scope of initial inquires to becoming familiar with the laws of the countries in which material is uploaded[205] and those from which its website has significant traffic or generates substantial sales orders. Through such analysis firms should aim to glean sufficient insight into foreign defamation laws to allow informed choices to be made as to whether or not continued "targeting" or maintenance of a "substantial connection" with a particular forum is desirable or prudent given the firm's particular risk preference.

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[203] *Gutnick*, above n 8, paras [54] per joint reasons and [165] per Kirby J.

[204] Discussion of countries' various substantive laws is outside the scope of this article but see authorities cited at n 12.

[205] Indeed, it is clear that firms cannot complain about jurisdiction being asserted for determination of world-wide damages in the country of upload because a positive choice has been made by the publisher to upload material/send an email etc from that location: O Bigos, above n 41; *Gutnick*, above n 8.

(b) Review all online content[206] & exercise responsible self-censorship

Broadly speaking, publication of accurate information is the best means of minimising the risk of becoming embroiled in defamation litigation abroad. Accordingly, particularly in countries where firms have clearly identifiable competitors,[207] deliberate or reckless inclusion of any content that misrepresents an individual or company should be avoided in all internet-mediated communications.[208] Likewise, in countries where strict free speech laws prevail, close attention should be paid to the nature of accurate content intended for publication. Indeed, in countries such as China and Saudi Arabia publication of some accurate content is prohibited per se (e.g. explicit anatomy sites or material deemed unfavourable to the Government or Royal family), albeit that much offending content is usually "blocked" or "filtered" at a State level before reaching its intended targets.[209] Where firms are unsure about the content of any material they have or wish to make available online, legal advice should be sought. It is important that archived material is not forgotten in this exercise, and that such material is checked for compliance with laws in all forums where it is accessible and an appropriate warning against treating it as truth included.[210]

Employers should also consider the impact of employees' use of non-web or direct communications technologies (e.g. Kazaa and Morpheus).[211] If uncomfortable with any of the risks generated by employees' internet use, firms should develop employee internet use

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[206] Whilst this article's discussion has focused on the internet's most popular applications – namely the World-Wide-Web and email, the comments included here apply equally to "blogs", "pop-ups", and other internet content posted by a business or its employees.
[207] As numerous commentators have emphasised, litigation statistics (at least in the United States) suggest that most defamation litigation arises as the result of competitor complaint: R Viguerie and A Keaty, "The World Wide Reach of the Internet: Can a Company Protect Itself From the Jurisdiction of Foreign Courts?" (2006) 34 Academy of Marketing Science Journal 87, 88.
[208] Attention is drawn to Courts' holdings in Canada and England and Wales that individuals/companies can take their business/political reputations with them wherever they go in the world: ***Bangoura***, above n 96; ***Lewis***, above n 124; and ***Berezovsky***, above n 124.
[209] B Earle and G Madek, above n 83, 256.
[210] ***Loutchansky***, above n 25, para [74].
[211] A Spencer, above n 43, 94 – 97 and 119 – 124.

policies and require agreement to these as part of their employment contract conditions.

If the cost of legal advice is prohibitive or delayed release of material is unacceptable, compliance with the international community's most conservative defamation laws is recommended.[212] As a general stringency guide, overall, Australian and New Zealand defamation laws are slightly more liberal than those of Canada and England and Wales. However, the free speech and protection of reputation balance struck in all these countries is far less favourable to publishers than that applied by America.[213] Where material concerns a celebrity, business or political figure or other "well-known" individual, it may be sensible to restrict publication to the location where the subject is domiciled, or primarily or ordinarily resides and routinely returns to after visiting other places.[214]

(c) Restrict user access & utilise "interactive" websites

For firms concerned about vulnerability in high-risk forums (i.e. those applying more stringent defamation laws than New Zealand), use of geo-location technologies[215] and subscription-only website access should be explored. However, in any application of these technologies it is important to recognise that such techniques may provide little to no additional protection in locations where *Gutnick's* conclusions prevail.

Whilst potentially costly to implement, *LICRA*[216] affirms that while technologies cannot currently prevent internet users' attempts to access content with 100% effectiveness, "filters" and other "blocking devices"

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[212] See generally, A Beyer, "Defamation on the Internet: *Joseph Gutnick v Dow Jones*" [2004] MurUEJL 26; A Mansfield, "Cyber-libelling the Glitterati: Protecting the First Amendment for Internet Speech" (2007) 9 Vanderbilt J. Ent. & Tech. Law 897.

[213] N Shanmuganathan and L Caddy, "Liability of online publishers following Gutnick" (2003) 153 NLJ 7071; J Hughes, "The Internet and the Persistence of Law" (2003) 44 B.C.L.Rev. 359, 364: "[free speech] is the most obvious area of law where the Internet is unlikely to produce substantial harmonization of legal norms".

[214] See generally, *Bangoura*, above n 96; *Lewis*, above n 124; and *Berezovsky*, above n 124.

[215] For useful discussion of available technologies, see generally D Svantesson, "Geo-Location Technologies and Other Means of Placing Borders on the 'Borderless' Internet" (2004) 23 Marshall J.Comp.&Info.L. 101.

[216] *LICRA*, above n 51, 1185 and 1203.

with success rates sufficient to protect against liability (i.e. upwards of 90% effectiveness) can be installed to prevent residents in particular locations from accessing all or part of a website's content so that a firm complies with local laws.[217] Establishment of separate corporate entities for the conduct of business in each State where a firm interacts with residents can also reduce litigation risk. Likewise, firms' hosting of separate websites specifically designed to comply with States' particular defamation laws can further safeguard against risk.[218]

Regarding subscription and "interactive"[219] websites, whilst perhaps a double-edged sword,[220] the key benefit of interactivity for firms is the ability to bind viewers through "clickwrap" contracts or "user agreements"[221] which protect their own interests. Additionally, as case law above establishes, where firms actively attempt to limit their global liability by refusing to accept subscriptions or credit card payments[222] from residents in locations with defamation laws unacceptable to them, without more, courts outside both the plaintiff's home country and State of domicile are unlikely to assert jurisdiction.[223]

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[217] ***LICRA***, ibid; B Cooper, "The US Libel Law Conundrum and the Necessity of Defensive Corporate Measure in Lessening International Internet Libel Liability" (2005) 21 Conn.J.Int'l L. 127, 152 – 153.

[218] R Viguerie and A Keaty, above n 207, 88. The existence and growing prevalence in internet users' use of anonymising devices (e.g. Safe Web) in response to geo-location technologies is noted: B Earle and G Madek, above n 83, 256 – 257.

[219] ***Zippo***, above n 34.

[220] In that it establishes an interaction sufficient for a foreign forum's assertion of jurisdiction: B Cooper, above n 217, 151.

[221] "Clickwrap" contracts generally require readers desiring access to a particular website to first read a firm's terms of use conditions and then take the positive step of clicking "yes" to subscribe to the website. The decision to provide subscription access to a website at a cost or free of charge is solely at the website operator's discretion. For discussion of "clickwrap" contracts, see generally, P Arne and M Bosse, "Overview of Clickwrap Agreements" (Jan-Mar, 2003) Practising Law Institute 279. Regarding "clickwrap" contracts' "shrinkwrap" counterpart, note ***ProCD v Szeidenburg*** 86 F. 3d 1447 (7th Circ, 1996).

[222] U Kohl, above n 11, 1051.

[223] See, for example, ***Bangoura***, above n 96; ***Toys R Us***, above n 160. Compare Dow Jones' arguable knowing acceptance of subscriptions from Australian residents in ***Gutnick***, above n 8.

(d) Use disclaimers & structure transactions carefully

Whilst clearly of limited use under an unrestricted *Gutnick* standard, in forums applying some sort of "minimum contacts" or "targeting" test,[224] disclaimers stating, for example, that content is intended only for readers in New Zealand, can weigh in publishers' favour in courts' evaluations of the propriety of asserting jurisdiction. Particularly for firms operating e-commerce websites, "clickwrap" contract inclusion of "terms and conditions" vis-à-vis forum selection, choice of law, limitation/exclusion of damages, or even mandating arbitration is prudent.[225] Regarding the particulars of such provisions, legal advice should be sought to ensure that wording is as advantageous as possible to the relevant firm.

(e) Keep businesses small/mid-sized

Acknowledging that this recommendation may appear ironic given that growth is the key objective driving many firms' decisions to pursue e-commerce activities, most commentators agree that large international entities are "natural targets" for defamation litigation due to perceptions of "deep pockets" and the increased likelihood of securing settlement or having a judgment satisfied.[226]

(f) Insure & attempt to arbitrate if sued

Absent an international Convention, disparate jurisdictional tests for defamation on the internet are unlikely to converge unassisted. Accordingly, firms publishing online should purchase insurance to insulate themselves from damages claims in foreign forums and the "spectre of 'global' liability".[227]

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[224] See Section IV above.

[225] R Viguerie and A Keaty, above n 207, 88; P Swire, "Elephants and Mice Revisited: Law and Choice of Law on the Internet" (2005) 153 U.Pa.L.Rev. 1975, 1989 – 1993; S Bone, "Private Harms in the Cyber-World: The Conundrum of Choice of Law for Defamation Posed by *Gutnick v Dow Jones & Co*" (2005) 62 Wash.& Lee L.Rev. 279, 314 – 335 (suggesting an arbitration model for internet defamation similar to the World Intellectual Property Organisation system applicable to trademark and domain name disputes).

[226] B Cooper, above n 217, 146 and P Swire, "Of Elephants, Mice and Privacy: International Choice of Law and the Internet" (1998) 32 Int'l Law 991, 991 – 1020.

[227] *Gutnick*, above n 8, para [165] per Kirby J. Indeed, as Pitt J stated in *Bangoura*, above n

(g) Monitor the law for changes

As the above discussion highlights, internet defamation law is in a state of flux. Firms concerned about minimising their litigation risk should therefore keep themselves up-to-date with developments in case law and international agreements and/or seek legal advice from time-to-time regarding matters which may affect their internet publishing decisions.

(h) Remove defamatory content as soon as possible when notified

In *Barrick*,[228] the Ontario Court of Appeal expressly identified the defendant's delay in removing material once notified of its defamatory status and failure to publish a retraction as important factors supporting its increase in the lower Court's damages award. Hence firms should judiciously consider requests for removal of content in a timely fashion.[229] In appropriate cases, publication of an apology (as well as retraction statement) will likely prove prudent.

(i) Lobby Governments to progress and conclude an international Convention harmonising internet law

Rome II's failure regarding defamation[230] emphasises that achieving international consensus in laws governing the internet will not be easy. Nevertheless, with Courts and commentators increasingly pleading for both domestic and multi-lateral action,[231] it may be that firms' lobbying of legislators can stimulate faster progression of international

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94, 572: "I would be surprised if [the Washington Post] were not insured for damages for libel or defamation anywhere in the world, and if it is not, then it should be". See also, R Jery and M Mekel, "Coverage for Cyber-Risks: An Overview of Insurers' Responses to the Perils of E-Commerce" (2002) 8 Conn.Ins. L.J. 7, 25.

[228] *Barrick*, above n 9, [47] – [52].

[229] Note Court's comments to this effect in *Bunt*, above n 148 in the context of ISPs.

[230] See Section IV(E).

[231] See, for example, *Gutnick*, above n 8 per Kirby J: "In default of … international agreement, there are limits on the extent to which national courts can provide radical solutions"; M Fagan, "Regulating Speech Across Borders: Technology vs Values" (2003) 9 Mich. Telecomm.& Tech. L.Rev. 395, 448: "[the internet] requires international arrangements that transcend state borders and originate beyond independent state government processes".

negotiations in this area. Indeed, all countries have a national interest in ensuring that the legal implications for firms engaging in e-commerce activity are as predictable as possible.

2. "Global highways"[232] & domestic laws: how to maximise litigation success if defamed by publishers abroad

(a) Evaluate chances of substantive success & shop around for the most favourable forum

Litigation is an expensive and often lengthy process. Hence, situations where vindication of reputation is the primary aim aside, once convinced a good cause of action in defamation exists, it is important to ensure *both* that the preferred forum selected for suit is willing to award an appropriate level of damages or order an injunction, and that the intended plaintiff is not "judgment proof".[233] As a general guide, permanent injunctions will rarely be granted for internet defamation in England and Wales.[234] Canada, however, appears happy to order such relief and, in appropriate cases (e.g. those involving severe or malicious conduct), will even award punitive damages.[235]

(b) Consider enforceability of any judgment likely to be obtained

Whilst jurisdiction and choice of law issues in internet disputes are often intertwined, a judgment's recognition and enforceability in a foreign forum is a separate matter[236] and seldom straightforward.[237] Importantly, as discussed above,[238] judgments secured by a New Zealand firm in one EU Member State against a defendant domiciled in another are enforceable as a matter of right under Brussels I. Additionally, numerous Reciprocal Enforcement of Judgments Treaties

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[232] E Clark and G Puig, "When Global Highways Intersect Local Laws: Defamation via the Internet – *Dow Jones & Company Inc v Gutnick*" [2002] HCA 56" (2001) 12 JLIS 271.
[233] In the sense that assets are located offshore, is impecunious or likely to "disappear"/move operations to a different State: B Cooper, above n 217, 145 – 148; A Beyer, above n 212, para [15]; P Swire, above n 225, 1019.
[234] *Schwarzenegger*, above n 123; *Bunt*, above n 148.
[235] *Barrick*, above n 7.
[236] Although note that the Court in *Braintech*, above n 34, does appear to somewhat conflate these issues.
[237] See, for example, significant obstacles encountered in *LICRA*, above n 51.
[238] See Part C, 5.

ensure that New Zealand-secured judgments are enforceable in most Commonwealth and various other trade-important countries.[239] Significantly, however, New Zealand currently has no Reciprocal Enforcement of Judgments Treaty with the United States. Consequently, unless a New Zealand/other foreign judgment can also be sustained under the First Amendment, it is unlikely to be enforced in the United States.[240]

(c) Insure against internet defamation-related loss

Although most insurance companies are unlikely to compensate on a mere allegation of damage to reputation,[241] insurers may provide relief where judgment is secured against a defendant whose assets are subsequently revealed to be out of reach or who is impecunious.

Conclusion

> If all printers were determined not to print anything till they were sure it would offend nobody, there would be very little printed.[242]

The overwhelming need for harmonisation and clarity in international internet defamation laws cannot be understated.

Whilst praised for its heightened flexibility over strict application of traditional defamation law principles, *Gutnick's* approach to jurisdiction and associated issues continues to be heavily criticised as "overbroad".[243] To date, however, an alternative satisfactory to the broader international community has not been advanced.[244] In contrast to English and Canadian courts' application of a "foreseeability" test,

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[239] See Reciprocal Enforcement of Judgments Act 1934, s 3 and relevant Regulations thereunder as to countries with which New Zealand has a Reciprocal Enforcement of Judgments Treaty.

[240] *LICRA*, above n 51; *Bachchan v India Abroad Publications Inc* 585 NYS 2d 661, 665 (NY SupCt, 1992); *Telnikoff v Matusevitch* 702 A.2d 230 (Md, 1997). For additional discussion, see R Sack, *Sack on Defamation: Libel, Slander and Related Problems* (3rd ed, 1999) § 15.4; B Cooper, above n 217, 135 – 139; S Bone, above n 225, 294 – 297.

[241] R Jery and M Mekel, above n 227.

[242] B Franklin, *An Apology for Printers* (1973 reprint), 7.

[243] See Section IV(A) above and note, for example, comments of N Garrett, "Dow Jones & Co v Gutnick: Will Australia's Long Jurisdictional Reach Chill Internet Speech World-Wide?" (2004) 13 Pac.Rim L.& Pol'y J. 61, 88.

[244] Note failed Rome II negotiations.

United States' courts currently require defendants to specifically target a forum. Although certainly correct on its facts, *Newlands*[245] has not significantly advanced New Zealand's position.

Differing views on the proper free speech and protection of reputation balance and the extent to which the internet actually differs from traditional communications technologies are at the heart of States' present failure to achieve consensus on a uniform approach for internet defamation disputes.[246] Nevertheless, Brussels I does offer some hope of future resolution in that it demonstrates that countries are willing to compromise and achieve outcomes that fairly balance the interests of both plaintiffs and defendants. Likewise, the EU's articulated commitment[247] to achieving harmonisation of Member States' internet laws as soon as is practicable is promising.[248] In the interim, however, firms must continue to respond to the internet's new and changing realities. Accordingly, it is suggested that firms would be sensible to take cognisance of the issues and recommendations identified in this article and to subsequently develop their own best practices and precedents specific to the nature of their online presence.

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[245] Above n 12.

[246] Compare, for example, Courts' views in *Braintech*, above n 34; *Barrick*, above n 7; *Berezovsky*, above n 124; *Young*, above n 160 and *Gutnick*, above n 8.

[247] See Rome II, above n 186.

[248] Regarding the likely nature of any uniform standard, it is accepted that the sophistication of geo-location technologies will, undoubtedly, continue to develop. However, with the EU's power-brokering role rapidly increasing and empirical evidence continuing to show that business-to-consumer sales growth in mature markets such as America is flattening, non-EU States may have little choice but to also adopt whatever jurisdictional test EU Members ultimately agree upon. For discussion of internet use evidence, see generally, R McGann, "Web Usage Growth Flatlines in US, Other Mature Markets", available at: <http://www.clickz.com/3491501> last viewed 22 December 2008; Nielson Online, *NetRatings Report on E-Commerce* (2007), above n 4 and K Myktyn, "The Importance of the Law for E-Commerce Strategies" (2005) 22 Information Systems Management Journal 50.

GAZING INTO THE CRYSTAL BALL: IMPROVING THE EVALUATION OF UNCERTAINTY IN NEW ZEALAND MERGER CLEARANCE APPLICATIONS*

RONEN LAZAROVITCH*

Introduction

Competition law aspects of New Zealand merger regulation are governed by the Commerce Act 1986. In 2001 the legal test for merger evaluation was amended.[1] Part of the reason for this amendment was to allow the agencies to apply more sophisticated methods of merger analysis.[2] However, the opportunity to modernise New Zealand's merger analysis test was rejected by the Court of Appeal in the *Warehouse Case*.[3] Instead, the Court adopted a test that, this paper will argue, poorly evaluates the likely consequences of a merger and causes greater uncertainty for businesses trying to predict whether a potential merger breaches the statutory prohibition. As an alternative, this paper suggests an Expected Value approach for evaluating all numerically quantifiable aspects of a merger.

A. Legislative Framework

The Commerce Act 1986 (the "Act") is the primary piece of legislation governing competition law in New Zealand. The Act is administered by the Commerce Commission[4] (the "Commission") and its purpose is to

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[1] Commerce Amendment Act 2001 (2001 No 32).

[2] Explanatory Note to the Commerce Amendment Bill 2001 No 2, 111-1.

[3] In this paper "Warehouse Case" refers collectively to *Commerce Commission v Woolworths Ltd* [2008] NZCA (also "Warehouse Case CA"), *Woolworths Ltd v Commerce Commission* 29/11/07, Mallon J and Dr King, HC Wellington CIV-2007-485-1255 (also "Warehouse Case HC") and *Foodstuffs Limited and Woolworths Limited / the Warehouse Group Limited* Com Com Decision Nos 606 & 607 (8 June 2007) (also "Foodstuffs/Warehouse").

[4] New Zealand Commerce Commission, *Mergers and Acquisitions Guidelines* (Wellington,

"promote competition in markets for the long-term benefit of consumers in New Zealand."[5] Parts II and III of the Act prohibit certain activities on the grounds that they are anti-competitive.[6] If these provisions are breached the person(s) involved are liable to pecuniary penalties.[7]

Section 47 of the Act prohibits business acquisitions that are likely to substantially lessen competition in a market.[8] If a person proposing a business acquisition is concerned that it might breach s 47, that person may apply to the Commission for a merger clearance under s 66 of the Act.[9] A clearance allows the applicant twelve months to complete the nominated acquisition, during which time the acquisition will be protected from challenge under the Act.[10] The Commission will grant an applicant a merger clearance if it is "satisfied" that the merger is "not likely to have the effect of substantially lessening competition in a market".[11]

The Commission publishes the New Zealand Mergers and Acquisitions Guidelines[12] (the "Merger Guidelines") to assist the public in determining whether a clearance should be sought and to explain the Commission's merger analysis procedure.[13] The Merger Guidelines are not intended as a substitute for the Act and do not bind the court.[14]

2004), 6. The Commission is also responsible for the regulatory regimes specified in the Dairy Industry Restructuring Act 2001, the Electricity Industry Reform Act 1998, the Telecommunications Act 2001 and the Fair Trading Act 1986.

[5] Commerce Act 1986, s 1A.

[6] Prohibited activities include entering into contracts, arrangements, understandings and covenants that substantially lessen competition (Commerce Act 1986, ss 27 and 28), boycotts (s 29), taking advantage of a substantial degree of market power for certain purposes (s 36) and resale price maintenance (s 37).

[7] Commerce Act 1986, s 83. The breaching party may also be liable for personal actions for damages (Commerce Act 1986, 84A), divestiture of assets or shares (Commerce Act 1986, 85) and injunctions (Commerce Act 1986, 84).

[8] Commerce Act 1986, s 47(1).

[9] Optional merger notification (also referred to as *ex post facto* control, or the 'strike-down' regime) replaced mandatory pre-merger notification in 1990 by virtue of the Commerce Amendment Act 1990. For an analysis of this legislative change see M Berry and A Riley, "Beware the New Business Acquisitions Provisions in the Commerce Amendment Act 1990" (1990) 21 VUWLR 91.

[10] Commerce Act 1986, s 69.

[11] Commerce Act 1986, s 66(3)(a).

[12] Merger Guidelines, above n 4.

[13] Ibid, 1.

[14] Ibid.

Such a publication is in line with most other Western competition law regulatory bodies.[15]

The general framework used by the Commission to evaluate mergers involves three steps.[16] First, the Commission will define the relevant market(s) and estimate the market shares of the participants in the market(s).[17] Second, the Commission will establish hypothetical scenarios for each relevant market: what will, or is likely to happen if the acquisition takes place (the "factual") and what will, or is likely to happen if the acquisition does not take place (the "counterfactual").[18] Third, the Commission will compare the state of competition between the factual and counterfactual to determine whether any reduction in competition amounts to a substantial lessening of competition (a "SLC"). If the Commission determines that a SLC is not likely then the clearance will be granted, otherwise the clearance will be refused.

B. The Warehouse Case

New Zealand has only two independent supermarket retailers, Foodstuffs and Woolworths,[19] who between them account for 100% of

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[15] E.g. U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (Washington DC, 1997), Australian Competition and Consumer Commission, *Merger Guidelines* (Canberra, 1999), UK Competition Commission, *Merger references: Competition Commission Guidelines* (London, 2003), Canadian Competition Bureau, *Merger Enforcement Guidelines* (Ottawa, 2004), European Competition Commission, *Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings* (Brussels, 2004).

[16] Merger Guidelines, above n 4, 6-7.

[17] The Commission uses a broad definition of 'market' that includes geographical area(s), goods/services supplied and level(s) of production/distribution. When relevant, the Commission also considers timing elements and customer types. The central inquiry when defining a market is substitutability. That is, products that are good substitutes for each other will be in the same market. Whether products are good substitutes is measured by customer reaction to price increases; the "SSNIP" test. The SSNIP test measures the smallest geographical area within which a hypothetical localised monopolist could impose a Small yet Significant and Non-transitory Increase in Price without customers substituting to other goods. Often the SSNIP used to determine customer reaction is a 4-5% increase in price. (Merger Guidelines, above n 4, 14).

[18] See Merger Guidelines, above n 4, 21.

[19] Prior to 2002 New Zealand had three independent supermarket retailers: Progressive, Woolworths (New Zealand) Limited and Foodstuffs. At the time Progressive had 24% of the market-share, Woolworths (New Zealand) Limited had 18% and Foodstuffs had 58% (See *Foodstuffs/Warehouse*, 6). In June 2002, Progressive acquired Woolworths (New Zealand) Limited from Dairy Farm International Holdings of Hong Kong. This acquisition reduced the number of independent supermarket retailers in New Zealand to

supermarket retail purchases in New Zealand.[20] The *Warehouse Case* involved two separate merger clearance applications to the Commission by both of the supermarkets to acquire the Warehouse Group Limited (the "Warehouse"). The decision to acquire the Warehouse followed the Warehouse becoming a direct competitor of the supermarkets by launching "supercentres"[21] that sold general merchandise together with a full range of groceries. The Commission declined both applications on the ground that the acquisitions would result in a substantial lessening of competition.[22] On appeal, the High Court overturned the Commission's decision.[23] The High Court's ruling was itself overturned by the Court of Appeal, which reinstated the Commission's original determination.[24]

Both parties accepted in court that the relevant market was the market for "retailing of grocery items in supermarkets, incorporating local markets not less than 5km in radius from The Warehouse Extra stores."[25] The central issues were how should uncertainty be dealt with under s 66 of the Act and how should the SLC be measured.

1. Evaluating uncertainty under Section 66

The relevant part of s 66 reads:

> **s66: Commission may give clearances for business acquisitions**
> (1) A person who proposes to acquire assets of a business or shares may give the Commission a notice seeking clearance for the acquisition.
> ..

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two. In December 2005, Progressive was sold by Foodland Association Limited of Australia to Woolworths Limited of Australia.

[20] Woolworths holds a market share of approximately 44% while Foodstuffs accounts for the remaining 56% (*Foodstuffs/Warehouse*, 10).

[21] Supercentre is a generic term for exceptionally large stores that offer both a wide range of general merchandise and a full range supermarket, all under one roof. The Warehouse called its supercentre stores "Warehouse Extra".

[22] *Foodstuffs/Warehouse*, 71.

[23] *Warehouse Case HC*, [261].

[24] *Warehouse Case CA*, [208].

[25] *Foodstuffs/Warehouse*, 30. At the High Court the supermarkets contested that the Commission's 5 km radius was arbitrary, but the High Court found that extending the boundary made no difference to the final result (*Warehouse Case HC*, [163]-[164]). See also *Warehouse Case CA*, [5].

> (3) Within 10 working days after the date of registration of the notice, or such longer period as the Commission and the person who gave the notice agree, the Commission shall either—
> (a) If it is satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market, by notice in writing to the person by or on whose behalf the notice was given, give a clearance for the acquisition; or
> (b) If it is not satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market, by notice in writing to the person by or on whose behalf the notice was given, decline to give a clearance for the acquisition.

The Court of Appeal found that s 66 requires the Commission to engage in an inquisitorial rather than adversarial process.[26] As part of this process, the Commission should make its own "reasonable inquiry" into the merits of the clearance sought[27] and grant a clearance "only if satisfied that a substantial lessening of competition is not likely."[28] If the Commission is left in "doubt" as to whether a SLC is likely or not, it should refuse the clearance.[29] The standard of proof to which the Commission should be satisfied that a SLC is unlikely is the civil "more probable than not" standard.

The Court of Appeal did not directly discuss the meaning of the word "likely" in s 66. The High Court expressed the meaning of 'likely' as:

> What is clear from the case law is it must be more than 'possible' that the proposed acquisition will have the prescribed effect but it need not be 'more probable than not' that it will. To be above merely what is 'possible', the case law has referred to 'a real chance' and a 'real and substantial risk'.[30]

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[26] *Warehouse Case CA*, [97].
[27] *Warehouse Case CA*, [101].
[28] *Warehouse Case CA*, [107]. The Court considered that s 66(3)(b) should be read as "In any other case ... decline to give a clearance for the acquisition." instead of "If it is not satisfied that the acquisition will not have, or would not be likely to have, the effect of substantially lessening competition .. decline to give a clearance." (*Warehouse Case CA* [95]). This interpretation is intended to simplify the reading if the double negative in the subsection.
[29] The Court of Appeal defined doubt in this context as "a failure to exclude a real chance of a substantial lessening of competition." (*Warehouse Case CA*, [98]).
[30] *Warehouse Case HC*, [112].

The High Court held that this formulation supported the following propositions:

- 'Likely' contemplated a 30% probability of occurrence;[31]
- There can be more than one 'likely' effect or outcome;[32]
- Where a certain outcome is dependent on more than one probability, both probabilities must be independently likely for the effect or outcome to be likely;[33] and
- The likelihood of an outcome must not be assessed in relation to the outcome itself.[34]

The Court of Appeal rejected this approach and stated that:

> We regard the key question on this aspect of the case as being whether there is a real and substantial prospect that the Extra concept will succeed to the extent that the Warehouse is prepared to roll out more stores. This question can, in the end, only be answered as a matter of impression.[35]

This passage dictates an approach whereby 'likely' is to be assessed on impressionistic grounds. Under this approach it is unclear when the Commission would be required to resort to economic evidence. Even where the Commission decides to resort to economic evidence, the impressionistic approach seems to allow a reasonable degree of discretion in weighting the evidence. Moreover, if the Commission is not confident of its own impressionistic evaluation, the Court of

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[31] *Warehouse Case HC*, [113]. Note that the Court adopted this threshold simply because the parties agreed to it. Subsequently, however, the Court placed little weight on the actual figure. For the purposes of this paper it is of little importance whether the probability threshold is 20%, 30% or 49% since they all carry the same degree of predictability for merger clearance applicants and they all treat uncertainty in the same manner. For reasons of simplicity this paper will use the Court's 30% threshold for illustrations.

[32] *Warehouse Case HC*, [113]. The Commission and the Court are not entitled to choose the one likely outcome that has the greatest prospect of occurring and evaluate only that outcome. Rather, if any one of these 'likely' outcomes will result in a SLC, the merger clearance will not be granted.

[33] *Warehouse Case HC*, [125].

[34] *Warehouse Case HC*, [123]. In other words the court must limit itself to the probability of an event occurring, while ignoring the consequences of that event: "The question is what is likely to happen, not what benefit to customers potentially could be gained if the acquisition is locked unrelated to the chance of that gain materialising."

[35] *Warehouse Case CA,* [135].

Appeal's approach means that the Commission should err on the side of declining the clearance.

This approach creates a gap between s 47, where the onus of proof is on the Commission to prove that a SLC is likely, and s 66 where the Commission must be satisfied that a SLC is unlikely. Thus, an applicant whose clearance application is declined because the Commission is uncertain whether a prescribed effect is likely, may decide to proceed with the acquisition without a clearance. The onus of then proving that the acquisition is likely to result in a SLC, as per s 47, will rest on the Commission. Given the Commission's earlier inability to be satisfied one way or the other, the Commission is unlikely to successfully discharge its onus of proof.

2. The factual and counterfactual

There was little disagreement between the Commission, the High Court and the Court of Appeal as to the formulation of the factual. All three agreed that the supermarkets currently competed with each other, but that the competition could potentially be more vigorous.[36] They also agreed that the supermarkets had no incentive to develop a successful Warehouse Extra once they purchased the Warehouse.

When assessing the counterfactual both the Commission and the High Court found it was not their role to evaluate Extra's business model and its likelihood of success.[37] However, both proceeded to evaluate the business model. The Commission found that the Warehouse Extra was likely to succeed because, by and large, the supercentre concept was successful overseas.[38] The High Court found three possible counterfactuals,[39] two in which the Warehouse Extra concept would fail and one in which it would succeed. The High Court held that the third counterfactual was not likely because the Warehouse Extra's chances of success were "remote".[40]

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[36] *Foodstuffs/Warehouse*, 33, *Warehouse Case HC*, [197] and *Warehouse Case CA*, [119]. The disincentive arose from the fact that a successful Warehouse Extra would cannibalise the traditional supermarkets' sales.

[37] *Foodstuffs/Warehouse*, 34 and *Warehouse Case HC*, [218].

[38] *Foodstuffs/Warehouse*, 35.

[39] *Warehouse Case HC*, [209].

[40] *Warehouse Case HC*, [224]. Note, however, that the Court only evaluated the limited empirical data available on Extra's performance since its launch to decide this (*Warehouse Case CA*, [143]).

The Court of Appeal examined Extra's business plan and found that it was both viable and showing signs of success.[41] Rather than leaving the business model assessment at that, however, the Court of Appeal went further and held that:

> While it is true that the [supercentre] concept has not been universally successful, it has had considerable success elsewhere. It is difficult to see why it cannot be developed to operate successfully in New Zealand, at least in some form. In this respect we are *not prepared to second-guess the business judgment of the senior management* and directors of the Warehouse. They would not have developed the Extra concept unless they saw it as viable.[42] (Emphasis added)

The Court of Appeal appears to make its final assessment of what is likely to happen by reference to management rather than the plan's likelihood of success. The Court is presuming that Extra is likely to succeed because the Warehouse executives chose to invest in it. Such a "Presumptions Approach", which is discussed in detail below, in section C 2 (b), is appealing because it allows the Court to avoid an evaluation of the empirical data. However, it sets a difficult precedent for future cases where the Commission and the courts might be required to presume that every business plan is likely to succeed merely because someone chose to invest in it. Such an approach risks substituting the judgment of business persons for that of the court.

3. Likely competitive impact

When evaluating Extra's likely competitive impact on the market, the Commission considered several theoretical concerns. Most importantly, the Commission evaluated the general undesirability of three-to-two mergers[43] and the high barriers of entry to the supermarket industry to conclude that a SLC was likely.[44] The High Court, on the other hand, was not required to evaluate the competitive impact since it concluded that Extra was unlikely to continue operating. The High Court nonetheless proceeded to assess the competitive impact of Extra if it

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[41] *Warehouse Case CA*, [141].
[42] *Warehouse Case CA*, [142].
[43] "Three-to-two mergers" are mergers that reduce market competition from three independent competitors to two independent competitors.
[44] *Foodstuffs/Warehouse*, 64.

continued in operation.[45] The Court focused on the available quantitative and empirical data on Extra's performance. It determined that the threshold for a SLC is generally a 4-5% price increase for consumers[46] but decided to reduce the threshold to 3% in this case because of the small profit margins characteristic of the supermarket retailing industry.[47] This approach is in line with the most recent Australian Competition and Consumer Commission's 2008 Draft Merger Guidelines, which state that a 5-10% increase in price for consumers will generally amount to a SLC under the Australian legislation.[48] The High Court then evaluated Extra's financial impact to date and concluded that a SLC was unlikely, even if Extra was continued, because Extra did not compete on price.[49]

The Court of Appeal criticised both approaches. The Commission, it found, focused too much on theory[50] while the High Court focused too much on available empirical data.[51] The Court of Appeal also rejected the idea of a general threshold for assessing a SLC.[52] The Court considered that:

> [W]hat constitutes a substantial lessening of competition must in the end be a matter of judgment, although we accept, of course, that such a judgment must be informed by as much practical evidence as possible.[53]

This approach is in line with the recent Court of Appeal authority in *New Zealand Bus Ltd v Commerce Commission*.[54] There the Court considered that the s 47 SLC assessment is one of "fundamental judgment", not to be obscured by "false scientism".[55]

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[45] *Warehouse Case HC*, [249].
[46] *Warehouse Case HC*, [145].
[47] *Warehouse Case HC*, [149].
[48] See Australian Competition and Consumer Commission, *Merger Guidelines Draft 2008* (Canberra, 2008), 7. New Zealand adopted the current SLC test for merger analysis from the Australian legislation (G Goddard and E Curry, "New Zealand's New Mergers Test: A Comparison of Dominance and Substantial Lessening of Competition in the Supermarket Industry" (2003) 24 European Competition Law Review 300).
[49] *Warehouse Case HC*, [258].
[50] *Warehouse Case CA*, [187].
[51] *Warehouse Case CA*, [188].
[52] *Warehouse Case CA*, [191].
[53] *Warehouse Case CA*, [191].
[54] [2007] NZCA 502.
[55] *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [104].

The Court of Appeal's approach to evaluating Extra's likely competitive impact was to consider both the available empirical evidence and the theoretical concerns of a three-to-two merger in a market with high barriers to entry. In its conclusion the Court favoured a theoretical evaluation of the evidence over an empirical evaluation.[56] It concluded that there is "no reason why [a successful Extra] would not have a significant effect" on Woolworths' and Foodstuffs' pricing, quality, range and service.[57] Woolworths and Foodstuffs would not be able to ignore Extra because neither could replicate Extra's offering involving general merchandise.[58] As a result the merger had a likely effect of substantially lessening competition in a market, and clearance was declined.

C. The Treatment of Uncertainty

That business and commerce are inherently uncertain has been recognised at least as far back as biblical times.[59] Businesses throughout history have nonetheless managed to deal with uncertainty with relative success.[60] Business best practice today employs various statistical methods to reach the best decision given the available information.[61] Statistics can in no way eliminate uncertainty (and the current economic turmoil is testament to that fact), but in practice statistics can help the decision-maker reach the best decision given the available information. It is, of course, essential that the decision-maker understand the statistic in order for him or her to utilise it effectively.

The Commerce Commission is also required to make business-like decisions in conditions of uncertainty. This is especially true when the Commission attempts to determine what is likely to happen in a given market when assessing a merger clearance under s 66 of the Act. Given the wide raft of factors that influence the behaviour

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[56] *Warehouse Case CA*, [135]: "This question can, in the end, only be answered as a matter of impression".
[57] *Warehouse Case CA*, [201].
[58] *Warehouse Case CA*, [203].
[59] James 4:13, "Come now, you who say, 'Today or tomorrow we will go to such and such a city, and spend a year there and engage in business and make a profit.' Yet you do not know what your life will be like tomorrow."
[60] Peter L Bernstein, *Against the Gods: The Remarkable Story of Risk* (John Wiley & Sons, New York, 1996), 1.
[61] See generally Robert Kast and André Lapied, *Economics and Finance of Risk and of the Future* (John Wiley & Sons, Chichester, England, 2006).

of a market and its participants,[62] this is a very difficult task. Yet the decision must be good, since the wrong decision may have negative long-term consequences for consumers in New Zealand.

This part of the paper will argue that the Court of Appeal's approach to evaluating uncertainty, as expressed in the *Warehouse Case*, is inadequate. Rather, the Commission and the courts should use a simple statistical method called "Expected Value",[63] which is discussed in detail below, in section C 2 (c), to improve their analysis of uncertainty. This paper will only discuss how to improve the analysis of effects that the Commission and the courts are able to quantify, and which they do quantify on a regular basis. The paper does not advocate a wholly scientific approach to merger analysis, nor does the majority of literature on the use of Expected Value in business decision-making.[64] Moreover, economics alone cannot provide objective or scientific solutions to merger analysis. As John Maynard Keynes once observed:

> The Theory of Economics does not furnish a body of settled conclusions immediately applicable to policy. It is a method rather than a doctrine, an apparatus of the mind, a technique of thinking, which helps its possessor to draw correct conclusions.[65]

The evaluation of qualitative effects, their relationship to quantitative effects and the final measurement of a SLC are beyond the scope of this paper.[66]

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[62] These would include changing customer preferences, the availability and costs of capital and labour, the behaviour of other firms in the relevant market, changes in the legislative framework, etc.

[63] Expected Value is also referred to in the literature as "Expected Utility", "Decision-Theory", "Prospect Theory" and sometimes simply as "Risk Assessment".

[64] Eg, Sean Cleary and Thierry Malleret, *Global Risk: Business Success in Turbulent Times* (Palgrave Macmillan, New York, 2007), 48: "In risk assessment, different forms of quantitative and qualitative techniques are used. More often than not, *quantitative* modelling is complemented by *qualitative* analysis for risks that are less suited to formal modelling."

[65] This observation is contained in an introduction written by Keynes to a series known as "The Cambridge Economic Handbooks", cited by C. W. Guillebaud and Milton Friedman in the introduction to Sir Dennis Robertson and Stanley Dennison, *The Control of Industry* (Cambridge University Press, Cambridge, 1960), vii.

[66] However, they are discussed in my dissertation: Ronen Lazarovitch, *An Expected Value Approach to Evaluating Uncertainty in New Zealand Merger Analysis* (Honours Research Paper, University of Otago, 2008), available online at <http://www.otago.ac.nz/law/oylr/2008/Ronen_Lazarovitch.pdf>.

1. Econometric analysis in merger clearance evaluation

When assessing the likely effects of a merger, the Commission evaluates changes in a number of market competition indicators. The Commission often focuses on changes in coordinated[67] and non-coordinated[68] market power.[69] An increase in coordinated market power means that firms find it easier to tacitly coordinate their pricing, output or related commercial decisions, usually due to a decrease in the number of participants in the market.[70] An increase in non-coordinated, or unilateral market power means that competitive restraints on a firm have been removed or weakened such that the firm finds it profitable to raise prices, reduce output or otherwise exercise market power.[71]

The economic measures used to estimate the potential changes in coordinated and non-coordinated market power include market concentration, market barriers to entry, elimination of a vigorous competitor, scope for collusion, etc.[72] These measures can be utilised in two ways. They can either be used as isolated measures to gain a general impression of the competitive effect of the merger or they can be integrated into an econometric model that estimates the quantitative effect of the merger. The quantitative measurement is often expressed as a percentage price increase or decrease for consumers.[73]

The Commission often assesses merger clearances using a number of relevant individual measures rather than a full econometric model.[74] This is appropriate when the merger clearance is relatively uncontroversial, either because one or more of the economic measures

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[67] For a discussion on coordinated effects and their econometric simulation see K U Kühn, "The Coordinated Effects of Mergers" in P Buccirossi (ed.), *Handbook of Antitrust Economics* (MIT Press, London, 2008), 105.
[68] For a discussion on non-coordinated effects and their econometric simulation see G J Werden and L M Froeb, "Unilateral Competitive Effects of Horizontal Mergers" in P Buccirossi (ed.), *Handbook of Antitrust Economics* (MIT Press, London, 2008), 43.
[68] Merger Guidelines, above n 4, 12.
[69] Merger Guidelines, above n 4, 12.
[70] Australian Competition and Consumer Commission, *Merger Guidelines Draft 2008* (Canberra, 2008), 28.
[71] Ibid, 20.
[72] See generally Merger Guidelines, above n 4.
[73] James Michael Mellsop and James Palmer, *Economics and Competition Law* (New Zealand Law Society, Wellington, 2004), 60-61.
[74] Merger Guidelines, above n 4, 22-31.

is so high that the merger is likely to cause a SLC or because the relevant measures are so small that the merger is unlikely to cause a SLC. In controversial or difficult mergers where the market is appropriate for modelling,[75] however, the Commission may undertake full econometric modelling. For example, econometric modelling was used for the Progressive/Woolworths,[76] Cendant/Budget[77] and Contact Energy/NGC[78] clearance applications and the Qantas/Air New Zealand[79] authorisation application.[80] All these applications involved oligopolistic markets and conflicting individual economic indicators. Econometric modelling is necessary in such cases because the Merger Guidelines require that merger effects on price or quantity must be sustainable for a period of two years or more.[81] In borderline cases this can only be gauged from full econometric modelling, as opposed to an assessment of individual economic indicators.

The Commission uses one of two broad economic models to evaluate mergers in oligopolistic markets: the Cournot model and the Bertrand model.[82] These are both well-established economic models that differ on the assumptions that they make. The Cournot model assumes that oligopolies produce a single homogenous product.[83] It is therefore most appropriate for modelling industries where firms make decisions based on quantity, as opposed to price. An example of such an industry would be the electricity market. The Bertrand model assumes firms largely compete on price with similar but differentiated products.[84] It would therefore be appropriate for modelling, for example, the personal computer hardware market. The Commission will sometimes use modifications of these models to better represent

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[75] Most oligopolistic markets are appropriate for econometric modelling, see I Kokkoris, "Merger Simulation: A Crystal Ball for Assessing Mergers" (2005) 28 World Competition 327, 332 (henceforth "Kokkoris I").

[76] *Progressive Enterprises Ltd / Woolworths NZ Ltd,* Com Com Decision No 448 (14 December 2001).

[77] *Cendant Corporation / Budget Group Incorporated*, Com Com Decision No 482 (6 November 2002).

[78] *Contact Energy Ltd / Natural Gas Corporation Holdings Ltd,* Com Com Decision No 491 (4 February 2003).

[79] *Qantas Airways Ltd / Air New Zealand Ltd,* Com Com Decision No 511 (23 October 2003).

[80] Mellsop and Palmer, above n 73, 60-61.

[81] Merger Guidelines, above n 4, 13.

[82] Mellsop and Palmer, above n 73, 58.

[83] Ibid.

[84] Ibid, 59.

the market analysed. However, the fact that the Commission uses one of two broad models means there is relatively little scope for disagreement over the general economic framework.

Under the current approach the Commission uses econometric modelling for a single factual or counterfactual that is considered 'likely' and causes the most serious reduction in competition. Factuals and counterfactuals that do not reach the 'likely' threshold or whose effects are not as serious as the factual or counterfactual being assessed are ignored from this early stage. However, once econometric modelling is created for a given merger, it is relatively simple to run the simulation several times with small changes that take account of the different possible factuals and counterfactuals. For example, if there is a 25% chance of new entry into the market and that possibility was not evaluated in the 'likely' counterfactual, then the exact same model could be run again, only with the added information of the new entry, resulting in two sets of possible price increases. Moreover, the information used to create the econometric model can be used to help quantify the likelihood of each potential event occurring.[85]

2. Three approaches for evaluating uncertainty

(a) The "Real Risk" Approach

This paper identifies three separate approaches for evaluating uncertainty in the context of merger analysis. The first is the Real Risk approach. This approach refers to the use of either a verbal or numerical probability threshold for the assessment of likely events. This is the current approach in New Zealand for evaluating uncertainty in merger clearance analysis. The Merger Guidelines express the evaluation of uncertainty under 'likely' in s 66 as:

> Likely does not mean more likely than not. It means more than a mere possibility, but it can mean less than a probability of 50 percent. Likely means a real risk, a substantial risk or something that might well happen.[86]

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[85] See Kast and Lapied, above n 61, Chapter 6: Risk Economics. See also Kokkoris I, above n 75.

[86] Merger Guidelines, above n 4, 10.

This interpretation accords largely with the pronouncements of the High Court and Court of Appeal in the *Warehouse Case*.

The advantage of the verbal formulation is that judges are familiar with it from their experience with other areas of the law. However, the formulation is vague and unpredictable in application. While it may be appropriate in criminal cases where the actions or beliefs of a person are at issue, it is not necessarily appropriate for the evaluation of the likely behaviour of a market and its participants. Moreover, an attempt to determine what the formulation means in practice may cause some frustration. Clearly any event with a 50% chance of occurring or more will be 'likely'. But, when the probability is lower one must try and determine, using an "impressionistic approach",[87] whether the chance of occurrence is "more than merely possible" and a "real risk".

The High Court's adoption of a 30% threshold for likelihood in the *Warehouse Case*, while arbitrary, could have injected a significantly higher degree of certainty into the Real Risk formulation. However, the 30% threshold shares two central deficiencies with the verbal formulation. The first deficiency is that the Real Risk formulation amounts to an "all-or-nothing" approach. That is, if a counterfactual reaches the 'likely' threshold it is treated as an absolute certainty and if it does not, the counterfactual is treated as if it does not exist. In the American context Katz and Shelanski express this deficiency as:

> Under this approach, events found to be of low probability or supported by uncertain evidence receive no weight in the decision calculus. Meanwhile, events with probabilities above the threshold are sometimes treated as if they were certain to occur. In short, uncertainty is treated as if it did not exist. This treatment can generate seriously inaccurate predictions regarding consumer welfare when low-probability events would have significant effects if they occurred.[88]

In the *Warehouse Case* the High Court considered that the counterfactual where Extra succeeded did not reach the 'likely' threshold.[89] As a result the Court ignored that counterfactual completely. Ignoring

[87] *Warehouse Case CA*, [135].
[88] M L Katz and H A Shelanski, "Merger Analysis and the Treatment of Uncertainty: Should We Expect Better?" (2007) 74 Antitrust Law Journal 537, 538-539.
[89] *Warehouse Case HC*, [224].

counterfactuals reduces the information on which the decision is founded and the quality of the decision is reduced. Innovation, for example, is a major casualty of such an approach. Innovation is often considered more important to a competitive market than price competition,[90] but it frequently takes several years to make its full impact on a market.[91] Effects due to take place several years into the future are more difficult to predict with accuracy than events in the near future and will therefore have lower likelihoods of occurrence. As a result detriments to consumers from losing this innovation will rarely be assessed by the Commission and the courts under the Real Risk approach, no matter how significant.

The second deficiency, closely related to the first, is that the Real Risk approach disregards likelihood when assessing the effects of a merger. That is, once a counterfactual passes the 'likely' threshold, the probability of it occurring is disregarded in the later assessment of the merger's effect. Consider, for example, two counterfactuals in two separate mergers. The counterfactual in the first merger is 'likely' and has a 90% chance of causing a 5% increase in prices for consumers. The counterfactual in the second merger is also 'likely' but has only a 40% chance of causing a 5% increase in prices for consumers. Under the Real Risk approach both counterfactuals would be evaluated as having an equal effect on the relevant markets. However, consumers should worry about the first merger more than the second, because the price increase in the first merger is almost certain to occur whereas the price increase in the second merger has a much smaller chance of occurring. Katz and Shelanski note that:

> The fundamental point for policy is that the magnitude of each possible outcome... and not just whether it is likely ... must be taken into account if the welfare implications of the merger are to be fully understood.[92]

To properly assess a merger, then, the probability of a counterfactual occurring must be linked to that counterfactual's effect.

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[90] M E Porter, "Competition and Antitrust: Toward a Productivity-Based Approach to Evaluating Mergers and Joint Ventures." (2001) 46 Antitrust Bulletin 919.
[91] Ministry of Economic Development, *Discussion Document: Review of the Clearance and Authorisation Provisions under the Commerce Act 1986* (Wellington, 2007), 13.
[92] Katz and Shelanski, above n 88, 550-551.

(b) The "Presumptions" Approach

The Presumptions approach is a modification of the Real Risk approach. It attempts to address some of the deficiencies in the way the Real Risk approach deals with events that have a low probability of occurrence by assuming that an event is likely, regardless of its actual probability, if a certain set of facts exists.

The Court of Appeal in the *Warehouse Case* tends towards this approach. This is particularly evident when the Court stated its unwillingness to "second-guess" the business judgment of the Warehouse's executives.[93] While a credible, well resourced management team with continuing faith in a business plan is relevant to the assessment of the plan's likelihood of success, the Court's comments can be interpreted as going further than this and creating a presumption that the Warehouse Extra is likely to succeed because: (a) the business plan envisages its success, and (b) the Warehouse executives chose to invest in it. Such an approach could be transferable to other cases where the Commission would be required to assume that a given business plan is likely to succeed because a competent investor thought that it was a good investment. While the matter was not explored in the Court of Appeal's judgment, it is possible that these presumptions are rebuttable. For example it may be possible to rebut the likelihood of Extra's success by showing that the business plan is wholly illusory or that it was negligently prepared.

The attraction of the Presumptions approach is the foreseeability and objectivity it injects into the analysis of certain kinds of mergers. Once a presumption is articulated by the Commission or the courts, legal advisors can forecast with reasonable accuracy whether a similar merger is likely to receive clearance or not. As things presently stand, however, businesses may be required to wait a long time until a sizable case law builds up articulating the various presumptions and their rebuttals.

Moreover, the Presumptions approach does not remedy the structural deficiencies of the Real Risk approach. By creating a list of presumptions it merely attempts to remedy specific situations where the presumptions may provide for the best outcome in most, but not

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[93] *Warehouse Case CA*, [142]: "In this respect we are not prepared to second-guess the business judgment of the senior management and directors of the Warehouse. They would not have developed the Extra concept unless they saw it as viable".

all, cases. Indeed, once the factual patterns that are required for a presumption become known, companies may attempt to artificially order their affairs to fit into a presumption's requirements if it will benefit them. Such a development would reduce the number of instances where the presumption provides for the best outcome and creates a whole new set of problems without solving the old ones. It is submitted, therefore, that a framework that arrives at the best decision without creating a list of exceptions to the rule would be preferable.

(c) The "Expected Value" Approach

Expected Value is a summary statistic.[94] It quantifies a decision's various possible outcomes, weighs each of them by the probability that they will occur, and sums these estimates together.[95] The Expected Value result can then be employed to help guide decision-makers, such as the Commerce Commission, in cost-benefit analysis.[96] Richard Posner argued as early as 1972 that the law in general should utilise an Expected Value-like approach to appraise legal disputes.[97] Today Expected Value is advocated by academics for use in various aspects of competition law.[98] Michael Katz and Howard Shelanski of the University of California at Berkley advocate an Expected Value approach for use in US merger analysis.[99] Ken Heyer, the Economics Director at the Antitrust Division of the United States Department of Justice, advocates a similar approach, which he would apply generally to most antitrust assessments of uncertainty.[100] The approach advocated in this paper differs from these US writers by tailoring the approach to

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[94] Summary statistics are a type of descriptive statistics that are used to summarise a set of observations in order to communicate them as simply as possible ("Summary Statistics" in Graham Upton and Ian Cook, *A Dictionary of Statistics* (2nd ed, Oxford University Press, Oxford, 2006)).

[95] K Heyer, "A World of Uncertainty: Economics and the Globalization of Antitrust" (2005) 72 Antitrust Law Journal 375, 376.

[96] Christian Gollier, *The Economics of Risk and Time* (MIT Press, Cambridge, Mass, 2001), 3.

[97] R A Posner, "An Economic Approach to Legal Procedure and Judicial Administration" (1973) 2 JLS 399.

[98] See eg, D S Evans and A J Padilla, "Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach" (2005) 72 University of Chicago Law Review 73, C Frederick-Beckner and S C Salop, "Decision Theory and Antitrust Rules" (1999) 67 Antitrust Law Journal 41 and K Hylton and M Salinger, "Tying Law and Policy: A Decision Theoretic Approach" (2001) 69 Antitrust Law Journal 469.

[99] Katz and Shelanski, above n 88.

[100] Heyer, above n 95.

fit the unique characteristics of New Zealand competition law. It also differs by combining Expected Value with qualitative assessments rather than relying on the Expected Value alone.[101] Expected Value is a suggested tool to improve merger analysis that has yet to be used judicially in New Zealand or overseas.

In order to calculate an Expected Value for a given merger the Commission would require three sets of figures: the number of possible counterfactuals (n), the probability of each counterfactual occurring (PR) and the percentage price impact[102] of each counterfactual, when compared to the factual (PI).[103] These figures would be assessed through econometric analysis currently undertaken by the Commission. Once these figures are obtained the Expected Value of the merger is calculated using the following formula:

Equation 1: Expected Value Formula

$$EV = \sum_{i=1}^{n} PR_i \times PI_i$$

EV = Expected value.
PR = Probability of counterfactual occurring.
PI = Price impact of each counterfactual, compared to the factual.
n = Number of possible counterfactuals.

This formula multiplies each counterfactual probability by the price impact of the counterfactual when compared to the factual,[104] and adds all the outcomes together.

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[101] Katz and Shelanski, above n 88, 571-574.

[102] Percentage price increases are used because it is a figure the Commission often calculates and that the courts often deal with (as was the case in the *Warehouse Case*). This approach can easily be modified to take account of any other quantifiable impact that the Commission may determine is relevant to the assessment of a particular merger (see Charles M Grinstead and J. Laurie Snell, *Introduction to Probability* (2nd ed, American Mathematical Society, Providence, RI, 1997), chapter 6: Expected Value and Variance).

[103] The comparison to the factual is used, so as to represent the fact that the counterfactual cannot occur if the merger takes place (see below n 104).

[104] In other words, the effect of each counterfactual is first deducted from the factual in

To illustrate, consider the three counterfactuals identified by the High Court in the *Warehouse Case*. For the purposes of illustration I will use probability percentages that are either above or below the 30% threshold expressed by the High Court, since the High Court did not assign percentage probabilities to each counterfactual.[105] The first counterfactual was that the Extra concept would fail. I will assign it a probability of 40% with a price impact of 0%. The second was that Extra would continue to be trialled for a while and then fail. I will assign that a probability of 35% and a price impact of 0%. The third was where Extra would succeed. This counterfactual was held not 'likely' and therefore I will assign it a probability of 25% and an impact of a 2.5%[106] price increase for consumers, when compared to the factual.[107] Putting the numbers into the equation we get:

Equation 2: Expected Value Example 1

$$(0.4\times 0)+(0.35\times 0)+(0.25\times 0.025)=0.00625$$

Under the High Court's assessment the price effect on consumers was zero because the third counterfactual did not reach the High Court's

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order to receive a net price impact for that scenario if the merger takes place. This is done so that the expected impact under Expected Value is calculated for the merger as a whole, rather than calculating Expected Value twice, once for all the factuals and again for all the counterfactuals, and then deducting one from the other. Thus, where a counterfactual would result in a price decrease for consumers, but that price decrease would be lost in the factual (ie, if the merger took place) then that price decrease would be calculated as a price increase to represent the fact that consumers could not benefit from it if the merger took place.

[105] Note that the High Court did not place significant weight on the 30% threshold, nor did it calculate the precise percentage probability of each counterfactual. However, the 30% threshold is useful for illustration purposes to demonstrate the difficulties associated with the Real Risk approach, which always uses an arbitrary cut-off point (expressed as either a verbal cut-off point or a percentage cut-off point). The percentage probability used here is either above or below the 30% threshold depending on whether the High Court considered the counterfactual was 'likely' or not.

[106] The price increase figures were omitted from the public version of the High Court judgment in the *Warehouse Case*. Since the SLC threshold in that case was held to be 3%, the price increase must be lower. Hence the use of a 2.5% price increase in this example.

[107] If the merger was declined and the counterfactual occurred then there would be a 2.5% price decrease for consumers. However, this price decrease would be lost in the factual (ie, if the merger took place). Therefore when comparing the counterfactual to factual we represent the *loss* of this price decrease as a price increase for consumers.

'likely' threshold and was therefore ignored. Under the Expected Value calculation the average expected price increase is small, 0.625%,[108] but it is not zero.

As a second example, consider a fictional merger with two possible counterfactuals: an 80% chance of a 1% price increase for consumers and a 20% chance of a 15% price increase for consumers. Under the Real Risk approach this merger would be allowed,[109] since the 20% probability counterfactual would be ignored and a 1% price increase may not be sufficient to constitute a SLC. Expected Value would measure the merger in this way:

Equation 3: Expected Value Example 2

$$(0.8 \times 0.01) + (0.2 \times 0.15) = 0.038$$

The average expected price increase of allowing this merger is 3.8%. The use of this statistic allows the lower probability counterfactual to be considered together with all other counterfactuals. As a result the decision-maker can come to an informed decision on whether to grant or decline the merger application.[110]

Before proceeding it is important to explain what the Expected Value result actually means. Expected Value is a descriptive quantity, akin to an average or a mean, of all the counterfactuals and their effects.[111] It is not equivalent to a price increase in a given counterfactual. The Expected Value may be, and often is, a result that we would not expect to observe in practice after making the decision a single time. In this respect it is similar to a class with an average grade of 72.3 despite no individual student receiving this mark. A useful way to conceptualise Expected Value, then, is as an average result for the proposed merger. What the Expected Value "average" actually measures is the price increase that would occur if we allowed a large

[108] The Expected Value of 0.625% is reached by multiplying the Expected Value result of 0.00625 by 100. This is because the Expected Value calculation expresses the percentage outcome out of a maximum of 1 (ie, a result of 1 = 100% and a result 0.5 = 50%). To express the Expected Value result as a percentage out of 100% we simply multiply the Expected Value result by 100.

[109] Assuming all other facts are equal.

[110] See Katz and Shelanski, above n 88 for numerous examples of how such an approach would work in different types of mergers with varying probabilities and outcomes.

[111] Grinstead and Snell, above n 102, 225.

number of mergers with the same facts and averaged the price increases that resulted in all of them.[112]

By combining all the possibilities and outcomes of a particular decision together, Expected Value allows us to assess a summary of all aspects of the decision instead of focusing on individual parts of it. To illustrate, consider an attempt to assess whether a given school class performed well in an exam. Adapting the Real Risk approach, we would measure how well a class did by determining whether a certain proportion received a mark higher than 80% and ignore the rest of the class, which would be misleading and unhelpful. The Expected Value approach would be akin to using an average mark for the class to determine how well it performed, thus taking into account more information than the Real Risk approach and condensing it into a single figure.

To further explain Expected Value, we can use a more complicated example. Consider being faced with an American roulette and the question whether it would be profitable to place a bet on one of the numbers? An American roulette has 38 numbers on it.[113] If you place a $1 bet on the winning number you will get your $1 back plus $35,[114] otherwise you will lose your $1. You thus have a 1/38 chance of winning 35 times your original bet and a 37/38 chance of losing your original bet. Using Expected Value we can calculate that you should expect to lose 5.26% of your money.[115] Obviously you could not lose this percentage of money on an individual bet. The Expected Value is the loss that you would expect if you repeatedly placed bets on the roulette. Note that if you bet $1 on all 38 numbers in a single roulette spin, then one of your numbers would inevitably come up and you end up with $36. This $36 represents a 5.26% loss from the $38 that you bet on the round,[116] which is equal to the loss as calculated by

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[112] Note that an ordinary average calculation can be accompanied by a variance, so that the average of 50 and 100 (ie, 75) can be distinguished from the average of 70 and 80 (which is also 75). Similarly Expected Value can be accompanied by a variance measure so that a merger with potential outcomes of -100% and +100% price change for consumers and a merger with -2% and +2% price changes can be distinguished from one another (see , Chapter 6 for a full explanation of the Expected Value variance).

[113] American roulettes have numbered slots 1-36 as well as "0" and "00" slots (38 slots in total). Non-American roulettes only one "0" (and therefore 37 slots in total).

[114] This is the standard 'win' when playing American roulette.

[115] The Expected Value calculation is $\frac{1}{38} \times 35 - \frac{37}{38} \times 1 = -0.0526$.

[116] The calculation is $\frac{36}{38} - 1 = -0.0526$.

Expected Value. Expected Value can thus help us reach the logical conclusion that gambling on roulette is a loss making exercise. When applied to merger analysis, Expected Value can give the decision-maker the same level of insight into the risks of granting clearance to a merger.

Since Expected Value represents an average outcome for a decision, it is especially useful in merger analysis. The Commission is required to analyse numerous merger clearance applications every year.[117] Most of these applications represent borderline cases where the advising solicitor is unsure whether the merger will or will not breach s 47 of the Act. Therefore the applications will often have similar probabilities and outcomes, despite existing in different markets and at different times. An Expected Value approach would allow the Commission to both make a long-term assessment of the benefit to consumers in New Zealand and enhance its ability to compare different mergers. Moreover, since Expected Value calculates the likely effect of the merger as a whole, it avoids the 'gap' between ss 66 and 47 caused by the current approach by the Court of Appeal.[118]

Further, the Court of Appeal in the *Warehouse Case* noted that:

> [T]he Commission can be expected to engage in an inquisitorial process in which it would make a reasonable inquiry into the merits or otherwise of the clearance that is sought. The decision to grant or refuse a clearance is necessarily to be made on the basis of all the evidence.[119]

It is difficult to see how the Court of Appeal's Real Risk approach complies with its own pronouncement. An approach that omits potentially important evidence from the final determination does not result in a decision made "on the basis of all the evidence". Expected Value, on the other hand, evaluates all the possible counterfactuals to allow a decision to be truly made on the basis of all the evidence.

In summary, Expected Value provides a single numerical summary of the entire quantitative aspects of the proposed merger, with which the Commission can begin to assess its likely impact.

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[117] On average the Commission evaluates approximately 20 clearance applications per year (Ministry of Economic Development, *Discussion Document: Review of the Clearance and Authorisation Provisions under the Commerce Act 1986* (Wellington, 2007), 23).

[118] See section B 1.

[119] *Warehouse Case CA*, [101].

Expected Value provides several additional benefits over the Real Risk and Presumptions approaches. The formalistic and well-established formulation of Expected Value promotes transparency in the merger clearance process; many applicants will easily understand the Expected Value techniques since they regularly use it in their business dealings; Expected Value takes into account future events with a low probability, ensuring that serious detriments to consumers will not be ignored; Expected Value links the probability of a counterfactual occurring to its effect; and, Expected Value allows the Commission and the courts to make their own assessment of the likely effect of the merger, rather than relying on the opinions of the parties involved in the merger. This quantitative assessment must, however, be supplemented by a qualitative assessment.[120]

3. The potential prevalence of Expected Value in merger analysis

Under the current Real Risk approach the Commission focuses on a single factual or counterfactual that is 'likely'. Therefore most of the reported cases and decisions do not discuss alternative possible counterfactuals. For example, in *Brambles New Zealand Ltd v Commerce Commission*[121] the Commission identified the relevant counterfactual as being a continuation of the status quo. The Commission specifically omitted an alternative counterfactual from its analysis because the probability of that counterfactual occurring did not reach the statutory threshold of 'likely'.[122] Since ignored counterfactuals are often not reported it is difficult to estimate precisely how much information is currently being discarded. The scarcity of discussion over alternative counterfactuals does not, however, mean that they do not exist. Nor does it mean that the alternative counterfactuals can be safely ignored: "low probability events can matter, and for that reason they should not be casually or easily discarded."[123]

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[120] The link between quantitative and qualitative assessment is outside the scope of this paper. However, it is discussed in my dissertation, above n 66.
[121] (2003) 10 TCLR 868.
[122] Ibid, 873. The details of that counterfactual were censored from the public version of the judgment: "[The Commission] then considered the counterfactual and concluded that the status quo was the counterfactual. In particular, it rejected the possibility that [...]."
[123] Katz and Shelanski, above n 88, 554.

It is feasible to estimate what counterfactuals may have been ignored in a decision by reading the case and contemplating what alternative scenarios may have been possible. For example, in *New Zealand Bus Ltd v Commerce Commission*[124] the largest bus company in Wellington, New Zealand Bus Limited, wanted to purchase the second largest bus company in Wellington, Mana Coach Services Limited.[125] The factual, that Mana and NZ Bus would no longer compete with each other after the merger was virtually certain and was not controversial.[126] The counterfactual, however, was not as obvious.[127] The High Court nonetheless considered that the only relevant counterfactual was that Mana would be sold to a different bus company who wished to enter the Wellington market, and that under new ownership Mana would compete with NZ Bus.[128] The High Court did not evaluate other counterfactuals, but that does not mean that there were none. One possibility would be for Mana to go bankrupt and not be purchased at all. Moreover, if Mana would have been purchased then there would still be at least two possibilities: that Mana remain a meek competitor, or, if Mana would have been purchased by a bus company that wanted to usurp NZ Bus, it may have become a very aggressive competitor. It would have been preferable for the High Court to have evaluated all the possible counterfactuals rather than a single one.

Notwithstanding this estimation exercise, without the information held at the time by the parties and the court we cannot know what scenarios were possible, or how possible they were. This exercise shows that, since the Commission and the courts can rarely determine with absolute certainty what *will* happen in the future, alternative possible counterfactuals should not be ignored.

The discussion in this paper has focused on the benefits of using Expected Value to calculate price increases as measured by econometric modelling. However, Expected Value can also be used to evaluate the likely effect of individual economic indicators that are expressed in numerical terms. For example, an economic indicator used to estimate increases or decreases in a firm's unilateral power is the

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[124] [2007] NZCA 502.
[125] Ibid, [10].
[126] Ibid, [256]-[258] and *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679, 719-720.
[127] *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679, 720.
[128] Ibid, 721.

firm's market share. Under the Real Risk approach the Commission would only evaluate the change in a firm's market share in a single 'likely' counterfactual and ignore market share changes in scenarios that do not reach the 'likely' threshold. Under the Expected Value approach the Commission would estimate the change in market share under all possible counterfactuals and use Expected Value to gain a complete understanding of the merger's effect on the firm's market share.

Thus, the Commission's and the court's use of the Real Risk approach masks the true risks that a merger gives rise to by discarding counterfactuals early on in the investigation. These counterfactuals are often not mentioned in the final decision or judgment, but they nonetheless exist. As a result the potential prevalence of Expected Value in merger analysis is large. The Expected Value approach could be employed in every merger analysis where the assessment involves deciding what is 'likely' to happen and where that evaluation involves quantitative indicators of competition.

4. Potential Criticism of the Expected Value Approach

The Expected Value approach, and indeed any mathematical or statistical usage can seem foreign within the law. In this part of the paper I would like to anticipate and address a number of potential criticisms that the Expected Value approach may give rise to. The first potential criticism that will be addressed is that judges and the Commission will not understand the concept or be able to apply it in practice. Katz and Shelanski also identify this potential criticism[129] and pose a simple, yet effective response to it – observing that "the difficulties of the expected-value approach arise not because the method of analysis is hard, but because the problem to be addressed is hard."[130] Merger analysis necessarily involves complicated econometric and statistical data.[131] The Expected Value approach helps synthesise this information in a more effective manner. It does not introduce foreign statistical calculations in an area of law where they do not currently exist.[132] Nor does it create an additional burden by including

[129] Katz and Shelanski, above n 88, 554.
[130] Ibid.
[131] See Mellsop and Palmer, above n 73, Chapter 3.
[132] *Telecom Corporation of New Zealand Ltd v Commerce Commission* [1992] 3 NZLR 429, 441.

quantitative data that could be safely ignored, since ignoring low probability events does not eliminate their impact.[133]

Moreover, the Commission and the courts are equipped to effectively implement such an approach. The Commission is a specialist tribunal that deals with significantly more complex mathematical, statistical and econometric data than Expected Value. A significant portion of the Commission's staff are trained in economics and related disciplines, and specialist economist assistance is regularly sought for merger clearance review.[134] Judges on appeals from the Commission are naturally privy to all the reports prepared by and presented to the Commission, and High Court Judges sitting on Commerce Act cases are in the unique position of sitting alongside a lay-member advisor who is literate in economics.[135] A central purpose of this arrangement is cross-pollination of expertise. One would expect the lay-member to explain the meaning of the Expected Value statistic to the judge in order for them to reach a conclusion on it together.

A second potential criticism that I would anticipate is that the Expected Value approach is one of "false scientism"[136] whereby the work of the law is replaced by an imprecise mathematical calculation. Such criticism, however, misunderstands the approach advocated. First, it is vital that the Commission and the courts understand the figures, the econometric modelling and the assumptions that make up the Expected Value. Since the Commission currently analyses this data itself there is no reason to assume that the Commission will not be able to continue to do so in the future. Second, Expected Value will rarely be the sole determining factor for the outcome of a clearance application. The use of Expected Value in merger analysis, like in business decision-making, requires an additional consideration of qualitative factors before a decision is made.[137] It should be noted that,

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[133] Katz and Shelanski, above n 88, 555.

[134] Alan Lear, *Report to the NZ Commerce Commission: A Best Practice Review of the New Zealand Merger Clearance Regime* (Auckland, 2007), 25.

[135] In competition law cases a "lay-member" ordinarily sits alongside the judge in High Court proceedings (Commerce Act 1986, ss 77 & 78). The lay-member is selected from a panel of persons with "knowledge or experience in industry, commerce, economics, law or accounting" (Commerce Act 1986 s 77(2)) and may issue his or her own opinion. In cases where there are two or more lay-members, they may constitute a majority opinion that decides the outcome of the case, notwithstanding the judge's opposing view (, 259).

[136] *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [104] per Hammond J.

[137] Cleary and Malleret, above n 64, 48-49.

A further potential criticism, also mentioned by Katz and Shelanski,[138] is that the figures used to calculate the Expected Value are sometimes controversial and could lead to disagreement between the Commission and the applicants. A subsequent appeal to the High Court would be very expensive, long and complicated, involving significant economic data and analysis. Such a criticism is well placed. However, it could equally be directed at the Real Risk approach. There too the Commission is required to undertake economic analysis of the proposed acquisition and, if the parties disagree over the Commission's modelling, the ensuing litigation is likely to be long, expensive and complicated. Thus, if there is no reliable economic data available the implication and solution in the Real Risk approach and the Expected Value approach is the same: to skip the quantitative assessment and focus on theoretical and qualitative concerns.

Moreover, it is submitted that where the data is reliable but the Commission misapplies the economic modelling, then the applicant is entitled to, and should challenge the modelling. In such a case the area requiring improvement is not the theoretical treatment of complicated economic data, but the quality of modelling undertaken by the Commission. Further, an Expected Value approach would be preferable to the Real Risk approach in such circumstances by reducing disagreements over small inaccuracies in the economic modelling. For example, under a 30% probability threshold it may be extremely important for an applicant to establish whether the likelihood of a potential event is estimated at 28% or 32%.[139] As a result significant resources may be expended in debunking the Commission's accuracy when assessing the event's probability. Expected Value, on the other hand, combines all the merger's figures together instead of focusing on one single figure. Therefore such a small variation would be virtually immaterial when using Expected Value, especially once qualitative factors are taken into account.[140]

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[138] Katz and Shelanski, above n 88, 553. Note, however, that Katz and Shelanski address this criticism from the context of evidence in American antitrust cases.

[139] Similarly, under an impressionistic approach, where it is controversial whether a counterfactual is 'likely' or not, the parties will conduct the same expensive exercise. The central difference between a percentage probability threshold and an impressionistic threshold is that the decision-maker has more discretion when using an impressionistic threshold. While the use of that discretion may in some cases resolve the disagreement, in other cases it may simply form the grounds for an expensive and drawn out appeal process.

[140] For example two calculations of expected value with such a variation could be

Some could build on the above potential criticism and claim that parties to litigation would engage in expensive 'arms races' or that judges could manipulate Expected Value and use it as a cover for intuitive judgments rather than a way of forcing transparency. Such criticism misses the purpose of Expected Value. Expected Value cannot, and is not designed to provide a foolproof mechanism for foreseeing the future. Expected Value is merely designed to improve the Commission's merger evaluation from its current state and provide a comprehensive summary of the quantitative information already at the Commission's disposal. It is possible that some people may attempt to manipulate Expected Value. However, Expected Value would be harder to manipulate than the Real Risk approach because Expected Value mandates deference to more objective criteria and, unlike the Real Risk approach, does not condone judges using their own intuitive impression to determine the outcome of complicated legal proceedings. The final potential criticism that this paper will address is that the Expected Value approach takes into account price decreases as well as price increases for consumers. This appears, on first inspection, similar to merger authorisation under s 67 of the Act where the Commission is required to look at the net benefit to the public.[141] Therefore, the argument would run, the Expected Value approach wrongly encroaches on territory reserved for merger authorisations.

The response to this criticism is twofold. First, it is true that the Expected Value approach increases the level of overlap between the clearance and authorisation provisions. However, the authorisation process takes into account significantly more information on the benefits to the public than the Expected Value approach. This 'Public Benefit' test under s 67 has been given a wide interpretation that includes matters such as greater international competitiveness for New Zealand, increased utilisation of New Zealand resources, preserving local economic activity and employment, better consumer information

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$(0.28 \times 0.05 + 0.72 \times 0.01) = 2.12\%$ and

$(0.32 \times 0.05 + 0.68 \times 0.01) = 2.28\%.$

The difference between the two figures is a fraction of percentage point (0.16%).

[141] Section 67(3)(b) requires the Commission to authorise a merger "if it is satisfied that the acquisition will result, or will be likely to result, in such a benefit to the public that it should be permitted." For an explanation of the net benefit test and some of its shortcomings see G Bertram, "What's Wrong With New Zealand's Public Benefit Test?" (2004) 38 New Zealand Economic Papers 265.

and preventing "free riding",[142] to name a few. Moreover, there is a difference between the authorisation procedure and the clearance procedure in the way the information is used.[143] The authorisation process uses this information to assess whether there is a net benefit to the public, while the clearance procedure uses this information to assess whether there is likely to be a change in the competitive pressures in a market.[144]

Second, the clearance process is a complex process. The Court of Appeal in the *Warehouse Case* noted that the 10 working day timeframe for clearances[145] is not an indication that the clearance process should be used only for obvious cases.[146] In practice it takes the Commission over two months on average to assess and publish a clearance decision.[147] In making this decision all relevant and available information that affects competition in the market should be taken into account to evaluate the likely effect of the merger.[148] This should include potential increases in competition as well as decreases in competition.

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[142] R Ahdar, "The Authorisation Process and the 'Public Benefit' Test" in R Ahdar (ed.), *Competition Law & Policy in New Zealand* (The Law Book Company, Sydney, 1991), 217, 239. See also Jill Caughey, *A Tangible Distinction? Intangibles and the Public Benefit Test in the Commerce Act 1986* (Honours Research Paper, University of Otago, 2006).

[143] See R Ahdar, "A Tale of Two Airlines (Still)" (2005) 33 Australian Business Law Review 64 for an analysis of *Air New Zealand Ltd v Commerce Commission (No 6)* (2004) 11 TCLR 374 where the Commission was required to analyse both a SLC and the public benefit tests under a merger authorisation request.

[144] For alternative views on analysing what constitutes a "Public Benefit" and the different factors that could be considered in the test see J S Gans, "Reconsidering the Public Benefit Test in Merger Analysis: The Role of 'Pass Through'" (2006) 34 Australian Business Law Review 28, P Hughes, "Comments on Professor Joshua Gans's Presentation 'Reconsidering the Public Benefit Test'" (2006) 34 Australian Business Law Review 49 and S P King, "The Public Benefit Standard for Merger Authorisations" (2006) 34 Australian Business Law Review 38.

[145] Section 66(3) of the Commerce Act 1986 requires the Commission to issue a decision over a clearance application within 10 working days unless the applicant agrees to extend that period.

[146] *Warehouse Case CA*, [96].

[147] Ministry of Economic Development, *Discussion Document: Review of the Clearance and Authorisation Provisions under the Commerce Act 1986* (Wellington, 2007), 25.

[148] *Warehouse Case CA*, [101].

5. Does the Commerce Act 1986 prohibit an Expected Value approach?

It is well established that merger analysis in New Zealand requires a comparison of the factual with the counterfactual.[149] The word 'likely' in s 66 dictates how the Commission and the courts are to treat uncertainty in merger analysis. 'Likely' is not defined in the Commerce Act 1986. Nonetheless, 'likely' has been interpreted as providing for a Real Risk approach in *Port Nelson Ltd v Commerce Commission*[150] case, which interpreted 'likely' in the context of s 27 and restrictive trade practices, and has since been expanded to all usage of the term 'likely' in the Commerce Act, regardless of the differences in context.[151] Clearly, Parliament could mandate the use of an Expected Value approach through specific legislation. However, this paper contends that the Supreme Court could reverse *Port Nelson* in the context of s 66 clearance applications, and adopt an Expected Value approach. The question that arises is whether, in this context, an interpretation of 'likely' necessarily dictates a Real Risk approach and prohibits an Expected Value approach.[152]

The interpretation of 'likely' depends on the statutory context in which it exists.[153] In *Telecom Corporation of New Zealand Ltd v Commerce Commission*[154] the Court of Appeal held that the essential notions and objectives of the Commerce Act 1986 were economic ones.[155] Words such as "market" and "competition" should be interpreted with reference to their economic equivalent.[156] Maureen Brunt, for example, who has sat as lay-member on many competition law cases in New Zealand and Australia, considers that "if antitrust is to be relevant and socially useful, the very fabric of the law must have mixed economic-

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[149] See *Tru Tone Ltd v Festival Records* [1998] 2 NZLR 352 (CA) and *New Zealand Bus Ltd v Commerce Commission* [2007] NZCA 502, [91].

[150] *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554, 563.

[151] For an in depth discussion on the evolution of the interpretation of 'likely' under the Commerce Act 1986 see above n 66.

[152] Note that Katz and Shelanski consider that Expected Value is not barred by the US statutory language which bars mergers where "the effect of such acquisition *may be* substantially to lessen competition or to tend to create a monopoly" (emphasis added, Katz and Shelanski, above n 88, 562-564).

[153] *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, 404.

[154] [1992] 3 NZLR 429.

[155] Ibid, 441.

[156] See Miriam Dean and Tom Weston, *New Zealand Law Society Seminar: Competition Law Update* (New Zealand Law Society, 2001), part 3.

legal content, with due attention given to both."[157] Thus, interpretation of 'likely' within the Commerce Act 1986 could be performed with reference to its economic equivalents of risk assessment, which would include Expected Value.[158]

Moreover, the current interpretation of s 66 assesses the likelihood of individual counterfactuals without linking them to the outcome or effect.[159] This interpretation appears incompatible with s 66, which requires an assessment of the merger's "likely effect of substantially lessening competition".[160] Read literally, the likely effect is for the merger as a whole where the likelihood and effect are linked to each other. This is precisely what Expected Value calculates. The current interpretation reads s 66 as if it read "a likely factual or counterfactual that has an effect of substantially lessening competition", despite no indication in the section that it should be read this way.

Finally, the Court of Appeal in *Benton v Miller & Poulgrain (a firm)*[161] discussed the treatment of uncertainty in the context of negligence and a loss of chance. Loss of chance evaluation involves a counterfactual analysis,[162] similar to that undertaken in merger analysis. In that context the Court found that uncertainty could either be evaluated on an "all-or-nothing" basis by reference to the balance of probabilities or on a proportionate basis.[163] The Court held that where the question is how would the plaintiff have acted in the absence of a breach of duty it should be evaluated on an all-or-nothing basis.[164] However, uncertainties as to how third parties would have acted should be

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[157] M Brunt, "Antitrust in the Courts: The Role of Economics and of Economists" in M Brunt (ed.), *Economic Essays on Australian and New Zealand Competition Law* (Kluwer Law International, The Hague, 2003), 353, 354.

[158] See Gollier, above n 96.

[159] The danger with such an approach is that "When merger review addresses uncertainty by overemphasising the likelihood of particular outcomes and discounting the importance of those outcomes, except perhaps when that importance reaches 'extraordinary' scale, a small effect that has a high probability of occurring may weigh much more heavily in enforcement decisions than an effect whose probability is lower but whose consequence is of greater magnitude. Such an approach could have perverse effects on consumer welfare." (Katz and Shelanski, above n 88, 545)

[160] Commerce Act 1986, s 66(3)(a).

[161] [2005] 1 NZLR 66.

[162] Ibid, [46].

[163] Ibid, [44].

[164] Ibid, [47].

evaluated on a proportionate basis.[165] Similarly in merger analysis, when evaluating the 'likely' effect of a merger, it is necessary to evaluate how customers and other participants in the market are likely to react. Extending the *Benton v Miller* ratio, the evaluation of what is 'likely' in merger analysis should use a more sophisticated method than a simple all-or-nothing approach. As a result, not only is it open to the courts to interpret 'likely' as allowing an Expected Value approach, it is more consistent with the legislation to do so.

Conclusion

Returning to the observation made at the introduction to this paper, the change in the legal test of merger analysis in 2001 provided the Commission and the courts with an opportunity to improve merger analysis. While sophisticated economic analysis is used in some areas of merger analysis, its absence in other areas materially reduces the quality of the analysis. The Real Risk approach expressed by the Court of Appeal in the *Warehouse Case* perpetuates this lack of sophistication. The most serious shortcoming of the Real Risk approach is its treatment of events with a low probability as if they did not exist and events with a high probability as if they were certain to occur, which can have perverse effects on consumer welfare. It also fails to link effects to their probability. The impressionistic aspect of this approach, as expressed by the Court of Appeal, injects unnecessary vagueness into this flawed assessment of likelihood.

As an alternative, this paper advocates an Expected Value approach to the evaluation of uncertainty in merger clearance applications. Expected Value is commonly used by businesses to evaluate risk in cost-benefit analysis and guide decision-makers.[166] This approach allows the Commission and the courts to consider the merger's entire quantitative effect using a single figure that denotes the merger's 'likely' effect. At the same time Expected Value provides a clear and simple measure that allows applicants to determine what the Commission and the courts will consider the merger's 'likely' effect to be. Since it would be open to the courts to adopt an Expected Value approach under current legislation, it is submitted that they should do so.

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[165] Ibid, [49].

[166] Heyer, above n 95, 376.

IT COULD HAVE BEEN OTHERWISE: EMPHASISING STUDENT EMPOWERMENT (VOICE, AGENCY AND NEEDS) IN MODERN LEGAL EDUCATION

JENNIFER MOORE*

Introduction

> Richard D Kahlenberg, Harvard law student: "My hatred for Harvard Law only grew as I realised that this school didn't have to put people through this hell, that there were other, more effective teaching methods. In my own timid way, I had, as Dunc [Kennedy] urged, resisted!"[1]
>
> Scott Turow, Harvard law student: "It was really wrong. A teacher shouldn't treat a student that way…It was agreed that a letter of protest would be written."[2]

The law students' accounts above capture the intensity of legal education. International empirical research supports students' stories of law school, indicating that the experience of legal education is frequently "psychologically distressing,"[3] "hell,"[4] alienating, competitive

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[1] Richard D Kahlenberg *Broken Contract: A Memoir of Harvard Law School* (Hill and Wang, New York, 1992) 128.

[2] Scott Turow *One L* (G P Putman's Sons, New York, 1977) 152.

[3] Andrew Benjamin "The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers" (1986) 2 American Bar Foundation Research Journal 225. See also Lawrence Krieger "Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence" (2002) 114 Journal of Legal Education 112; Caroline Morris " 'A Mean Hard Place'? Law Students Tell It As It Is" (2005) 36 VUWLR 197; James Olgoff "More than 'Learning to Think Like a Lawyer': The Empirical Research on Legal Education" (2000) 34 Creighton Law Review 73; Michael Rustad and Thomas Koenig "Symposium: Perspectives on Lawyer Happiness: A Hard Day's Night: Hierarchy, History and Happiness in Legal Education" (2008) 58 Syracuse Law Review 261.

[4] Kahlenberg, above n 1, 128.

and "actually makes students sick!"[5] This literature also depicts legal education as a far more dissatisfying experience for students who are female, homosexual or from minority ethnic groups.[6] As Whiu explains, bicultural legal education is safer than the current dominant legal educational system for Maori law students.[7]

Kennedy's critique of legal education[8] lacks an empirically grounded student voice, even though much of the discussion purports to analyse their experiences. He concedes that it is "hard"[9] for him to "know whether [he] even understands the attitudes toward hierarchy of women and blacks, for example, or of children of working-class parents."[10] Despite this concession, Kennedy fails to remedy the limitations of his analysis by including students' own voices. This essay critiques Kennedy's analysis of legal education. Given that Kennedy is a United States law professor, I focus on the experiences of United States law students. However, as I have indicated, the international literature suggests that the experiences of law students in many other countries are similar.

My critique of Kennedy's non-empirical discussion highlights the broader debate about the limitations of Critical Legal Studies method and, particularly, the marginal position of empirical research in many law schools.[11] The consequence of Kennedy's failure to include empirical evidence is that law students become "absent presences."[12]

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[5] Morrison Torrey "Yet Another Gender Study? A Critique of the Harvard Study and a Proposal for Change" (2007) 13 William and Mary Journal of Women and the Law 795, 805.

[6] Leah Whiu "A Maori Woman's Experience of Feminist Legal Education in Aotearoa" (1994) 2 Waikato Law Review 161; Morrison Torrey "What Every First Year Female Law Student Should Know" (1998) 7 Columbia Journal of Gender and Law 267; Janice Austin "Results From a Survey: Gay, Lesbian and Bisexual Students' Attitudes About Law School" (1998) 48 Journal of Legal Education 157; Timothy Clydesdale "A Forked River Runs Through Law School: Toward Understanding Race, Gender, Age and Related Gaps in Law School Performance and Bar Passage" (2004) 29 Law and Social Inquiry 711.

[7] Ibid.

[8] Duncan Kennedy "Legal Education as Training for Hierarchy" in David Kairys (ed) *The Politics of Law* (Pantheon, New York, 1982) 40.

[9] Ibid, 61.

[10] Ibid.

[11] David Trubek "Where The Action Is: Critical Legal Studies and Empiricism" (1984) 36 Stanford Law Review 575.

[12] Anne Witz "Whose Body Matters? Feminist Sociology and the Corporeal Turn in Sociology and Feminism" (2000) 6 Body and Society 1, 3. Kennedy's interpretation of law students' experiences is at the centre of his analysis (thus students are present), but the inclusion of students' own voices is noticeably absent.

My point is not that Kennedy lacks authority to discuss legal education; he was a law student and he is a law professor. However, researchers question writing which is based on limited samples.[13]

Kennedy's polemic creates a hierarchy in the conceptualisation of student behaviour: students either (and typically according to Kennedy) reproduce legal hierarchies, or they resist. His focus on the "passivizing"[14] effects of hierarchical legal education, combined with the absence of students' own voices, produces an analysis that demands resistance from students but constructs an image of students who are powerless to resist.

Inclusion of students' voices would have revealed a more complicated picture. As Kahlenberg and Turow's accounts above illustrate, students can, and do, resist and even write protest letters. While not denying that law students are subjected to the pacifying exploitation of legal education, subordination is not a fixed feature of law students' subjectivities.

This essay began with students' own voices in order to inject some empiricism into the discussion of legal education. I explore Kennedy's critique of legal education by analysing my own, and other law students', experiences of law school primarily through the lenses of (legal and non-legal) feminist[15] poststructuralism and critical race theory.

Exploring students' experiences highlights that the way law is taught is not an inevitable outcome: "it could have been otherwise,"[16] there are "other, more effective teaching methods"[17] that could have been, and could be, constructed as right. Such an analysis reveals that the status quo is a constructed achievement and that there are alternatives such as "bicultural"[18] and student-centred legal education.

Aspects of Kennedy's analysis of legal pedagogy are more convincing than his descriptive claims about law students and teachers.

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[13] Carl Davidson and Martin Tolich (eds) *Social Science Research in New Zealand: Many Paths To Understanding* (Pearson, Auckland, 2003); D A de Vaus *Surveys in Social Research* (Allen & Unwin, Sydney, 2002).

[14] Kennedy, above n 8, 43.

[15] There is no such thing as 'the' feminist perspective or univocal theory. Rather, as Davies has pointed out, it is more appropriate to refer to "feminisms". See Margaret Davies *Asking the Law Question: The Dissolution of Legal Theory* (2 ed, Lawbook Company, Sydney, 2002) 203.

[16] Everett Hughes *The Sociological Eye* (Aldine, Chicago, 1971) 12.

[17] Kahlenberg above n 1, 128.

[18] Whiu, above n 6, 162.

Kennedy's argument that students can do "little or nothing"[19] to change legal hierarchies fits uneasily with his admonition to: "Resist!"[20] By excluding student voice from his analysis, Kennedy (ironically) reproduces a central legal hierarchy whereby experience is subordinated in favour of abstract theorising.

I disrupt Kennedy's hierarchy by placing 'experience' (examined from a critical poststructuralist perspective)[21] centre-stage alongside theorising. I also take seriously Delgado's "plea for narrative."[22] I interrupt the traditional essay structure with stories about my experiences of legal education. In keeping with critical race theorists' use of stories, fiction, poetry and narrative,[23] this essay also uses a poem to convey my message. Following feminist legal scholars and critical race theorists, I disrupt Kennedy's hierarchy by emphasising an alternative approach where experience (examined critically), narrative, and different (often active) images of students take centre-stage alongside theorising. My narrative critiques of legal education should not be interpreted as evidence that I do not enjoy studying law.

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[19] Kennedy, above n 8, 50.

[20] Duncan Kennedy *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (Afar, Cambridge, 1983) ii.

[21] Banu Ramachandran "Re-Reading Difference: Feminist Critiques of The Law School Classroom and The Problem with Speaking From Experience" (1998) 98 Columbia Law Review 1757; Donna Haraway *Simians, Cyborgs and Women: The Reinvention of Nature* (Routledge, New York, 1991); Alison Jones "Teaching Post-structuralist Feminist Theory in Education: Student Resistances" (1997) 9 Gender and Education 261; Brownyn Davies "The Subject of Post-structuralism: A Reply to Alison Jones" (1997) 9 Gender and Education 271; Dorinne Kondo *Crafting Selves* (Chicago University Press, Chicago, 1990). Postructuralists do not dispense with the notion of 'experience' entirely. The shift involves viewing experience as discursive. It is beyond the scope of this essay to delve in detail into postmodernism and poststructuralism. These movements are often used interchangeably. For instance, 'postmodernism' is often used despite the discussion of poststructuralist ideas by Gary Minda "Jurisprudence at Century's End" (1993) 43 Journal of Legal Education 27. I treat the two movements as somewhat similar in that they are both anti-foundationalist, critical of liberal humanism and have radicalised notions of power, meaning and the self. However, they are different. While postmodernism describes the general character of the present age (lacking faith in objectivity), poststructuralism is particularly concerned with dismantling discursive practices such as hierarchical oppositions.

[22] Richard Delgado "Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative" in Richard Delgado (ed) *Critical Race Theory* (Temple University Press, Philadelphia, 1995) 64.

[23] M J Matsuda, C R Lawrence, R Delgado and K W Crenshaw (eds) *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press, Boulder, 1993) 5.

I find law a stimulating challenge.[24] My critiques do not mean that there are few good law school teachers.

A. "Chatterbox" Counter-Narrative

The Victoria University lecturer was at the front of the classroom. The students sat quietly in rows of seats facing the teacher. The physical layout of the room emphasised the hierarchical lecturer-student relationship. An Australian law student notes how the physical spaces of her law school accentuate hierarchies. She describes the fourteen-storey building which houses the law school as "intimidating", "non-student friendly" and "hierarchical."[25]

I interrupted with questions during the lecture. My water bottle made faint cracking noises as I squeezed the bottle to sip the water. The lecturer said the drink bottle was too noisy. At the end of the class, I asked another question. The lecturer said "This is unacceptable. You've asked enough questions. I have a lot of material that I have to teach you. You're too much of a chatterbox."

Rather than pacifying[26] me, or turning me into a "docile"[27] law student, the experience had the opposite effect: I felt indignant. Surely there was nothing wrong with being a "chatterbox", which I preferred to translate as 'communicative extrovert'. I thought I was engaging in 'Socratic dialogue.'

In the Israeli Hebrew University classroom, there was left-over *challah*[28] on a table in the centre of the classroom. The circular layout of the room contrasted with the classroom at Victoria University. Rather than reflecting hierarchies, the classroom environment in Israel signified collaborative teacher-student

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[24] Turow, Kahlenberg and Kimes (all of whom have critiqued their legal educations) make similar disclaimers and insist that they enjoyed law school despite the challenges. Martha Kimes *Ivy Briefs: True Tales of a Neurotic Law Student* (Atria, New York, 2007); Turow, above n 2; Kahlenberg, above n 1.

[25] Miranda Stewart "Conflict and Connection at Sydney University Law School: Twelve Women Speak Of Our Legal Education" (1992) 18 Melbourne University Law Review 828, 837.

[26] Kennedy, above n 8, 43.

[27] Anon "Making Docile Lawyers: An Essay on the Pacification of Law Students" (1998) 111 Harvard Law Rev 2027.

[28] *Challah* is bread eaten on Shabbat, the Jewish Sabbath from Friday sundown to Saturday sundown.

relationships.[29]

When the teacher arrived he said: "*Nu*?!"[30] Multiple students, simultaneously, started making comments about Jewish law. The lecturer was not the source of all the knowledge. Rather, he acted like a learning coach. Teaching and learning were merged, much like the Maori concept of *ako* and their approach that "everyone is a teacher and everyone is a learner."[31]

My experiences at Hebrew University and as a teacher taught me that it "could have been otherwise"[32] and, indeed, that it actually *was* otherwise in some classrooms. My insistence on speaking up at Victoria University represented, for me, a micro, daily effort to destabilise the traditional teacher/student hierarchy. I constructed a counter-narrative: I am a learner and teacher with an inquiring disposition, who comes from a cultural background in which questioning, interrupting, and eating or drinking while learning is *acceptable*.

Constructing an essential Jewish or New Zealand identity would be inaccurate. My subjectivity is on the "border lands,"[33] an intricate interlacing of multiple parts such as: Jewish woman, (dis)abled, wife, student, middle class, gymnast, teacher, researcher, community

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[29] I am not arguing that all classrooms at Hebrew University or Victoria University have the physical layouts that I describe. I do not wish to idealise Hebrew University as the perfect classroom. On the contrary, as an advocate of learner-centred approaches to teaching, different styles of teaching are appropriate depending on the learner and circumstances. I am using the contrasting physical spaces to highlight that there are different ways to teach law.

[30] *Nu* is a Hebrew colloquialism. It does not have a satisfactory English translation. The meaning is something like "well, hurry up then, respond." Israelis are often compared with *Sabras*, a pear which is prickly on the outside and mushy on the inside. Many visitors to Israel find the Israeli Jewish culture affronting and rude. *Nu* captures this supposedly aggressive and rude characteristic of Jews, particularly Israelis.

[31] Russell Bishop and Ted Glynn *Culture Counts: Changing Power Relations in Education* (Dunmore Press, Auckland, 1999).

[32] Hughes, above n 16, 12.

[33] For examples of border lands writers see Gloria Anzaldua *Border Lands: La Frontera: The New Mestiza* (Aunt Lute Books, New York, 1999); Gloria Anzaldua "How To Tame a Wild Tongue" in Jessica Munns & Gita Rajan (eds) *A Cultural Studies Reader: History, Theory, Practice* (Longman, London and New York, 1995) 402; Gayatri Chakravorty Spivak "Can the Subaltern Speak?" in Cary Nelson and Lawrence Grossberg (ed) *Marxism and the Interpretation of Culture* (University of Illinois Press, Urbana, 1988); Robert Burt *Two Jewish Justices: Outcasts in the Promised Land* (University of California Press, Berkeley, 1988). Anzaldua writes in both English and Spanish (without translation) in order to force the non-Spanish speaking reader to temporarily experience living on the border between different cultures and languages.

member. Nevertheless, some feminist legal theorists speak of woman as though she is a fixed, essential category. The assumption is that just because I am a woman, I must experience law school as unsafe in the same way as other women. For example, one of the main complaints which female law students make is that legal education "silences"[34] women. For me, the questioner role adopted in *Pesach* each year would not stand by, quietly, and allow me to be silenced.[35] Differences between women and students make essentialism dangerous.

B. Kennedy's Hierarchies

Kennedy's central polemic is that legal education contributes to illegitimate hierarchies in society and the bar.[36] The dominance of law lecturers over students is the most fundamental hierarchy. Aggressive pedagogy in legal education creates an oppressive atmosphere. The best response is a large-scale movement aimed at liberating students and staff from hierarchies.

Aspects of Kennedy's analysis ring true. There are poor teachers and students who become frightened and apathetic. However, Kennedy's description of legal education is not the complete picture. The structuralism[37] underlying his analysis leads to an image of an entrenched hierarchical legal education system. While hierarchies do exist in legal education, they are not immune to disruptions and destabilisation. By focusing on macro-structures, Kennedy fails to notice micro resistance.

Kennedy simplifies power to those who have it and those who do not. In contrast, Foucault reconceptualises power as circulating and diffuse, rather than as fixed, so that wherever power is located, it

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[34] Lucinda Finley "Women's Experience in Legal Education: Silencing and Alienation" (1989) 1 Legal Education Review 101; Jenny Morgan "The Socratic Method: Silencing Cooperation" (1989) 1 Legal Education Review 151. See also Melissa Cole "Struggling to Enjoy Ourselves or Enjoying the Struggle? One Perspective From the Newest Generation of Women Law Professors" (2000) 10 UCLA Women's Law Journal 321, 325 for a discussion of the "burden" of being the "woman-who-talked."

[35] During *Pesach* (Passover) someone is asked to be the questioner for the evening. His/her role is to probe other members around the dinner table about the festival. Questions and interruptions are encouraged.

[36] Kennedy, above n 8; Kennedy, above n 20.

[37] I realise that Critical Legal Scholars, such as Kennedy, draw from poststructuralism and postmodernism, but I am arguing that in his critique of legal education, there is an underlying structuralism to the analysis.

invites resistance and destablises conventional notions of authority.[38] At first glance, Kennedy's construction of the docile law student appears similar to Foucault's notion of docile and disciplined bodies.[39] However, the difference between the two approaches to docility is that Foucault emphasises the interconnection of power and resistance, whereas, Kennedy does not. Many feminist writers have been attracted to Foucault's approach to power because he recognises that power should not only be understood in terms of a structural, institutional centre but also that there are capillaries or micro sites of power.[40] This essay focuses on micro sites of resistance, including "small, everyday actions of seeming insignificance that can nevertheless validate the actor's sense of dignity."[41] Using a Foucauldian approach to power avoids the trap (into which Kennedy falls) of constructing students as powerless victims paralysed in a powerful institution.

1. Kennedy's construction of the passive law student

Kennedy's construction of the passive law student is not only reductive, but also disempowering. His claim that the experience of law students is "double surrender: to a passivizing classroom experience and to a passive attitude toward the content of the legal system."[42] Kennedy should not assume that docility is an essential, fixed element of all students' subjectivities. Had he actually spoken to students, he may have been surprised by the range of experiences and attitudes.[43] For example, Cole describes a confrontation with one of her teachers:[44]

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[38] Michel Foucault *Power/Knowledge: Selected Interviews and Other Writings* C Gordon (ed) (Harvester Wheatsheaf, New York, 1977).

[39] Michel Foucualt *Discipline and Punish: The Birth of the Prison* Translated by Alan Sheridan (Vintage Books, New York, 1977).

[40] For example, see Adrian Howe *Punish and Critique: Towards a Feminist Analysis of Penalty* (Routledge, London, 1994); Drucilla Cornell *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (Routledge, New York and London, 1991).

[41] Paulette Caldwell "A Hair Piece: Perspectives on the Intersection of Race and Gender" in Richard Delgado (ed) *Critical Race Theory* (Temple University Press, Philadelphia, 1995) 276.

[42] Kennedy, above n 8, 43.

[43] Kennedy's section entitled "the student response to hierarchy" suggests that students' voices will be central. But, the section is disappointingly devoid of actual students' comments. His analysis is arguably based on a pseudo participant-observation which involves "looking around" and observing students in a less than systematic fashion. Kennedy, above n 7, 59.

[44] Cole, above n 34, 323.

> The professor calls on a man: "Mister?" "Smith," comes the reply. "Smith," the professor repeats, committing the name to memory. Another, "Mister?" "Brown." "Brown." Then me. "Miss?" I don't hesitate. "*Ms* Cole." "*Miss* Cole," he replies with a smile. I believe he enjoys the fact that I fight him from that day forward. (Emphasis in the original).

According to Kennedy, when a teacher makes sexist or racist remarks it is "unlikely that [students] will do anything in the classroom setting itself, however much [they] gripe to friends."[45] Kennedy's observation may be true for some students. However, Cole's example illustrates that some students *do* respond to sexist remarks in the classroom setting.

It is significant that Cole explains her ongoing confrontations with her law teachers as a "fight." Radical legal feminists, such as Catharine MacKinnon, typically focus on the sexualisation of oppression and dominance.[46] This approach, while influential, has been criticised as being disempowering for women and one-dimensional.[47] To counter the disabling effects of theorising women as subjugated, some feminists have sought to present positive, empowering images of women as resisters.[48] For instance, Atwood urges women to resist "victim positions."[49] Similarly, Marcus's discussion of rape displaces the dominant narrative of female rape victim as passive and, instead,

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[45] Kennedy, above n 8, 63-64.

[46] Catharine MacKinnon *Toward a Feminist Theory of the State* (Harvard University Press, Cambridge, 1989); Catharine MacKinnon *Feminism Unmodified: Discourses on Life and the Law* (Harvard University Press, Cambridge, 1987).

[47] For example, see Kathryn Abrams "Sex Wars Redux: Agency and Coercion in Feminist Legal Theory" (1995) 95 Columbia Law Review 304; Drucilla Cornell "Feminism Always Modified: The Affirmation of Feminine Difference Rethought" in Cornell *Beyond Accommodation: Ethical Feminism, Deconstruction and The Law* (Routledge, London and New York, 1991) 119.

[48] For example, see Sharon Marcus "Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention" in J Butler and JW Scott (eds) *Feminists Theorise the Political* (London, Routledge, 1992); Margaret Atwood *Survival: A Thematic Guide To Canadian Literature* (Anansi, Toronto, 1972).

[49] Margaret Atwood *Survival: A Thematic Guide To Canadian Literature* (Anansi, Toronto, 1972). In *Survival*, Atwood identifies different victim positions and then divides Canadian literature according to which victim position is articulated. Atwood's novel *Surfacing* (Virago Press, London, 1972) is arguably an example of her victim position number four: the "creative non-victim". Also, for discussion of oral contraceptive users' resistance to the media's depiction of them as victims, see Jennifer Hester-Moore "Bricolage and Bodies of Knowledge: Exploring Consumer Responses to Controversy about the Third Generation Oral Contraceptive Pill" (2005) 11 Body and Society 77.

emphasises women's capacity for retaliation, their "fighting bodies, fighting words."[50] Cole also "fights" back. She is not paralysed by the classroom experience.

I am not suggesting that the experiences of rape and a dissatisfying legal education are analogous. My intention is to highlight the importance of reconfiguring students as active agents. Kennedy is bound to disempower students and staff by telling them that law school cannot be improved except by total structural reorganisation. Thankfully many feminist writers have not taken such a disenabling approach.

In addition to feminists, some critical race theorists have also criticised portrayals of, for example, African Americans as passive victims. For instance, the term "Uncle Tom" (and its connotations of passivity) was resisted during the American civil rights movement.[51] In terms of legal education, not all African American students do "little or nothing"[52] when confronted with racism in law school. At Harvard Law School in 1981 there was a student boycott and an alternative course organised.[53] The students' agency challenges Kennedy's claim that all students have "passive attitude[s] toward the content of the legal system."[54] These students did not "surrender"[55] themselves to a legal curriculum that failed to be responsive to their needs as ethnic minorities.

Some students also challenge Kennedy's contention that they will passively accept their subordinated places in law firm hierarchies. Kimes describes her resistance during her first law job after graduation. She is unhappy working under a partner (Jerome) in the firm. Once Kimes realises that she is "entitled", she decides to confront Jerome:[56]

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[50] Marcus, above n 48.

[51] Michael Asimov and Shannon Mader "Lawyers as Heroes Assigned Film: To Kill a Mockingbird (1962)" in *Law and Popular Culture: A Course Book* (Peter Long, New York, 2004) 31.

[52] Kennedy, above n 8, 50.

[53] M J Matsuda, C R Lawrence, R Delgado and K W Crenshaw (eds) *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press, Boulder, 1993) 4. The aim of the protest was to achieve greater representation of tenured lecturers of colour.

[54] Kennedy, above n 8, 43.

[55] Ibid.

[56] Kimes, above n 24, 208.

> Entitlement – what a wonderful thing… Because I like life better this way. What was it with that self-doubting, hardworking, subservient attitude I'd been carrying around. God, I was such a sucker! Self-doubt is for losers... Entitlement! Yeah! That's where it's at!

Kimes's epiphany about her "entitlement" suggests that law students are not necessarily inherently or *essentially* docile. As Kimes asserts, "self-doubt is for losers" and such traits need not determine students'/lawyers' subjectivities. An alternative interpretation of Kimes's experience is that students are neither essentially docile nor active. Rather, subjectivities are fluid and comprise complicated mixtures of "subservience" and agency.

My intention in presenting proactive, resistant students' voices is to emphasise student empowerment. Kennedy shows little inclination to testing his observations of docile students against possible alternatives such as active students. My critique of the lack of empiricism in Kennedy's work does not mean that the use of narrative is unproblematic. The difference is that the narrative style is a discussion of the scholar's own experiences, whereas Kennedy's analysis purports to be speaking *for* other people without asking them to speak for themselves.

2. Kennedy's construction of the law professor as Kingsfield[57]

Kennedy's polemic about law school also showcases a law professor stock character. One kind of teacher, Kingsfield, dominates Kennedy's discussion. My contention is that Kennedy's vision of legal education centralises some characters and marginalises others. Kingsfield speaks through Kennedy via the frequent references to brutal teaching techniques such as the "incapacitating device"[58] of teaching doctrine and the "fear"[59] shrouding the Socratic classroom. To be sure, there are teachers at law school who appear to model themselves on Kingsfield.

However, legal education does have better teachers than Kingsfield. There are law teachers who favour relaxed rather than tense classrooms, encouragement and nurturing over competition, and theory and policy over doctrine. I recall being engrossed by one contract

[57] Professor Kingsfield is the contract professor in the movie *The Paper Chase* (Boston, 1971).
[58] Kennedy, above n 20, 30.
[59] Kennedy, above n 8, 42.

lecturer's use of theory to help us to understand the development of undue influence. Her approach generated interesting classes and a deep understanding of the concept. I have also experienced the joy of fun learning spaces. One lecturer, for example, used bingo in order to assist us to revise for exams. Students who answered questions correctly and called "bingo" were then presented with sweets as prizes. The classroom atmosphere was relaxed and students engaged in active learning.

Good teaching encourages and inspires students to learn. Kahlenberg describes feeling "energized"[60] by his adviser Alan Dershowitz because of this teacher's engagement in the student's research project. Dershowitz's attention and interest encourages Kahlenberg to "work very hard on [his] paper."[61] Likewise, I have felt stimulated to improve my legal opinion writing by attentive teachers who have provided thorough and constructive feedback on my papers. My experience suggests that Kennedy's contention that students "receive no feedback at all except a grade on a single examination at the end of the course"[62] is now inaccurate. In most law schools today this is (thankfully!) no longer the approach to assessment. Educationalists report that exams are a poor way to measure students' grasp of the material.[63]

Recognising that changes have occurred is not to deny that some inappropriate assessment techniques persist in legal academia. For instance, I have received marked law assignments which provided no individualised feedback whatsoever. I have studied in a range of departments where all teachers have provided individualised feedback on marked assignments. Teachers have a responsibility and duty to provide feedback based on students' needs. While generic feedback is helpful, it is limited.[64]

Teachers who invoke the Kingsfield-style Socratic Method may be under the false impression that this technique enables active learning. Forcing frightened students to speak is not active learning. As

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[60] Kahlenberg, above n 1, 210.
[61] Ibid.
[62] Kennedy, above n 8, 51.
[63] William Sullivan, Anne Colby, Judith Wegner, Lloyd Bond and Lee Shulman *Educating Lawyers: Preparation for the Profession of Law* (John Wiley & Sons, San Francisco, 2007) 162; Rosemary Hipkins *Key competencies: Challenges for Implementation into the National Curriculum* (NZCER Press, Wellington, 2006).
[64] For example, see Jane Gilbert *Catching the Knowledge Wave? The Knowledge Society and The Future of Education* (NZCER, Wellington, 2005).

Kennedy rightly points out, the humiliating, nerve-wracking version of the Socratic Method is merely "pseudo-participation."[65] Indeed, complaints have been made about the Socratic Method by multiple authors for many years.[66]

The Socratic Method can be a useful way to teach law, provided it is not invoked Kingsfield-style. In one course, discussion questions are posed to students. If there are no volunteers, the lecturer calls on students, but there is no desperate struggle to "read a [teacher's] mind determined to elude you."[67] On the contrary, this lecturer is genuinely interested in students' answers to the discussion questions.

Regrettably, alternatives to Kingsfield are marginalised in Kennedy's discussion. Lecturers who are "softer,"[68] "mushy"[69] and teach policy, are sidelined as ineffective teachers:[70]

> Teachers are overwhelmingly white, male, and middle class, and most (by no means all) black and women law teachers give the impression of thorough assimilation to that style, or of insecurity and unhappiness.

Despite the presence of women, "softies" and ethnic minorities, Kingsfield appears to be the pedagogical yardstick. Those teachers who do not assimilate to this style apparently experience "insecurity and unhappiness." The Kingsfield measure is dismissive of alternative pedagogies and disempowering to non-Kingsfield teachers. Kennedy's configuration of "mushy", female and minority teachers meshes with

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[65] Kennedy, above n 8, 42.

[66] For example, see Jennifer Rosato "The Socratic Method and Women Law Students: Humanize, Don't Feminize" (1997) 7 Southern California Review of Law and Women's Studies 37; Ruta Stropus "Mend it, Bend it, and Extend it: The Fate of Traditional Law School Methodology in the 21st Century" (1996) 27 Loy Chi Law Review 449; Tanisha Makeba Bailey "The Master's Tools: Deconstructing the Socratic Method and Its Disparate Impact on Women Through the Prism of the Equal Protection Doctrine" (2003) 3 Margins 125; Archie Zariski "Roll Over Socrates: Reflection on the Conference on Clinical Legal Education" (2001) 9 Journal of Professional Legal Education" 149. Krieger explains that "as an experienced litigator" he "rejects the idea that intensely stressing students is useful professional preparation." Lawrence Krieger "Institutional Denial About the Dark Side of Law School, and Fresh Empirical Guidance for Constructively Breaking the Silence" (2002) 52 Journal of Legal Education 112, 124.

[67] Kennedy, above n 8, 42.

[68] Ibid.

[69] Ibid, 43.

[70] Kennedy, above n 20, 62.

his approach to rights. Blaming rights for legitimising an oppressive ideology fails to recognise the experiences of those for whom rights have been important, empowering devices. Williams, for example, argues that for the "historically disempowered, the conferring of rights is symbolic of all the denied aspects of their humanity."[71] Adoption of Kennedy's approach to rights could lead to the depressing conclusion that students have no rights to good teaching. Kennedy's vision might also lead readers to believe that good teaching is nonexistent because of classroom hierarchy. Kennedy could have unpacked the notion of hierarchy further. For instance, Kennedy's analysis of hierarchy pays *less* attention to hierarchies in legal thought.

B. Hierarchies in Western Legal Thought

Western thought is organised around a series of dualisms such as mind/body. The first term is privileged over the second. Feminists argue that dualisms are gendered.[72] Derrida, the chief figure of poststructuralism, argues that this dominant system of thought gains meaning from relations of difference.[73] Cornell, a legal poststructuralist feminist, builds on Derrida's work.[74] Her focus on the boundaries between dualisms is similar to Derrida's notion of 'undecidables.'[75] Undecidables disrupt oppositional logic. People of mixed ethnicities, for example, destabilise the white/black hierarchy. My contention in this essay, that individual law students can be *both* active *and* passive, follows the undecidability tradition by contesting binary oppositions.

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[71] Patricia Williams *The Alchemy of Race and Rights* (Harvard University Press, Cambridge (Mass), 1991), 153.

[72] For example, see Drucilla Cornell *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law* (Routledge, New York and London, 1991); Frances Olsen "The Sex of the Law" in *The Politics of Law: A Progressive Critique* David Kairys (ed) (Pantheon Books, New York, 1990) 453. According to Olsen, the law is identified with the hierarchically superior masculine side of binaries. The law purports to be "rational, objective, abstract and principled, as men claim they are." The law is not supposed to be "irrational, subjective, contextualised, or personalised" as per the alleged construction of women.

[73] Jacques Derrida *Of Grammatology* (translated by G Spiva, John Hopkins University Press, 1974).

[74] Cornell, above n 40.

[75] Jacques Derrida *Writing and Difference* (University of Chicago Press, Chicago, 1978).

1. Unpacking the Rationalism/Empiricism dualism

In the Western tradition there are two basic philosophies of knowledge. In the first, rationalism, knowledge is developed through logical thinking. In the other, empiricism, knowledge is developed through experience and observation. These two approaches can be put together in, for example, social sciences. However, the rational (thinking) model is more highly valued.

Learning to "think like a lawyer"[76] involves the first model of knowledge: rationalism. Although there are some law academics who conduct socio-legal research (combining rationalism and empiricism), such an approach is on the margins of law schools. The dominant model of knowledge is non-empirical rationalism. Rogers explains that legal rationalism makes her feel "assaulted"[77] because there is no acknowledgment that she "feels and experiences."[78] Similarly, MacKinnon has commented that becoming a lawyer means to "forget your feelings, forget your community"[79] and "forget your experience."[80]

Given that it is important for legal thinkers to be rational, it is perhaps unsurprising that Kennedy's analysis privileges abstract theorising. According to Kennedy, law students become paralysed victims of legal education because they possess "no base for the mastery of ambivalence."[81] Only an "extraordinary"[82] student can achieve the "theoretically critical attitude"[83] necessary to avoid becoming docile. This student achieves an objective, rational, intellectual "mastery"[84] of the legal system. By contrast, ordinary students possess only "an emotional stance against the system."[85]

But does resistance to the "ideological content of legal

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[76] Kurt Saunders and Linda Levine "Learning to Think Like A Lawyer" (1994) 29 USFL Review 121.
[77] Carmel Rogers "How Legal Education Will Assault You as a Woman" (1993) 23 VUWLR 167, 172.
[78] Ibid.
[79] Catharine MacKinnon "On Collaboration" in *Feminism Unmodified: Discourses on Life and the Law* (Harvard University Press, Cambridge (Mass), 1987) 198, 205.
[80] Ibid.
[81] Kennedy, above n 20, 22.
[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] Ibid.

education"[86] necessarily require the objective, theoretically critical attitude which Kennedy suggests? Students who wish to avoid having their idealism crushed by the system may need to invoke their experiences and feelings of right and wrong.

When I started law school at Canterbury University in 1995, I remember feeling much like Rogers, "assaulted" by legal reasoning. The writing style struck me as hypocritical. The use of the obligatory "back-handed passive"[87] ('it is submitted that…') appeared false. Given that people write legal opinions it seemed obvious to me that their "social fingerprints"[88] would leave their mark on the legal research process and production of the written text. Legal writers demonstrated little recognition that their analyses were influenced by the epistemological and ontological assumptions that they brought to their work. I felt frustrated by a system of thought which hid behind the cloak of objectivity. When one of my first assignments was returned with a red circle around 'I' and "avoid!" scrawled in red ink, I decided that it would be best to drop law.

Over ten years later, I returned to law school. I no longer feel as disconcerted about legal written expression. Several writers have suggested that increasing the age of law students may protect students against the potentially disturbing experience of legal education.[89] A strong sense of self, a clear sense of purpose (attributes which are more likely to be present in older students) can mitigate the ideology of legal education. I do not think that I have managed to become a non-victim of legal education by becoming Kennedy's "extraordinary" student. Rather, it is my recognition that law is but one system of knowledge and my belief that empathy[90] does make good lawyers, which rescues me from the snare of becoming a docile student.

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[86] Ibid, 14.

[87] Fred Rodell "Goodbye to Law Reviews" in William Fisher, Morton Horwtiz and Thomas Reed (eds) *American Legal Realism* (Oxford University Press, Oxford, 1993) 291. Rodell asserts that there are two things wrong with legal writing: style and content.

[88] Sandra Harding "Is there a Feminist Method?" in Feminism and Methodology (Milton Keynes, Bloomington, 1987) 1, 9.

[89] For example, see Anon, above n 27, 2043.

[90] Some feminist scholars have identified the importance of injecting empathy into legality. West proposes the "literary woman" as a promising option for lawyers who wish to understand others. According to "fem-crits", it is this attention to experience and empathy which differentiates Critical Legal Scholars from feminists. Robin West "Economic Man and Literary Woman: One Contrast" 39 Mercer Law Review (1988) 39 867; Carrie Menkel-Meadow "Feminist Legal Theory, Critical Legal Studies, and Legal Education or The Fem-Crits Go To Law School" (1999) 38 Journal of Legal Education

2. Critiquing the treatment of experience as unmediated truth

Although I stress the importance of empiricism in this essay, I do not treat students' experiences as if they are "waiting outside the violations of language and culture."[91] The quest for access to the 'authentic' meaning of experience has been called into question by several legal theorists.[92] Cornell's critique of MacKinnon,[93] for example, involves identifying a theoretical mistake whereby MacKinnon reinstates the "absolute dichotomy between reality and fiction."[94] According to Cornell, MacKinnon fails to recognise that "we see through the world presented in language."[95]

Similarly, Harris is arguably trying to inject scepticism into school girls' claims that a woman's account of rape "should always be believed!"[96] The girls' treatment of experience as 'truth' sits uncomfortably with (feminist) poststructuralists. A naïve positivism underlies assumptions that people's 'real' thoughts are 'out' there in 'reality' waiting to be discovered. 'Reality', as a problematic notion, is explored by Curnow in the following poem:[97]

It is not what you say,
It is not the way you say it,
It is not the words in a certain order.
Look out the window
It is on the page
Examine the page
It is out the window
Knuckle the cool pane
It is on the bone
Why is the mud glassed?
With mangroves

61; Lynne Henderson "Legality and Empathy" in Patricia Smith *Feminist Jurisprudence* (Oxford University Press, New York, 1993) 244.

[91] Haraway, above n 21, 109-113.

[92] Rosemary Hunter "Close Encounters of a Judicial Kind: 'Hearing' Children's 'Voices' in Family Law Proceedings" (2007) 19 Child and Family Law Quarterly 283; J W Harris *Legal Philosophies* (2 ed, Oxford University Press, Oxford, 2004); Ramachandran, above n 21; Marcus, above n 48.

[93] Cornell, above n 40, 129 describes Mackinnon as a "realist."

[94] Ibid, 131.

[95] Ibid.

[96] Harris, above n 92, 295.

[97] Allen Curnow *Collected Poems 1933-1973* (Reed, Wellington, 1974) 63.

Bedded in the glass?
Why is the cloud
Inverted in the glass?
Why are the islands
In the Gulf stained blue
Grained green with
Interior lighting
By Hoyte?
Why not?

The narrator is involved in the 'framing' of 'reality' outside the window. When he sees Hoyte colours instead of the 'real' scene, he realises that art has formed his perceptions. I also recognise that students' accounts (including my own) of law school experiences involve framing of the events through memories and dominant discourses about legal education.

3. Mind/Body or (dis)embodiment and (dis)ability

In contrast to the poststructural subject, the traditional legal subject has a neutral perspective and he[98] is objective and disembodied. The legal subject is the quintessential humanist subject. The traditional legal subject privileges the mind over the body. For instance, the standard of the reason/able person is a disembodied entity, "everywhere and nowhere."[99] This standard generally does not involve viewing acts in light of what the particular individual might do.[100] This test is supposedly objective. The reasonable person becomes the "unmarked"[101] category. An investigation into the assumptions that underpin the reasonable person reveals that this subject is made from a very specific set of epistemological and ontological tools. He is the product of discourse, constructed from readily available, familiar and enduring narratives from Western logocentrism.

[98] I have deliberately used 'he' here because, as feminist legal scholars have pointed out, the legal subject has traditionally been male.
[99] Haraway, above n 21, 163.
[100] Kent Greenawalt *Law and Objectivity* (Oxford University Press, Oxford, New York, 1992) 4.
[101] Haraway, above n 21, 17.

I remember feeling troubled by *Gustav v Macfield*[102] because our analysis of the case did not unpack the obvious mind/body dualism which was operating in the decision. This case concerned a claim of unconscionable dealing in a commercial land transaction. Mr Parkinson had terminal cancer at the time of the bargain. The Court held that Mr Parkinson did not have a disability. This finding was made despite expert oncological evidence that Mr Parkinson's ability to preserve his interests would have been severely diminished as a result of the cancer and the effect of the drugs. The Court held that although the effects of Mr Parkinson's illness were "clearly apparent in physical terms,"[103] he "appeared lucid, mentally acute, business-like and rational."[104] These findings assume that terminal illnesses can reveal their devastation on the body, but somehow the mind is immune. Medics know that the mind and the body are intricately interconnected.

I, too, know that the mind/body dualism is a myth. I know this not just because I have been trained in health, but also because I suffer from chronic occupational overuse syndrome which affects my mind and body. At university, I use a room which is reserved for students with disabilities. I frequently have to debate with able-bodied students who are using the ergonomic computers in this reserved room. Just as the Court in *Gustav* held that Mr Parkinson's apparent rationality meant that his physical impairment could not possibly be affecting him, so, too, just because I "talk no problem,"[105] apparently means that there is nothing wrong with me physically. On the contrary, sometimes I am so sore that I cannot be a "chatterbox" or think.

The experiences of disabled law students are noticeably absent from Kennedy's and most feminists' critiques of legal education. Perhaps this omission is reflective of the minority of law students and professors who have disabilities. My contention, however, is that the

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[102] *Gustav & Co Ltd v Macfield Ltd* (24 May 2007) CA 168/05 205 Arnold J for the Court; *Gustav & Co Ltd v Macfield Ltd* (20 June 2008) NZSC 39/2007 47 Tipping J for the Court.

[103] *Gustav & Co Ltd v Macfield Ltd* (20 June 2008) NZSC 39/2007 47 Tipping J for the Court, para 23.

[104] *Gustav & Co Ltd v Macfield Ltd* (24 May 2007) CA 168/05 205 Arnold J for the Court, para 54.

[105] Many able-bodied students complain that because I "talk no problem" it follows that I cannot possibly have any physical impairment. Do you, able-bodied law student, need to see a "broken body" in order to be convinced of the 'reality' of my claim? Dis/ability need not be seen as a "fixed category most clearly signified by the wheelchair user" but as a fluid and shifting set of conditions. See Margrit Shildrick and Janet Price "Breaking the Boundaries of the Broken Body" (1996) 2 Body and Society 93, 94.

absence of disability from these accounts is also reflective of the disembodiment of the law.

For the past two decades, there has been a "corporeal turn"[106] in sociology and feminism. By contrast, the body has been a conceptual blind spot in mainstream law and there is comparatively little literature. A notable exception proposes "thinking *through* the body"[107] as a means to overcome the mind/body dualism in law. The law could recognise that the boundaries between categories such as mind/body, rationalism/empiricism, ability/disability are "leaky."[108]

C. Alternative Legal Education Pedagogies

Legal education "could have been otherwise" and the "way law is taught is emphatically not immutable."[109]

1. Using "peripheral subjects"[110] to teach systems-level thinking

Subjects such as jurisprudence should not be located on the periphery of the legal curriculum. Jurisprudence teaches students to be systems-level thinkers. Students not only need content expertise, but they also need to understand how law works as a *system*.[111] This approach would counter the dominance of formalism.

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[106] For example, see Anne Witz "Whose Body Matters? Feminist Sociology and the Corporeal Turn in Sociology and Feminism" (2000) 6 Body and Society 1; Margaret Shildrick *Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio)Ethics* (Routledge, London and New York, 1997); Jane Usher (ed) *Body Talk: The Material and Discursive Regulation of Sexuality, Madness and Reproduction* (Routledge, London and New York, 1997). While some jurisprudence scholars, especially feminists, have recognised the law's failure to theorise embodiment, there is not a sustained movement in legal academia which can be described as a "corporeal turn." Hilaire Barnett, for example, acknowledges the disembodiment of the law, but does not push the analysis further. See Hilaire Barnett *Introduction to Feminist Jurisprudence* (Cavendish, London, 1998) 205.

[107] Pheng Cheah, David Fraser and Judith Grbich *Thinking Through the Body of the Law* (Allen & Unwin, Sydney, 1996).

[108] Shildrick, above n 105.

[109] Stewart, above n 25, 850. See also Kahlenberg, page 1: "there are other, more effective" ways to teach law."

[110] Kennedy, above n 20, 20. These "peripheral subjects" are useful because they teach students the big picture. Otherwise, there is too much focus in law school on "trees at the expense of forests." Kennedy, above n 7, 40.

[111] Gilbert, above n 64, 156 argues that the secondary curriculum should be designed to teach students how different disciplines like science and history work as systems. Her theorising arguably applies equally well to the law school curriculum.

2. Challenging the marginalisation of skills

Kennedy argues that law schools "teach a small number of useful skills."[112] His views are echoed by some students who enter law firms shocked to discover that they have not "learned how to *be* lawyers."[113] However, there has been progress. Skills-focused courses are now required, but they were not when I started law school ten years ago. Despite these improvements, more could be done.[114] For example, students should be encouraged to conduct legal research in all subjects.[115]

3. Reconceptualising knowledge and learning

Opponents of postmodernism and poststructuralism often voice complaints that these movements are apolitical, nihilistic and offer few solutions.[116] In response to these charges, I am offering solutions. Rather than presenting knowledge to students as something that is monolithic and fixed, knowledge could be (re)presented as organic and in process.[117] In the 'knowledge society', identifying the "correct solution"[118] may be less important than knowing how to do things with, and generate, new knowledge.[119]

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[112] Kennedy, above n 8, 50.
[113] Kimes, above n 24, 257.
[114] Many legal educationalists have argued that aspects of legal education need changing. For example, see Richard Johnstone "Rethinking the Teaching of Law" (1993) 3 Legal Education Review 42; Andras Jakab "Dilemmas of Legal Education: A Comparative Overview" (2007) 57 Journal of Legal Education 253; John Goldring "The Future of Legal Education: Why? And How? Doubtful Assumptions and Unfulfilled Expectations" (2006) 11 Journal of Professional Legal Education 149.
[115] For analyses on the importance of encouraging law, medicine and education students at all levels to do research see Clare Cappa "A Model for the Integration of Legal Research into Australian Undergraduate Law Curricula" (2004) 14 Legal Education Review 43; Rosemary Hipkins *Learning to Do Research* (NZCER Press, Wellington, 2006); Jennifer Moore "Practitioner-Researcher Imaginations: Teaching Social Research to Medical Undergraduates" (2008) 10 Focus on Health Professional Education: A Multi-Disciplinary Journal 1-21.
[116] Catharine MacKinnon "Points Against Postmodernism" (2000) 75 Chicago-Kent Law Review 687; Kristin Waters "(Re)Turning to the Modern: Radical Feminism and the Postmodern Turn" in D Bell and R Klein (eds) *Radically Speaking: Feminism Reclaimed* (Spinifex, Melbourne, 1996).
[117] Gilbert, above n 64, 66.
[118] Kennedy, above n 8, 50.
[119] Gilbert, above n 64, 67.

Legal education could be reconstructed as problem solving, inquiry-based, cooperative, and collaborative.[120] When learning is collaborative, students are less likely to apathetically "believe what they are told" or "accept the way things are."[121] New Zealand research indicates that Maori and Asian students are the most likely to "study regularly with fellow students."[122]

Comparisons are often made between medical and legal education.[123] Although medical education is hierarchical, studies report that medical students do not experience the same degree of anxiety and stress as law students.[124] One possible explanation for this difference is that medical education is more collaborative. A paediatrician has recently observed that the new Generation Y health practitioners have a "collaborative approach"[125] and "relative lack of deference to hierarchy."[126] This approach is "changing the way we do medicine."[127] It is to be hoped that legal education adopts this collaborative approach at its earliest convenience.

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[120] There is growing recognition in the legal literature that problem-based learning could be an effective way to teach law. For example, see Fiona Martin "Teaching Legal Problem Solving: A Problem-Based Learning Approach Combined with a Computerised Generic Problem" (2003) 14 Legal Education Review 77; Julie Macfarlane and John Manwaring "Using Problem-Based Learning to Teach First Year Contracts" (1998) 16 Journal of Professional Legal Education 271.

[121] Kennedy, above n 8, 40-41.

[122] Morris, above n 3, 215. See also Turow, above n 2, 70 who describes being "positively intoxicated by the kind of speed and depth of insight that could be achieved by a group of bright, willing people working together" in a study group. Similarly, anecdotal evidence from discussions with mooting students at Victoria University suggests that this type of learning is enjoyable.

[123] For example, see Robert Kellner "Distress in Medical and Law Students" (1986) 27 Comprehensive Psychiatry 220; Marilyn Heins "Law Students and Med Students: A Comparison of Perceived Stress" (1983) 33 Journal of Legal Education 511.

[124] For example see Krieger, above n 3; Kellner, above n 123.

[125] Matt Philp "Why You Don't Understand Your Kids" (September 2008) *North and South issue 270* 38, 40.

[126] Ibid. See also Claire McEntee "Hierarchical School System Faces Change" (11 August 2008) *The Dominion* Wellington C5, for a discussion of the dramatic changes in secondary education as schools move from hierarchical to community focused and collaborative models; Joanne Ingham and Robin A Boyle "Generation X in Law School: How These Law Students Are Different From Those Who Teach Them" (2006) 36 Journal of Legal Education 281, for a discussion of the importance of adopting teaching methods which are appropriate to new generations of students.

[127] Philip, above n 125, 40.

Conclusion

My main contention has been that the disciplinary practises of law school do not entail a state of absolute oppression. Kennedy's desire for resistance is lost in his over-emphasis of the supposedly relentless character of subordination. A preferable approach is to stress the relationality of power and the possibility of change. Kennedy could have usefully applied his indeterminacy of the law thesis to his construction of law students' and professors' subjectivities.

The law has traditionally avoided looking at "who or what thinks or produces the law."[128] By contrast, the theorists from whom I have drawn in this essay are unashamedly transparent about our "positionality."[129] It is time for law schools to start teaching students that it is acceptable for, and inevitable that, emotional and rational selves will integrate and merge. As many critical race theorists and feminists remind us, 'experience' counts as knowledge.

My analysis has highlighted that particular choices have been made in legal education, while others have been overlooked. This is an important observation because it suggests that multiple choices are available. In a space with multiplicities the potential for change exists. It "could [still be] otherwise"; hierarchies can be challenged by daily micro practices.

Kennedy's critique of legal education recognises that it "doesn't *have* to be that way."[130] Thus, his analysis of legal pedagogy is more convincing and accurate than his descriptive claims about students and professors. However, Kennedy's "utopian proposal"[131] for a new legal education curriculum is limited because he does not challenge long-held ideas about knowledge and learning. My re-orientation of legal education does not necessarily entail major structural changes. Some of my suggestions could be incorporated relatively easily. For example, collaborative and cooperative learning could be incorporated by increasing the length of tutorials.

In keeping with my own cries about the importance of empiricism and student voice, I started, and will conclude, this essay

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[128] Pierre Schlag "The Problem of the Subject" (1991) 69 Tex Law Review 1627, 1629.
[129] Katherine Bartlett "Feminist Legal Methods" (1990) 103 Harvard Law Review 829, 880. See also Haraway, above n 21, 191. Haraway uses "partial perspectives" to indicate that people's social locations matter.
[130] Kennedy, above n 8, 59.
[131] Kennedy, above n 20, 120.

with students' own accounts. Refusal to become a docile student can involve Kennedy-style polemics about large-scale structural changes:[132]

> It's *our* tuition dollars, *our* careers, and *our* intellectual and emotional investments that are at stake. We are the "grassroots" of the law schools; we must take part in the struggle against the reproduction of hierarchy fostered by our institutions. (Emphasis in the original).

Resistance to hierarchies in legal education can also entail subtle, micro instances of defiance:[133]

> That moment served to make overt the mood of quiet opposition and determination of some in the class to resist any heavy-handed techniques.

[132] K C Worden "A Student Polemic" (1986) 16 New Mexico Law Review 573, 574.
[133] Turow, above n 2, 209.

PERSONAL LIABILITY OF COMPANY DIRECTORS: *TREVOR IVORY* NOT "THE LAST WORD"

JOSHUA MCGETTIGAN*

Introduction

The personal liability of company directors for torts committed in their capacity as directors is one of the most important and vexed issues of company law. It is important because attaching liability to a person behind a company can negate the effect of incorporation, by bypassing the principle of separate corporate personality. The person behind the company will have to cover any losses suffered by involuntary creditors of the company in tort – and so the notion that a director's personal assets are always safe so long as the company is incorporated is rendered a misconception. The issue is vexed because it resides in a place where three different areas of law legitimately overlap: company law, tort law, and now the Fair Trading Act 1986 (FTA).[1] As is usually the case with areas of law serving different functions, their policy bases are different. Thus, where they overlap, they lead to inconsistent outcomes.

This article will describe and analyse the effect that the August 2008 New Zealand Court of Appeal case *Body Corporate 202254 v Taylor* [2008] NZCA 317 has had on the personal liability of company directors, and consider how one issue it leaves unresolved ought to be addressed. The article's body is broken into four parts. The first will describe the old approach under *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517, which prioritised company law principles in determining directors' personal liability in tort. The second will describe how *Taylor* not only limits the scope of *Trevor Ivory*'s application, but discredits *Trevor Ivory*'s rationale and formulation where it does apply. The third

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[1] The FTA 1986 applies since the majority in *Body Corporate 202254 v Taylor* [2008] NZCA 317 at para 78 favoured a broad interpretation of "in trade" from section 9 of the FTA 1986. This means that liability under section 9 can attach to agents of companies as principals.

will describe how liability can attach to directors as principals under the FTA, and compares this with their liability under tort. Finally, the most appropriate way of dealing with the incongruity between FTA and tort liability will be considered.

A. The *Trevor Ivory* Approach to Tortious Liability: Company Law to the Fore

Company law points away from personal liability in tort for directors acting for their company. Company law is founded on principles of limited liability and separate corporate personality, which broadly have the effect of attaching liability for debts to the company rather than the agent acting for the company.[2] The approach to personal liability espoused in *Trevor Ivory*, particularly by Cooke P, favours such principles. As a result, the situations in which a director would be held personally liable under *Trevor Ivory* are limited.

Trevor Ivory concerned a one-man agricultural and horticultural company, whose sole director advised a raspberry orchard owner that 'Roundup' should be used to combat a couch-weed problem. Despite the fact that the plaintiff followed the defendant's instructions, the Roundup killed the raspberries as well as the weeds. The client unsuccessfully sued Mr Ivory personally for negligence. In giving his judgment, Cooke P noted that it "behoves the court" to avoid imposing personal liability because it would erode the principles of limited liability and separate identity.[3] The Court was unanimous on the notion that the imposition of liability on a director for a negligent misstatement requires an "assumption of responsibility" by the director. Hardie Boys J went so far as to state that the general rule would be not to enforce personal liability and that "clear evidence" is needed to decide otherwise.[4] Although McGechan J's reasoning was effectively just an application of general agency principles, even he considered the involvement of a company to be important. In determining whether Mr Ivory had personally assumed responsibility, McGechan J repeatedly pointed to the "insulating corporate structure"

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[2] See John Farrar (gen ed.) *Company and Securities Law in New Zealand* (Brookers Ltd, 2008) at 84-87.
[3] See *Trevor Ivory v Anderson* [1992] 2 NZLR 517 at 523, line 50.
[4] *Trevor Ivory*, see n3 above at 527, line 17.

that Mr Ivory implemented, which counted against a finding of personal liability.[5]

The liability threshold set by Cooke P and Hardie Boys J in this case is uniquely high. Even when a director is essentially acting as an agent of the company in proffering his advice to a client which the client relies on to the client's detriment, the negligent advice of that director results in only his principal (the company) being liable. The director's liability in this context is imposed in a manner different to any other agent of any other principal – an observation that has led some commentators to describe directors' tortious liability as "directors' immunity".[6] Generally, agents who have committed torts are liable for them independently of their principal.[7] The vicarious liability of their principal attaches separately from, and as well as, their own liability. An assumption of responsibility requirement also cuts against the very foundations of tort law, which functions by imposing accountability where a tort has been committed, rather than waiting for actors to personally assume it.[8] However, it should be acknowledged that Justice McGechan's reasoning, which reached the same result, was not peculiar to employees of incorporated companies. Regardless, the majority in *Trevor Ivory* demonstrate the Court's preference for the application of company law principles.

There is another point to take out of the case, the importance of which will become more obvious when *Body Corporate v Taylor* is analysed below. The Court suggested that personal liability would possibly attach if Mr Ivory had carried out the spraying himself.[9] Although the Court does not make it clear, this can be explained on the basis that an "assumption of responsibility" requirement will apply only when the cause of action is negligent misstatement, and not negligence.[10] Thus, because it was only Mr Ivory's *words* being relied on here, and not his

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[5] *Trevor Ivory*, see n3 above at 532.

[6] See for example Stephen Todd (gen ed) *The Law of Torts in New Zealand* (4th ed, Brookers Ltd, 2005) at 290.

[7] Todd, see n6 above at 294-295.

[8] Todd, see n6 above at 294.

[9] *Trevor Ivory*, See n3 above at 527, line 40.

[10] Todd, see n6 above at 173-4 for a discussion about why negligent misstatement receives this special treatment.

actions or *omissions,* a duty of care would attach only if there had been a personal assumption of responsibility.

B. *Body Corporate v Taylor*: Questioning the Contemporary Relevance of *Trevor Ivory*

This part of the paper looks at three important consequences of *Body Corporate v Taylor*. The first is the specific restriction it places on the scope of *Trevor Ivory*'s application. The second is its discrediting of the rationale and particular formulation of the assumption of responsibility test from *Trevor Ivory*. This is not to be confused with a discrediting of the test per se. The third is its implication that an assumption of responsibility will be required for torts other than negligent misstatement. It will be argued that this third consequence renders the first one of little significance.

Taylor concerned another one-person company, in which Mr Taylor, the director of a building development company, put out a promotional brochure to prospective purchasers regarding buildings to be constructed. The brochure emphasised Mr Taylor's professionalism, experience, and the (future) quality of the workmanship and design of the buildings. The buildings (once built) suffered from leaky building syndrome,[11] and the owners sued Mr Taylor personally for negligence and for breach of the FTA. Mr Taylor applied to have the claims struck out in the High Court, and for summary judgment. The High Court struck out the negligence claim, but not the FTA claim, and declined to give summary judgment.[12] These decisions were appealed to the Court of Appeal, which is the decision here under consideration. In strike out applications, the facts as alleged are assumed to be true, and claims will only be struck out if they are "so clearly untenable that they cannot possibly succeed".[13] The Court's findings in *Taylor* are therefore not absolute; rather they only determine whether or not the claims against Mr Taylor were "clearly untenable".

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[11] For a discussion of 'leaky building syndrome' see May, P J, "Performance-based regulation and regulatory regimes: the saga of leaky buildings" *Law and Policy* (2003), vol. 25, 381 at 393-4.

[12] *Body Corporate 202254 v Approved Building Certifiers Ltd* (HC, Auckland CIV 2003-404-003116, 13 April 2005, Keane J); *Body Corporate 202254 v Approved Building Certifiers Ltd (in liquidation) (No 2)* (HC, Auckland CIV-2003-404-3116, 29 August 2006, Keane J).

[13] See *Attorney-General v Prince* [1998] 1 NZLR 262 at 267-268.

The leading judgment in *Taylor* emphatically restricts the ambit of *Trevor Ivory* to situations where assumption of responsibility is an element of the tort, stating that *Trevor Ivory* has "no application at all" outside this area.[14] As authority for this, the judgment refers to *Standard Chartered Bank v Pakistan National Shipping Corp*.[15] This case concerned the director of a transport company who fraudulently backdated a bill of lading to obtain a bank payment. The House of Lords found him liable in deceit, holding that a personal assumption of responsibility was not required for liability under that tort. All that was needed was proof of the requisite elements of deceit.

The immediate implication of this restriction is clear enough: in general, tort law will apply to company directors as it does to other agents. The fact that the principal is a company is of no significance. Hence, for intentional torts such as deceit, or where damage to property is involved,[16] company directors have the same scope for personal liability as a person who is not acting for a company.

Secondly, *Taylor* discredits much of the rationale used to justify the approach taken in *Trevor Ivory*. The following rationales are discredited:[17]

> (a) the idea of "disattribution" – that is the identification of a director (or other employee) with a company meaning that her tortious actions are no longer her own;[18]
> (b) the concern that attaching personal liability to directors would be erosive of the concept of limited liability; and
> (c) a sense that allowing a claim in tort would be inconsistent with the contractual distribution of liabilities.

However, the "elements of the tort" reasoning, most evident in McGechan J's judgment from *Trevor Ivory*, is upheld.[19]

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[14] *Body Corporate 202254 v Taylor* [2008] NZCA 317 at para 34 part (b).
[15] [2003] 1 AC 959.
[16] *Body Corporate v Taylor*, see n14 above at para 34, part (c).
[17] *Body Corporate v Taylor*, see n14 above at paras 29 – 34. The rationale stated in (c) primarily comes from *Williams v Natural Life Health Foods Ltd* [1998] 2 All ER 577 rather than *Trevor Ivory*, but *Williams* stands for the same principles.
[18] Todd, see n6 above at 294 for a compelling discussion about why this rationale is flawed.

Later on in *Taylor*, the Court again refers to the requirement of assumption of responsibility, stating that its formulation may need to be reconsidered[20] and that *Trevor Ivory* is not necessarily "the last word on this topic in New Zealand".[21] Such comments, when accompanied with such a major discrediting of the reasoning *Trevor Ivory* uses, must surely be harbingers of an overhaul of the *Trevor Ivory* approach to personal liability. The degree to which the approach is overhauled may not be great: the Court states that "considerable caution" will still be needed before imposing personal liability,[22] which suggests that liability will still not be imposed lightly. However, the dissonant situation of the current law, with FTA liability (which will be discussed in Part D of this paper) being inconsistent with *Trevor Ivory*, obviously makes the Court uncomfortable.

Thirdly, the majority in *Taylor* lend credence to the idea that assumption of responsibility is an element of torts other than negligent misstatement, at least for company directors. This view conflicts with respected authorities. Professor Todd (as can be seen in his commentary about the special treatment that negligent misstatement receives),[23] Chambers J (as seen in his judgment in *Taylor*)[24] and negligent building construction cases generally[25] are examples. The Court arrives at this decision by conflating elements of negligence with negligent misstatement, which appears to confuse the law if *Taylor* is an orthodox negligence case.

However, the basis of liability in leaky building cases can be seen as an implied misstatement regarding the quality of the product, rather than a negligent act or omission.[26] The loss a plaintiff suffers is not receiving the quality of house he was promised. Liability is thus quasi-contractual; it spawns from the defendant's consent in assuming

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[19] *Body Corporate v Taylor*, see n14 above at para 33.
[20] *Body Corporate v Taylor*, see n14 above at para 96.
[21] *Body Corporate v Taylor*, see n14 above at para 44.
[22] *Body Corporate v Taylor*, see n14 above at para 33.
[23] Todd, see n6 above at 173-4 and 176-8 for a discussion of why negligent misstatement receives this special treatment.
[24] *Body Corporate v Taylor*, see n14 above at para 144.
[25] See *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) and *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 for examples.
[26] Professor Watts, personal communication, 5/8/2009.

responsibility for the accuracy of an implied statement as to the house's quality.[27] On this view, it is a misapprehension to view leaky building cases where a director is sued by a third party as governed by the *Donaghue v Stevenson*[28] principles of negligence. The basis of liability is not an imposed duty. If this argument is correct, then the court in *Taylor* expressly requiring an assumption of responsibility for negligence liability is not surprising, seeing as liability is actually grounded in an implied misstatement. However, this explanation is implausible for two main reasons.

Firstly, as already pointed out above, *Taylor* concerned an action in *negligence*, for constructing a defective dwelling. It did not concern negligent misstatement, and certainly not negligent implied misstatement as to quality. In such cases, the courts have required the director to have "actual control" over the development to be made personally liable.[29] In some more recent cases, an assumption of responsibility test has been used in its place. But it has been seen (rather confusingly) as neither essential nor sufficient for liability.[30] Its use has also been the subject of academic criticism.[31] Regardless, in *Taylor*, the action brought was founded on *Invercargill City Council v Hamlin*[32] (the pre-eminent negligence case for defective dwelling liability) – not *Hedley Byrne*[33] (the pre-eminent precedent for negligent misstatement).[34] The Court did not try to infer an implied misstatement into the facts in order to ground negligence liability. If the courts have in fact been deciding leaky building cases according to the doctrine of implied misstatement as to quality, then they have been astonishingly misleading when describing it.

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[27] Examples of academics espousing this view can be found in Grantham and Rickett, "Directors' 'Tortious' Liability: Contract, Tort or Company Law?" 1999 MLR 133 at 136-7, and Brian Coote, "Assumption of Responsibility and Pure Economic Loss in New Zealand" [2005] NZ Law Review 1 at 2 and 22.

[28] [1932] AC 562.

[29] See Samuel Carpenter, "Directors' liability and leaky buildings" [2006] NZLJ 117.

[30] *Drillien v Tubberty* (HC, Auckland CIV 2004-404-2873, 15 February 2005, Associate Judge Faire) at para 42-45.

[31] Carpenter, see n29 above; Campbell, "Leaking Homes, Leaking Companies?" [2002] CSLB 101.

[32] [1996] 1 NZLR 513 (PC).

[33] [1964] AC 465 (HL).

[34] Professor Todd also makes this point. See Stephen Todd (gen ed) *The Law of Torts in New Zealand* (5th ed, Brookers Ltd, 2009) at 346.

Secondly, it is submitted that reading an "implied misstatement" into leaky building cases is to obscure the actual basis of liability. Liability can arise in any or all of a series of negligently performed *acts*: supervision of the development, design of a building, the building process itself, or inspection and certification. To describe the basis of liability as an implied misstatement as to quality is to conflate the distinction between negligence and negligent misstatement. This distinction is made clear in *Trevor Ivory*. The basis of Mr Ivory's liability was his negligent advice regarding the application of Roundup to his client's raspberry crop. His misstatement is what caused the loss. If he had sprayed the crop himself, there would have been no question of liability: not because he would have personally assumed responsibility for his implied misstatement as to the quality of his work, but because he had negligently performed a duty of care.

The negligent implied misstatement as to quality notion is neither plausible, nor helpful, as an alternative way of conceptualising *Taylor*. The action was brought in, and described as, one in negligence. Its requiring of an assumption of responsibility was therefore inappropriate. If this logic is accepted, the problems with the Court's reasoning become clear. The Court suggests two separate grounds as the most plausible "basis" for a negligence suit:[35]

> (a) Mr Taylor's promotion of himself and his professionalism (assuming that this is the right way to construe the brochure) implied an assumption of responsibility to supervise the development.
> (b) Errors in the way in which the project proceeded, which would not have occurred had there been such supervision or competent supervision, are evidence of negligence.

The Court in (a) has looked to the statement as the means by which responsibility could be assumed, and in (b) has looked to the action (or omission) for the evidence of negligence. This reinforces the argument made above that the Court was not looking to ground negligence liability in Mr Taylor's words. His promotion of himself and his professionalism was not negligent. These were (assumed) statements of fact. Such statements are to be contrasted with *Trevor Ivory*, a true negligent misstatement case, where the advice given was causative of loss.

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[35] *Body Corporate v Taylor*, see n14 above at para 43.

It is possible to explain this on the basis that the Court made its decision according to the framework by which the case was argued. Because the case was framed in a way that deliberately tried to align with *Trevor Ivory* and negligent misstatement, the assumption of responsibility element the Court outlines in (a) above was awkward but necessary and not indicative of a change in the way tort liability should be conceived. However, if this was the case, one would expect the Court to have pointed it out. Furthermore, a closer analysis indicates that the Court has actually gone further than this.

As described above, courts looking at the personal liability of a director in negligent housing construction cases have used what has been coined an "actual control" test to ground liability.[36] The actual control test requires the director to have some actual influence and involvement in the building process for a duty of care to attach.[37] This could happen quite independently of any misleading or negligent statements or representations – liability is rather grounded in actions or omissions. In *Trevor Ivory*, both Cooke P and Hardie Boys J distinguish *Morton v Douglas Homes* on the basis that there was an (albeit unmentioned) assumption of responsibility in that case – with Hardie Boys J even commenting that assumption of responsibility may well arise where control exists.[38] These comments are cited with approval in *Taylor*.[39] This shows that the Court in both *Taylor* and *Trevor Ivory*, at least in retrospect, saw assumption of responsibility as an important element of liability in *Morton v Douglas Homes*, a standard case of negligence.

But what is most surprising about the most plausible "basis" the Court identifies for liability is that it does not fit into either of the conflicting views regarding the requirements of a director's tortious personal liability. The Court hedges its bets by choosing both. The ground specified in (a) looks to the assumption of responsibility by a statement. The ground specified in (b) connotes that Mr Taylor's actions or omissions would have to be causative of the defect in order for liability to attach. This would require an investigation into whether he had

[36] *Morton v Douglas Homes Ltd*, see n25 above; *Callaghan v Robert Ronayne Ltd* (1979) 1 NZCPR 98 at 109.
[37] *Morton v Douglas Homes Ltd*, see n25 above at 593.
[38] *Trevor Ivory*, see n3 above at 527, lines 29-40; and at 523, line 43.
[39] *Body Corporate v Taylor*, see n14 above at para 41-42.

actual control over the building project. Proof of actual control is effectively just an element of causation, and so it should not be necessary to establish any wider assumption of responsibility. All that should be required is proof of causation between the director's actions or omissions (that is, "actual control" over the project) and the loss suffered. Yet the Court appears to see these two distinct routes to liability (by assuming responsibility for a statement, or by negligently supervising a building project one had control over), as interdependent. The line between what is required for liability in negligence and negligent misstatement is thus thoroughly blurred, and the situation in which an assumption of responsibility will be required is rendered uncertain. For these reasons, the judgment of Chambers J, who does not consider *Trevor Ivory* to be relevant, is preferable.[40]

This interpretation perhaps explains the odd wording used to describe the restriction made on *Trevor Ivory*'s scope. The only way in which *Trevor Ivory* is literally restricted is that it, as a case concerning a tort that had assumption of responsibility as an element, is only relevant to other tortious actions sharing this element. It is odd that this wording was chosen, rather than limiting *Trevor Ivory* to the tort that it concerned: negligent misstatement. Furthermore, the exact scope of actions for which an assumption of responsibility is required has been the topic of much controversy. An assumption of responsibility has been seen as required for all tortious actions of directors,[41] as an element of liability for negligent misstatements and "services",[42] as part of the torts of negligent misstatement and omission to act,[43] and some academics appear to claim it is a separate tort in its own right.[44] From this perspective, the Court has been spectacularly cryptic in saying that *Trevor Ivory* is only relevant to torts "where assumption of responsibility is an element", without giving any clues as to what those torts are. It is submitted that this peculiar wording was chosen because the Court must see assumption of responsibility as a requirement for other torts as well – but it is indecisive about which and why.

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[40] I note that Professor Todd's recent commentary supports this contention. See Todd, n34 above at 346.
[41] *Drillien*, see n30 above at para 42.
[42] *Rolls Royce New Zealand Ltd v Carter Holt Harvey Ltd* [2005] 1 NZLR 324 at para 98.
[43] Todd, see n34 above, at para 5.6.07, 5.6.08 and 5.8.04.
[44] Grantham and Rickett, see n27 above at 137-9.

This is significant because it means that the scope of a director's (or an employee's) liability, at least in leaky building cases, is more restricted than would appear on first impression. The statements in *Taylor* about *Trevor Ivory*'s irrelevance to the general tortious liability of directors are not unqualified. The Court has shown a tendency to infer an unheralded assumption of responsibility requirement in negligence, and given no clues as to what other torts might be subject to the same type of reformulation. There is possibly an unmentioned assumption of responsibility element to many torts. The first consequence of *Taylor* considered in this part (that *Trevor Ivory* will be irrelevant to general tortious liability) is thus rendered less wide-reaching, and the basis of a director's tortious liability is rendered less clear.

C. Personal Liability under the FTA 1986

The Court in *Taylor* held that a company employee can be held personally liable under section 9 of the FTA for misleading conduct in trade, despite acting only in the course of their employment. For liability to attach, the Court in *Taylor* notes four hurdles for Mr Taylor's liability under section 9.[45] This part will briefly describe the first three before analysing the fourth in greater depth. The word "employee" is often used here because the Court in *Taylor* states that liability could apply to employees generally – but it obviously includes directors.

The first hurdle is whether there has been a misleading or deceptive representation. This requires the usual care in identifying the exact representation made in the statement. The distinction between representing an opinion and a fact is important.[46] The second hurdle is whether exclusion clauses absolve Mr Taylor of liability. In this regard the Court decides that the prohibition on misleading conduct provided by section 9 cannot be contracted out of, and that the clauses could not directly affect Mr Taylor's liability in any event.[47] The third is whether there is a causal link between the misleading and deceptive statement and the loss accrued.

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[45] *Body Corporate v Taylor*, see n14 above at para 49.
[46] See *Premium Real Estate Ltd v Stevens* [2008] NZCA 82 for a discussion of these concepts.
[47] *Body Corporate v Taylor*, see n14 above at para 63.

The fourth hurdle, whether the employee is responsible for the misleading or deceptive statement, is the greatest point of difference between liability in tort and the FTA. It is broken into two parts. The first is whether the employee should be considered "in trade" under the FTA. The second is whether the employee's conduct associated with the representation is misleading or deceptive.

In relation to the first part, the majority in *Taylor* favours a broad interpretation of "in trade", which includes more than just those who are in business on their own account. The Court cites the congruity of this approach with the words of the statute, the most recent Australian decision on similar legislation and the pattern of New Zealand authority in making this decision.[48] Glazebrook and Ellen France JJ give a strong dissent on this aspect of the majority's decision. They instead favour the "narrow" interpretation, which would restrict "in trade" to entities on business in their own account. It is understandable that such a determination would be the subject of a dissent. From a bystander's position, the company would seem to be in trade with the purchasers of the buildings, not Mr Taylor. This position is implied even by the leading judgment itself, when it determines that the liability disclaimer on the brochure could not cover Mr Taylor personally because he was not in contract with the building owners.[49]

Perhaps this is why the second part is also required for liability to attach. In respect of this part, the Court considers two alternative tests. The first comes from *Megavitamin Laboratories (NZ) v Commerce Commission* (1995) 6 TCLR 231. It requires a level of personal association with the employee – for example releasing a brochure containing a photograph of a director, and statements saying that the brochure was "researched and compiled by" the director, could suffice as conduct on the part of the director.[50] The second is a lower threshold test from *Specialised Livestock Imports Ltd v Borrie* CA 72/01 20 September 2002, in which "the drift of the judgment" supports the requirement of actual responsibility for the statement.[51] This implies that even if there was no personal endorsement, a representation could still be considered conduct on the director's part. The Court decided it

[48] *Body Corporate v Taylor*, see n14 above at para 78.
[49] *Body Corporate v Taylor*, see n14 above at para 63.
[50] *Body Corporate v Taylor*, see n14 above at para 81.
[51] *Body Corporate v Taylor*, see n14 above at para 83.

was arguable that the brochure could be regarded as being endorsed by Mr Taylor and, having done so, saw no need to make a conclusion on the appropriateness of the less strict test implicit in *Borrie*.

It is this element of liability under the FTA which makes it most distinct from liability for negligence or negligent misstatement. Some academic commentary has pointed out that the FTA would sometimes (even if the broad approach to "in trade" is correct) impose liability in equivalent situations to the common law.[52] These articles compare the facts of cases where a breach of section 9 has been found with common law liability for negligent misstatement. They point out that, generally, the FTA cases are not wrongly decided on their facts, because the employees would have been liable under the common law anyway (as well as section 45, but that is unimportant for present purposes). Although this is not disputed, the articles do not consider how cases where negligent misstatement was the cause of action would be decided under the FTA. It is submitted that this inquiry is a pertinent one because it illuminates differences in the scope of each head of liability.

A director who makes a false representation which is relied on by a client to the client's detriment would satisfy most elements of both FTA and negligent misstatement liability. Proximity and causation would be present. However, the conduct test discussed in the above paragraph essentially plays the same role for FTA liability as the "assumption of responsibility" requirement plays for negligent misstatement liability, only it sets the threshold much lower. A director who has face-to-face contact with a client, for example, would almost certainly have made a personal endorsement under the favoured *Megavitamins* test. However, Mr Ivory (who had face-to-face contact) was not considered personally liable in tort due to a lack of assumed responsibility.[53] The difference would be even more stark if the less strict test implicit in *Borrie* is considered to be the law. In that case, an employee would be liable merely if she was responsible for the statement having been made – even without personal endorsement.

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[52] Peter Watts, "Directors' and Employees' Liability Under the Fair Trading Act 1986 – The Scope of "Trading"" [2002] CSLB 77 at 80; Andrew Beck, "Misleading Business Sales: Who Foots the Bill?" [2002] CSLB 81 at 82.

[53] *Trevor Ivory*, see n3 above.

Given that the FTA imposes strict liability, it is understandable that this would make the Court uncomfortable.[54] Imposing personal liability on all employees even for reasonable misstatements is a draconian measure. This lack of congruity between the two different forms of liability is one of the reasons the Court cites in *Taylor* in favour of a reformulation of the "assumption of responsibility" requirement in tort liability.[55] Although, as discussed above, the Court makes some comments to suggest that a reformulation may not be drastic, the message is that the reign of *Trevor Ivory* as the leading authority is in jeopardy.

The last thing the leading judgment in *Taylor* notes about FTA liability relates to the measure of damages. Under section 43(2)(d) of the FTA, damages for breaches of the Act may only be awarded on the "reliance" measure, so the Court advises that the home owners should be careful about how they word their claims.[56] However, in a comparison of FTA liability with tort liability, this is not a pertinent observation. In assessing damages, the Court of Appeal has treated a claim under the Act in the same way as a claim in tort.[57] This is also the result that appeals to logic. Paying for a structurally sound house and receiving one with leaky building syndrome involves relying on the vendor to one's detriment.[58] It is therefore submitted that a similar quantum of damages will be recoverable for claims under either torts or the FTA.

D. Should the FTA or the Common Law Budge?

The identified discrepancies between the common law and the FTA (as the majority in *Taylor* interprets it) will need to be addressed by a court of high authority in the near future. This part of the paper considers how this should be done. The Court is hyper-aware of avoiding rash decisions, due to the lack of available facts. Testament to this is

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[54] The FTA 1986 has been held to impose strict liability in *Smythe v Bayleys Real Estate Ltd* (1993) 5 TCLR 454, 464; *Goldsboro v Walker* [1993] 1 NZLR 394, 406; *Megavitamin Laboratories (NZ) Ltd v Commerce Commission* (1995) 5 NZBLC 103,834, 103,846, 103,849.

[55] *Body Corporate v Taylor*, see n14 above at para 96.

[56] *Body Corporate v Taylor*, see n14 above at para 92.

[57] Todd, see n6 above at p193; *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15.

[58] See *Joblin Insurance Brokers v ME Joblin Insurances Ltd* [2001] 1 NZLR 753 for an example of a case where, in a FTA claim, the reliance damage was quantified as the difference between the price paid and the actual value of a business.

paragraph 96, in which the Court identifies a number of possible ways that future courts could deal with discrepancies between the two forms of liability, without actually indicating a preference for any of them. This means that a future court hearing a case with similar facts still has significant interpretive freedom.

The Court in *Taylor* sees the assumption of responsibility requirement as a possible point of change.[59] If the Court's fears are to do with the inconsistency of outcomes between the FTA and the common law, then a reformulation would most likely lead to a softening of the assumption of responsibility requirement. This would bring the common law in line with the FTA, which, as argued above, has a lower threshold for imposing personal liability. It is submitted that this would be an undesirable development, and that the court should rather "hold the line" with respect to the formulation of the responsibility test in *Trevor Ivory*. It ought not to be the focus of judicial creativity. Rather, the focus should be the restriction of the FTA's scope, by favouring the dissenting judgment's interpretation of "in trade" from section 9, for three main reasons.

Firstly, imposing strict personal liability on company employees is unjustifiably austere. In situations where they are acting on behalf of their employer and make reasonable, innocent misstatements (for example, if they misinterpret a client's question and so give a misleading answer), it would be unfair to impose liability on them personally. Not only are they likely to be in a poor position to bear the loss, but unless they own the business or have assumed responsibility beyond their employment, their liability is unwarranted.[60] The leading judgment in Taylor dismisses this argument by claiming that it is overstated – pointing to the invariable seniority of the employees who have been made liable so far under the provision.[61] The requirement that the relevant conduct be in itself misleading and deceptive is also pointed out as a potential safeguard.[62] These are not good counter-

[59] *Body Corporate v Taylor*, see n14 above at para 96. The Court suggests that "reconsideration of what is required to justify imputation of an assumption of responsibility" may be warranted.
[60] Professor Watts, "Employee Liability Under the Fair Trading Regime: A Lost Opportunity in the High Court of Australia", 2007 NZBLQ 152 at 154.
[61] *Body Corporate v Taylor*, see n14 above at para 77, part (b).
[62] *Body Corporate v Taylor*, see n14 above at para 77, part (b).

arguments. Effectively, the court has stated that thus far there has been no test case for this argument, so therefore it is overstated. Not only is this speculative and illogical, but it does not actually contradict the possibility that junior employees could inappropriately be made personally liable under the broad approach.

Secondly, the Act was intended to apply to traders, not to the agents or employees of traders.[63] This can be seen in parliamentary speeches at various stages of the Bill's passage to enactment in New Zealand[64] and the equivalent legislation in Australia.[65] Bizarrely, this extremely relevant piece of information is not expressly considered by the leading judgment. The Court notes that the FTA is based on the Australian Trade Practices Act 1974, and that the provisions of that Act (generally) only apply directly to corporations.[66] Parliamentary speeches are not referred to in determining what the legislators intended. The dissent, however, does consider them.[67]

Thirdly, adopting the dissent's narrow approach would make more sense in terms of the scheme of the FTA, particularly with regard to the secondary liability provisions. For example, section 43(1)(b) imposes secondary liability for "aiding, abetting, counselling or procuring" a breach of section 9. If any person representing a company can generally be liable as a principal anyway, then these provisions are made almost redundant. They would apply only to third parties assisting corporate agents – which would be a rare occurrence indeed. This point is made by the dissenting judgment.[68] A similar argument is acknowledged, but not evaluated or contradicted, by the majority.[69]

Overall, the majority has not sufficiently weighted several counter-arguments against their finding that a broad interpretation of "in trade" is to be favoured. The majority is right to point out that section 9 has

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[63] Campbell, n29 above; Watts, n60 above at 153.
[64] See 467 NZPD 7884, where Hon Margaret Shields states, regarding the Bill, that it "represents a significant step in…consolidat[ing] and revis[ing] the *law relating to trading*."
[65] See the Minister's second reading speech to the Victorian Parliament in introducing the FTA (Vic), in which it is stated that the purpose of the Act is to expand application to "non-corporate traders".
[66] *Body Corporate v Taylor*, see n14 above at para 73.
[67] See paras 111-115.
[68] See paras 106-109.
[69] See para 73.

undercut policy bases of the common law to some degree, in that the FTA is more heavily consumer-protection focussed.[70] However, creating the capacity for employees to be held personally liable for innocent misstatements is an extremely serious legal reform. This is particularly so given that the available quantum of damages is likely to be equivalent under tort and the FTA.[71] When sheeting home liability to innocent employees also cuts against the intention of legislators and the scheme of the Act, just accepting anomalous differences between the common law and the FTA is not appropriate. Therefore future courts should take the "retreat away from how the FTA has been applied" option to reconcile the incongruities.[72] The dissent's narrow approach to "in trade" would achieve this.

Conclusion

The judgment in *Taylor* leaves the personal liability of company directors in an uncertain position. It states that *Trevor Ivory* is relevant only insofar as it relates to torts that have assumption of responsibility as an element. For torts that clearly do not have this element –such as deceit, conversion, trespass, and other intentional torts – this means that a director's liability will be assessed according to normal agency principles. However, the Court's suggestion about plausible grounds on which an action in negligence could be based against Mr Taylor, and past willingness to infer assumption of responsibility as an unmentioned element of negligence liability suggests uncertainty. It appears that an assumption of responsibility will be required at least for negligence liability, but the curious wording of the restriction *Taylor* places on *Trevor Ivory* means that it is unclear exactly when else the element will be required as a precondition to liability.

The Court in *Taylor* also decides that there is scope for claims against directors under section 9 of the FTA. The threshold for this type of liability is set much lower than the assumption of responsibility requirement. The two different forms of liability are thus in conflict, which makes the Court uncomfortable. This is one of the key reasons the Court cites for a reformulation of what "assumption of

[70] *Body Corporate v Taylor*, see n14 above, para 77 part (d).
[71] See Part D above, where this argument is made.
[72] *Body Corporate v Taylor*, see n14 above, para 96.

responsibility" means according to *Trevor Ivory*. The Court identifies a number of possible ways that future courts could deal with the inconsistencies, without giving a preference. Due to its draconian consequences, inconsistency with the intention of legislators, and inconsistency with the scheme of the FTA, the broad approach to "in trade" should be retreated from in the future.

In the meantime, directors looking to limit their liability under the FTA would be wise to take steps beyond merely trading through a limited liability company. Avoiding making any reference to themselves in promotional brochures or engaging in face-to-face contact with clients would be one step. Taking out insurance to protect themselves (and their employees) against FTA claims would be another. How to protect against liability in tort is less clear due to the uncertain nature of when assumption of responsibility will be an element of liability and what the requirement will entail. The circumstances in *Taylor* were not apt for making a decision as to the appropriate formulation of an assumption of responsibility, but the opportunity will inevitably present itself soon. When this occurs, one can only hope that the court will clarify what is now an issue of law that has its importance rivalled only by its indeterminacy.

FOREIGN PRINCES IN FAR OFF LANDS: A BRIEF HISTORY OF HOW INTERNATIONAL LAW GOVERNING MERCENARIES HAS AIDED COLONIAL AND NEO-COLONIAL EXPLOITATION OF 'UNCIVILISED' NATIONS

WILLIAM FOTHERBY*

Introduction

The term "mercenary" carries with it an implication of moral bankruptcy matched by few other rubrics of international law. Terrorists, at least, are moved ultimately by a desire to achieve some ideological goal: that is to say, it is their violent means, not necessarily their aims, which are deplorable. Mercenaries peddle this same violence but for their own personal gain.

Yet mercenaries have not always carried with them this cultural capital. As this paper will show, while mercenaries have fought around the world for over 3000 years, their treatment by international law has varied greatly over the last 300, and most particularly over the last 60 years. It is the argument of this article, however, that this variation has been by no means the result of chance or the random shifting of attitudes or legal norms over time. Rather, this article will argue that the way international law has applied to mercenaries and, what may or may not be viewed as their modern manifestation, private military companies, reflects what Antony Anghie has termed "the civilising mission" of international law.

To do this, Part A will begin by examining Anghie's hypothesis that international law absorbs and reifies the division between self and other – between the civilised and the barbarian. Then, in Part B, the paper will examine the way international law governed mercenaries prior to 1907. This Part will show that, while a norm against mercenary use may have crystallised by the beginning of the twentieth century, this did little to prevent European powers from hiring soldiers to further

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colonial aims away from the European continent. Part C will track the strengthening of an international prohibition on mercenary use during the period of African decolonisation, led predominantly by those African countries against which mercenaries had been used to thwart self-determination and strong nationhood. This part will also show, however, how deference to the interests of powerful, European, and civilised states endowed this norm with a number of fatal inherent weaknesses. Finally, in Part D, the article will examine the most recent and controversial development in this area of law – private military companies – and will argue that their tacit legitimisation, as well as the prevailing argument that these companies are not affected by anti-mercenary laws, reflects the continuing colonial undercurrents that Anghie sees ever-present in international law. In the article's concluding remarks, I will reflect upon what this analysis tells us more broadly about Anghie's theory of international law's civilising mission.

A. Anthony Anghie

Anghie's claim is that the "colonial confrontation" was and is central to the formation of international law.[1] He develops his argument in the following way. While international law claims to be universal, authoritative, and advanced, in reality it is predicated on an implicit division between those who are civilised and those who are not: between the European and non-European worlds.[2] This perceived cultural difference animates what Anghie terms the "civilising mission":[3]

> [T]he grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilization of Europe.

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[1] This argument can be found in a number of pieces of Anghie's work. See e.g. Antony Anghie "Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations" (2001–2002) 34 NYU J Int'l L & Pol 513 ["Birth of International Institutions"]. However, this central thesis can also be found in Antony Anghie *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge, 2005) ["*Making of International Law*"] and several other articles, which will be cited as appropriate.

[2] Anghie, Birth of International Institutions, ibid 518–519.

[3] Anghie *Making of International Law*, above n 1, 3.

The civilising mission leads jurists to create legal doctrines that seek to overcome this dichotomy and achieve uniformity and universality. It is this process, this "dynamic of difference", that lies behind many of the central doctrines and structures of international law.[4] For Anghie, therefore, the economic exploitation, territorial dispossession, and cultural subordination – understood to be an inevitable part of the colonising methodology – cannot be considered to be "epiphenomenal aberrations in the international system that were remedied by the project of decolonisation and self-determination".[5] To the contrary, they endure in contemporary international relations and serve to generate the categories of analysis that crucially affect our understanding of the international legal system.[6]

B. Mercenaries and International Law to 1907

In 1294 BC, Ramses II led an army of mostly Numidian mercenaries[7] in the Battle of Kadesh.[8] Nearly a thousand years later, when Alexander the Great crossed the Hellespont to invade Persia, he did so with an army in which one-third, 11,900 men, were mercenaries, mainly foot soldiers.[9] More recently – that is, in this millennium – Britain used 18,000 Hessian mercenaries during the United States War of Independence.[10] Indeed, hired soldiers have been an indispensable part of many armies throughout recorded history. Neither is the concept of private, hireable companies of military skill a recent invention. In medieval Europe "free companies" of soldiers were formed with the aim of making profit,[11] while in the subsequent era of mercantile imperialism, corporations such as the Dutch East India Company

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[4] Ibid 4.
[5] Anghie, Birth of International Institutions, above n 1, 518.
[6] Ibid.
[7] The definition of "mercenary" is a central point of contention in this area of law, and during the course of this paper this debate will be elaborated upon. At present, it is sufficient to note that the Oxford English Dictionary defines mercenary as a "hired soldier in foreign service" and it is on this general proposition that the article will proceed.
[8] Major Todd Milliard "Overcoming Post Colonial Myopia: A Call to Recognize and Regulate Private Military Companies" (2003) 176 Mil L Rev 1, 2.
[9] Ibid.
[10] Juan Carlos Zarate "The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder" (1998) 34 Stan J Int'l Law 75, 82.
[11] Ibid 83.

fielded private fleets and armies to protect their own economic interests.[12] It was not until the middle of the 19th century that military knowledge and labour were seen as anything other than a freely alienable commodity in an international market;[13] only with the rise of the notion of nation-state sovereignty, and the establishment of national standing armies, was it considered objectionable for a person to fight for a foreign power.[14] The nation-state construct allowed governments to be held accountable for the coercive extra-territorial activities of their "citizens", and the sudden strength of the link between an individual and his or her land of origin threatened to draw states into foreign wars in which "their" mercenaries were involved.[15] Consequently, recruiting mercenaries within the borders of a state was seen as an attack on sovereignty itself.[16] To counter this, states began to pass neutrality laws, which prevented the recruitment of their citizens to foreign military forces.[17] The United States promulgated the first of these laws in 1794,[18] the same year that it signed the Jay Treaty with Great Britain,[19] which prohibited nationals of each state serving in the foreign armies at war with the other.[20] Hand in hand with the perceived threat to state sovereignty and legitimacy posed by uncontrollable private military corporations, this saw the use of mercenaries between European nations gradually diminish.[21]

The writings of various international legal publicists over this time document these changes. Vitoria was of the opinion that those who were prepared to fight for pay, not caring whether the war was just or

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[12] Ellen Frye "Private Military Firms in the New World Order" (2005) 73 Fordham Law Review 2608, 2618.

[13] Montgomery Sapone "Have Rifle with Scope, Will Travel: The Global Economy of Mercenary Violence" (1999) 30(1) Cal W Int'l L J 1, 10.

[14] Milliard, above n 8, 6.

[15] Sapone, above n 13, 30.

[16] Ibid.

[17] Ibid 29.

[18] Neutrality Act 1794 ch 50 § 5, 1 Stat 381 (US). Congress later repealed this Act in 1818; however, concern over citizen involvement in the Spanish Civil War led to a second Neutrality Act being passed in 1935.

[19] Opened for signature 19 November 1794, TS 105 (entered into force 29 February 1796).

[20] H C Burmester "The Recruitment and Use of Mercenaries in Armed Conflicts (1978) 72 Am J Int'l L 37, 42.

[21] Christopher Lytton "Blood for Hire: How the War in Iraq has Reinvented the World's Second Oldest Profession" (2006) 8 Or Rev Int'l Law 307, 308.

not, committed a mortal sin, not only where they were actually went to battle, but also whenever they were thus willing.[22] However, this moral issue had largely disappeared by 1737, when Bynkershoek argued that there was no difference between the hire of mercenaries and any other contract.[23] Even by the latter part of the 19th century there were few objections: writing in 1863 Twiss saw no problem in allowing recruitment on neutral territory if that territory allowed it,[24] and in 1888 Calvo countenanced the employment of foreign troops assimilated into a national army.[25] Yet, by the early 20th century, there was a perceived difference between active participation in recruitment and a duty to prevent individual citizens leaving national territory to recruit abroad. It was this distinction that was drawn in the Hague Conventions of 1907 – the first international attempt to regulate mercenary activity. Article 4 of the Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land ("Hague V")[26] prevented corps of combatants being formed or recruiting agencies being opened on neutral territory to assist belligerents. Article 6, however, denied that states had any duty to prevent individuals crossing their frontier separately to offer their services to one of the belligerents. Therefore, Hague V only affected mercenaries to the extent that a state implemented its obligations as a neutral.[27]

Frédéric Mégret has followed a similar path of analysis to Antony Anghie, but has focused more specifically on international humanitarian law ("IHL") (known also and equally as the law of armed conflict).[28] His work is a useful entry point to any post-colonial critique that may be developed. Mégret's view is that the laws of war have acted as one of the foremost instruments of forced socialisation of

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[22] F Vitoria *De Bello* art I § 8 quoted in H C Burmester above n 20, fn 12.
[23] Burmester, above n 20, 41.
[24] Travers Twiss *The Law of Nations Considered as Independent Political Communities* (Clarendon Press, Oxford, 1863) 456.
[25] Burmester, above n 20, 41.
[26] Opened for signature 18 October 1907, TS 540 (entered into force 26 January 1910) ("Hague V").
[27] Milliard, above n 8, 21. These articles were only agreed after a German proposal, which would have had belligerent states prohibited from accepting the service of foreigners, was rejected.
[28] See Frédéric Mégret "From 'savages' to 'unlawful combatants': a postcolonial look at international humanitarian law's 'other'" in Anne Orford (ed) *International Law and its Others* (Cambridge University Press, Cambridge, 2000).

non-European states into the international community.[29] The requirements that these laws impose is the product of a Western fantasy about how wars should be waged:[30]

> [A]nalogously constituted armies: adversaries rather than enemies, endowed with the same military ethos and mores, and who fundamentally situate their violence in the context of the exercise of sovereign prerogatives.

In the face of "*levee en masse*, spontaneous resistance under occupation and the use of guerrilla tactics from South Africa to Cuba", the laws of war worked to consolidate the state's monopoly on the use of violence.[31] A further important, and related, point to note is that until the 1910s, and even the 1920s, these rules were thought simply not to apply to non-Europeans.[32] From a formalistic point of view, this was because these laws applied only between those states parties that ratified the constituent agreements, something from which non-civilised nations were excluded because they were not considered sovereign.[33] An anthropological rationale lay in the belief that the "savages" of Asia and Africa were not capable of showing restraint in battle: they were not capable of waging "civilised warfare". Obviously, therefore, it was impossible to wage "civilised warfare" against them.[34]

Accepting Mégret's argument means that, from the start, the body of international law that has regulated hired military skill has been complicit in a civilising and universalising mission. It comes as little surprise, therefore, that in spite of whatever code against the use of mercenaries may have developed between European states by the 19th century, these powers freely hired foreigners to wage war extra-continentally.[35] While the 1854 Crimean War is the most frequently given final instance of a European state (Great Britain) raising an army of foreigners to fight on European soil,[36] only twenty years previously King Louis of France established the Légion Étrangère (the French

[29] Ibid 308.
[30] Ibid 307.
[31] Ibid 305.
[32] Ibid 279.
[33] Ibid 284–286.
[34] Ibid 289–295.
[35] Zarate, above n 10, 86.
[36] Ibid.

Foreign Legion) referring to "the traditions of foreign troops who have served France since the Middle Ages".[37] Similarly, the British established the equally famous Brigade of Gurkhas after defeating these Nepalese fighters in 1816.[38] With the former used extensively in Africa and Indochina,[39] and the latter serving in Burma, China, India, and Malaya, among many others,[40] both of these forces were means by which foreign soldiers could further imperial aims in colonial battles. Yet, while the argument above is an important setting and beginning for this discussion, the intention of this article is to search for colonial structures beyond this. That international law endorsed the exploitation and conquest of non-European peoples, prior to the 20th century, is unsurprising because during this time it did not claim to be truly open or universal: it palpably distinguished between the "civilised", which it would protect, and the "uncivilised" that it would not. The focus of this article is, rather, on the period following the process of decolonisation, for it was after this that a more powerful argument regarding the universality of international law was made – that it was "not merely equally applicable to all societies, but that all societies participated on equal terms in its formulation".[41] In this next part, therefore, the focus will be on the specific laws and conventions applied to mercenaries since the latter half of last century.

C. Mercenaries and Decolonisation

Decolonisation led to a mercenary renaissance. From the 1960s onwards, colonial powers used mercenaries against national liberation groups in the third world, almost exclusively in Africa.[42] The use of mercenaries by the Katanga secessionists in the Congo from 1960 to 1963, and, subsequently, by the Tshombe and Mobutu governments against the Simbas from 1964 onwards, was supported by missions sent to Belgium and France in 1960, and the opening of recruiting offices in South Africa in 1961.[43] The United Nations ("UN") condemned Portugal, too, for allowing foreign mercenaries to use Angola as a base

[37] Frye, above n 12, 2617.
[38] Zarate, above n 10, 86.
[39] Ibid.
[40] Frye, above n 12, 2617.
[41] Anghie, "Birth of International Institutions", above n 1, 517.
[42] Frye, above n 12, 2625–2626.
[43] Burmester, above n 20, 48.

for this interference in the Congo's internal affairs.[44] The French Secret Service recruited 53 French and German mercenaries to aid the unsuccessful secessionist attempt by Biafra, from Nigeria, in 1967,[45] while the Rhodesian government recruited British mercenaries to support white minority rule.[46] There are suggestions also that the United States' Central Intelligence Agency ("CIA") might have covertly funded the mercenaries subjected to the infamous Luanda trial of 1976,[47] something made more believable by the fact that the agency aided recruitment for Tshombe's government in the Congo between 1964 and 1965.[48]

The period of decolonisation also opened the door to increased participation in international law by newly independent states, which, for example, quickly ratified the Geneva Conventions.[49] While the colonial powers attempted to avoid discussing the issue, second and third world countries were successful in pressuring the UN to confront the mercenary problem, especially given the number of countries in which mercenaries operated and the notoriety that they enjoyed for the brutality of their actions.[50] In 1968, the General Assembly ("GA") adopted Resolution 2465, the Declaration on the Granting of Independence to Colonial Countries and Peoples, by 53 votes to 8, with 43 abstentions.[51] The resolution included the following:[52]

> [T]he practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act and ... mercenaries themselves are outlaws.... Governments of all countries [should] enact legislation declaring the recruitment, financing and training in their territories to be a punishable offence and prohibiting their nationals from serving as mercenaries.

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[44] See e.g. SC Res 241 22 SCOR, 1378th Meeting, UN Doc S/RES/241 (1967).
[45] House of Commons *Private Military Companies: Options for Regulation: HC 577* (2002) 29.
[46] Ibid.
[47] Sarah Percy "Mercenaries: Strong Norm, Weak Law" (2007) 61 International Organization 367, 373.
[48] House of Commons, above n 45, 28.
[49] Mégret, above n 28, 296.
[50] Zarate, above n 10, 128.
[51] GA Res 2465, UN GAOR, 23rd sess, Supp No 18 at 4, UN Doc A/7218 (1968).
[52] Ibid [8].

This resolution was not indicative of an existing international or domestic crime of mercenarism, an observation that leads Milliard to conclude that it was a principle promoted by some UN member states in the hope that it would eventually become, through state practice, customary international law.[53] The fact it received only slightly more than half the votes in the General Assembly at the time supports this.[54]

In contrast, the GA adopted Resolution 2625 by consensus in 1970.[55] This differed from Resolution 2465 in three ways: it did not refer to individual mercenaries as criminals per se; it did not limit itself to national independence and liberation movements; and rather than prohibiting states from knowingly tolerating mercenary activities that led to incursions into other states, it proscribed their organisation or encouragement.[56] It thus was a retreat from the position stated in Resolution 2465: not only did it lack its political overtones, but also it was consistent with the principles enunciated in Hague V. These two factors are credited with the Resolution's unanimous acceptance.[57] Three years later, however, Resolution 3103 returned to these earlier themes, declaring the use of mercenaries by colonial and racist regimes a criminal act and mercenaries punishable as criminals.[58] This was passed by 83 votes to 13, with 19 abstaining.[59]

These resolutions could not modify the rules of the Geneva Conventions signed in 1949. Neither was subsequent state practice sufficiently uniform to suggest that a customary law rule had evolved as a result. Nevertheless, writing in 1980, Cassese concluded that the resolutions, insofar as the non-European states managed to gain acceptance of their view from numerous others, could be viewed as laying the foundations for an adequate modification of the relevant international law.[60]

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[53] Milliard, above n 8, 26. This is to say it was a *de lege ferenda* principle, as opposed to a *de lege lata* principle that represents an emerging customary law rule.
[54] Antonio Cassese "Mercenaries: Lawful Combatants or War Criminals" (1980) 40(1) ZaöRV 1, fn 23.
[55] GA Res 2625, UN GAOR 25th sess, Supp No 28, at 123, UN Doc A/8028 (1970).
[56] Ibid.
[57] Milliard, above n 8, 27.
[58] GA Res 3103, UN GAOR 28th sess, Supp No 30, at 142, UN Doc A/9030 (1973).
[59] Ibid.
[60] Cassese, above n 54, 11.

In 1963, newly independent African states formed the Organisation of African Unity ("OAU"), which at that time was the world's largest regional grouping.[61] Its charter elevated state sovereignty, calling for the inviolability of national borders and denouncing uninvited interference in member states' internal affairs.[62] Given this, it did not take long before it looked to confront the destabilising effect of mercenaries. In 1971, the OAU issued a declaration stating that foreign domination in some African states enabled mercenaries to operate, and that their liberation was an essential factor in eliminating mercenaries from the continent.[63] The following year it produced the Draft Convention for the Elimination of Mercenaries in Africa ("Draft Convention").[64] The text's intention was to criminalise mercenarism and mercenary recruitment. It also defined mercenarism, without reference to motivation, to cover anyone who was not a national of the state against which the actions were directed, and who was employed, enrolled or linked themselves willingly to a person, group or organisation whose aim was to overthrow a government of a member state, undermine the independence of a member state, or to block the activities of a liberation movement recognised by the OAU.[65] In this way, it "correctly identif[ied] what needed to be proscribed"[66] and "define[d] mercenaries narrowly according to their purpose."[67] The Draft Convention also did not address mercenary status under the laws of war.[68] In 1976, the International Commission of Inquiry on Mercenaries, created by the Angolan government, issued its own draft convention.[69] During this time, 13 foreigners were on trial in Luanda, Angola, for mercenary activity, and it was this politically charged atmosphere that incubated the agreement, something that has led to it being roundly criticised.[70] It, too, declared mercenarism to be an

[61] Milliard, above n 8, 43.
[62] Charter of the Organisation of African Unity, opened for signature 25 May 1963, 479 UNTS 39 (entered into 13 September 1963).
[63] OAU Declaration on the Activities of Mercenaries in Africa, OAU Doc CM/St 6(XVII) (1971) cited in Milliard, above n 8, 45.
[64] OAU Doc CM/433/Rev L Annex I (1972) ("Draft Convention").
[65] Ibid art 1.
[66] Milliard, above n 8, 43.
[67] House of Commons, above n 45, 7.
[68] Milliard, above n 8, 46.
[69] Frye, above n 12, 2629.
[70] Milliard, above n 8, 47–52.

international crime and an obstacle to self-determination, and called on states to prevent it from occurring within their jurisdiction.

The next important step came at the Diplomatic Conference on the Reaffirmation and Development of International Law Applicable in Armed Conflicts, the ultimate result of which was, in 1977, to add a protocol to the Geneva Conventions of 1949 ("Protocol I").[71] Article 47 of this protocol covered the activities of mercenaries, and resulted from a proposal of the Nigerian delegation in 1976. Article 47(1) denied mercenaries the rights of combatant or prisoner of war status, something African states had fought hard for throughout the conference.[72] However, its effect is largely neutralised by the definition found in art 47(2):

> **2. A mercenary is any person who:**
> (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
> (b) Does, in fact, take a direct part in the hostilities;
> (c) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
> (d) Is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
> (e) Is not a member of the armed forces of a Party to the conflict; and
> (f) Has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Article 47, therefore, embodies the intention, on the part of African and Socialist states, to equate mercenaries with war criminals and deprive them of any legal protection.[73] Yet, at the behest of Western states, it neither makes mercenarism a crime nor prohibits the recruitment, training, or financing of mercenaries.[74] Further, art 47(2) is cumulative, and because each criterion must be satisfied, the

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[71] Protocol additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1979)("Protocol I").
[72] Fris Kalshoven and Liesbeth Zegveld *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (3rd ed, ICRC, Geneva, 2003) 90.
[73] Cassese, above n 54, 28.
[74] Ibid.

definition is exceedingly narrow.[75] It is also widely regarded to be so flawed as to be unusable, for well-known reasons.[76] The financial motivation at the heart of the definition is at best difficult, and at worst impossible, to prove. Paragraph 2(e), furthermore, allows states to incorporate mercenaries into their own armed forces and avoid liability.[77] Ultimately, therefore, art 47 did not serve to suppress the use of mercenaries, but merely provided options for states that wish to do so.[78] Cassese's assessment is both apt and eloquent:[79]

> Incompleteness, reticence, ambiguity—this is the price that must be paid ... to the forces in favour of the *status quo* and the protection of vested interests.

Less than a month after Protocol I opened for signature, the OAU issued its Convention for the Elimination of Mercenarism in Africa ("OAU Mercenary Convention").[80] It abandoned the more considered language of the 1972 Draft Convention, instead referring to "colonial and racist domination"—language that also appears in the general provisions of Protocol I.[81] Further, while it adopted the problematic definition of mercenary found in Protocol I,[82] it also incorporated the crime of mercenarism adopted by the Luanda Convention.[83] This could perhaps be indicative of the disappointment of OAU members with the result of the international negotiations. Certainly, it was in response to these member states' dissatisfaction with the limited curtailment of mercenary activities that, in 1980, the GA created an ad hoc committee with the responsibility for drafting an international mercenary convention.[84]

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[75] Percy, above n 47, 377.
[76] House of Commons, above n 45, 8.
[77] Percy, above n 47, 377.
[78] Lindsey Cameron "Private Military Companies and their Status under International Humanitarian Law" (2006) 88(863) International Review of the Red Cross 573, 579.
[79] Cassese, above n 54, 28.
[80] Opened for signature 3 July 1977 OAU Doc CM/817 (XXIX), Annex II Rev I (entered into force 22 April 1985) ("OAU Mercenary Convention").
[81] Milliard, above n 8, 52.
[82] OAU Mercenary Convention, above n 80, art 1(1).
[83] Ibid art 1(2).
[84] Milliard, above n 8, 65.

Not until 1989, however, did the GA adopt and open for signature the Convention against the Recruitment, Use, Financing and Training of Mercenaries.[85] It adopted nearly entirely the definition of art 47(2) of Protocol I, but also included a complementary definition in art 1(2), which states that a mercenary is, in any other situation, a person recruited to overthrow a government or undermine the territorial integrity of the state. In all likelihood, this was added to protect the fragile sovereignty of nascent African states, at the expense of the groups of irregular forces still vying for power within them.[86] A similar concern is evident in the OAU Mercenary Convention.[87]

The UN Convention imposes criminal liability on mercenaries and those who recruit them.[88] It also imposes on states an affirmative obligation to "prohibit" these activities generally and "prevent" them if they oppose a self-determination movement.[89] Finally, for the first time, States Parties are prohibited from directly or indirectly using mercenaries.[90] Therefore, it would seem that the concerns of the African states, evident in Resolution 2465, and the OAU and Luanda Conventions, largely found protection in international law. However, as this article will show, the colonial drive Anghie identifies has by no means been exorcised from the law in this area.

D. Private Military Companies

The resistance of Western states to the proposals for mercenary regulation was to be expected. Mercenaries were, for some time, a means by which colonial powers could delay progress towards African self-determination, often in furtherance of the aim of economic exploitation.[91] Yet, as reports of mercenary brutality emerged, and the former colonies were able to win support for their plight internationally, both ideological and legal norms hardened against any link to mercenary activity. The reason mercenaries were to be regulated

[85] Opened for signature 4 December 1989, A/Res/44/34 (entered into force 20 October 2001) ("UN Mercenaries Convention").
[86] Milliard, above n 8, 62.
[87] Zarate, above n 10, 125.
[88] UN Mercenaries Convention, above n 85, arts 2–4.
[89] Ibid art 5.
[90] Ibid.
[91] Frye, above n 12, 2623; House of Commons, above n 45, 15–16.

lay in the fact they did not fight for an "appropriate cause" – they were motivated by money, rather than by patriotism or ideology – and so their actions were to be viewed as immoral, dangerous, or both.[92] Further, they were unaccountable: they operated outside any type of legitimate (that is, state-administered) authoritative control.[93] The relevant legal instruments reflect these fears.[94]

Yet, from the early 1990s, an ostensibly new phenomenon confronted international legal discourse on the subject of mercenaries: the Private Military Company ("PMC").[95] This term was and is understood to cover a number of different profit-orientated entities that offer military services.[96] And it was these companies that became the predominant form of hired military skill active in non-European countries. The best-known example is that of the South African firm "Executive Outcomes" ("EO"). The Angolan government hired this PMC, first to secure an oil field owned by Western oil companies and, second, to train government troops attempting to suppress rebel movements inside the country.[97] EO brought with them infrared capabilities, advanced communications, not to mention Mi-8, Mi-17, and Mi-17 gunships, and was widely credited with regaining territory with mineral wealth and forcing the rebel movement to agree to the UN-brokered Lusaka Protocol of 1995.[98] After this success, the Sierra Leonean Government hired EO for roughly the same purposes.[99] Another commonly cited example is Military Professional Resources ("MPRI"), a United States company with strong links to its national military. MPRI was hired by the Croatian Government to improve the capabilities of its armed forces in 1995, and, that year, Croatian forces performed unexpectedly well in "Operation Storm" – an offensive against Serb forces in the Krajina region.[100] Demand for PMCs

[92] Percy, above n 47, 371.
[93] Sarah Percy "This Gun's for Hire: A New Look at an Old Issue" (2003) 58 Int'l J 721, 736 ["This Gun's for Hire"].
[94] Percy, above n 47, 379–380.
[95] Zarate, above n 10, 75–76.
[96] PW Singer "War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law" (2004) 42 Colum J Transnat'l L 521, 522. Note that this, too, is a vexed definition and the interpretation given to it in this article is a broad one.
[97] House of Commons, above n 45, 11.
[98] Zarate, above n 10, 94–95.
[99] House of Commons, above n 45, 12.
[100] Sapone, above n 13, 25.

exploded with operations in Iraq and Afghanistan, with an estimated 20,000 to 30,000 PMC employees in Iraq making them the second largest contingent in the country after the United States Army.[101]

The obvious question attached to the rise of PMCs and their operation in numerous countries all round the world is why they are neither prohibited nor even regulated by international law. After all, they and their employees would seem to meet the definition of forces foreign to a conflict that engage in warfare with the object of private gain. Their theatres of operations would appear also to encompass many, if not most, of the states and territories in which mercenaries were most active and considered the most problematic.[102] Yet the use of PMCs is widespread because international law has not evolved to meet the challenges that their operations pose.[103] It is the hypothesis of this article that Anghie's thesis, detailed above, is capable of explaining this lacuna.

The first point to address is why the services of PMCs are in such demand. While they are an "overwhelmingly Western phenomenon",[104] most of their work takes place in weak and non-European states.[105] And it is not just military operations conducted openly by Western governments, such as the imposed change to a democratic regime in Iraq, that rely on PMC assistance. Both the United Kingdom and the United States have long been prominent users of private contractors to execute foreign policy in parts of the world where they would prefer not to be seen.[106] Added to this must be the strong links between PMCs and the governments and militaries of their home states, especially given the fact that PMCs usually include former members of national armed forces or intelligence services.[107] Further, while PMCs commonly claim to work for legitimate governments only, and thus not

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[101] E L Gaston "Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement" (2008) 49 Harv Int'l LJ 221, 223.
[102] Zarate, above n 10, 140–141; Sapone, above n 13, 19.
[103] Percy, above n 47, 368.
[104] House of Commons, above n 45, 12.
[105] Frye, above n 12, 2646.
[106] Geneva Centre for the Democratic Control of Armed Forces *Privatising Security: Law, Practice and Governance of Private Military and* Security *Companies: Occasional Paper 6* (2005) 72 ["GDAF"].
[107] Ibid.

rogue states with suspected links to terrorism like Sudan, or patently unpopular regimes like Mobutu's in Zaire,[108] there are suggestions that this, in fact, may not be the case.[109] In any event, it will be these companies' home states and media that will be the arbiter of which governments are "legitimate" and thus influence those clients PMCs choose to serve. Yet, it is not just by allowing Western states to give military support to its chosen causes that PMCs help perpetuate imperialism. Anghie has argued that the Mandate System heralded a transition from a formal system of colonialism to a "more elusive but nonetheless powerful system of neo-colonialism based on economic control",[110] and, similarly, it is these concerns that are raised by the use of PMCs in third world states, even from within the UN.[111] The Special Rapporteur on the Use of Mercenaries has noted the way that PMCs take advantage of their connections with multinationals – oil, mineral, chemical companies among others – and use their military resources to establish an "economic and financial hegemony of their business partners ... pav[ing] the way for the multinational neo-colonialism of the twenty-first century".[112] The House of Commons has labelled it "striking" that the countries in Africa with readily available mineral wealth are PMCs' greatest employers.[113] Moreover, many analysts have noted EO's close connections with the Branch-Heritage group: a group of companies with interests in energy and mining.[114] This group secured concessions to oil blocks in Angola and diamond blocks in Sierra Leone following EO operations in each of these states.[115] The cost for developing countries in consolidating self-government is to make such government subservient to the corporate interests of the developing world, a move that does not ameliorate the threat to these states' sovereignty but rather shifts and exacerbates this threat to and at the economic level. In short, therefore, PMCs are used

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[108] Zarate, above n 10, 94.
[109] Ibid 101.
[110] Antony Anghie "Time Present and Time Past: Globalization, International Financial Institutions, and the Third World" (2000) 32 NYU J Int'l L & Pol 243, 277 ["Time Present and Time Past"].
[111] Enrique Bernales Ballestros *Report on the Question of the Use of Mercenaries as a Means of Violating Human Rights and impeding the Exercise of the Right of Peoples to Self-Determination* UN ESCOR, 53rd sess, UN Doc E/CN.4/1997/24 (1997).
[112] Ibid [109].
[113] House of Commons, above n 45, 16.
[114] Zarate, above n 10, 100.
[115] House of Commons, above n 45, 16.

overwhelmingly to further the aims of Western powers in poor, non-Western countries. Often this will be in a manner that bypasses the democratic and electoral controls that otherwise serve to regulate initiatives of foreign policy.

Anghie notes too that these techniques of control and management are justified by the formulation of a new and comprehensive moral framework "based on a proper understanding of universal laws on how 'development and welfare' may be achieved".[116] In this context, what is conspicuous is that the moral concern that mercenary activity raised – the precept that it is wrong for strangers to a conflict to seek profit from it – is absent from the discourse surrounding PMCs. Rather, EO claimed that it was "trying to aid growth and democracy by bringing stability and foreign investment".[117] This is a common argument raised in favour of PMCs: many claim that they are vital to upholding the sanctity of developing nation states by safeguarding the rule of legitimate but weak and challenged governments,[118] and, further, that any possible blanket ban could imperil these states' inherent right to self-defence enshrined in art 51 of the UN Charter.[119] Another example can be found in the suggestion, with regard to the recent "rent a coup" episode in Equatorial Guinea involving the South African "Logo Logistics" firm, that although the firm may have fronted for outside interests in the profit-motivated toppling of a government, the results of the coup may have been an improvement. While in this case the president, (who came to power by killing his uncle) may have been legitimate under "archaic international standards", he was, it was noted, a wholly ruthless abuser of human rights.[120] It is this characterisation – as states in need of stability, development, and investment – that legitimises the intervention in domestic affairs by private Western companies.

Despite the international law instruments that have sought to curtail mercenary activity, state practice, which determines the development of customary international law, suggests that there is a general acceptance of PMCs and the basis for an international norm to support their

[116] Anghie, "Time Present and Time Past", above n 110, 284.
[117] Zarate, above n 10, 98.
[118] GDAF, above n 106, 119.
[119] Singer, above n 96, 544.
[120] GDAF, above n 106, 73.

legitimacy.[121] The "unworkable" definition of mercenary at international law, if easily evadable by individuals, certainly poses no danger to private companies. Similarly, the UN Mercenary Convention, which opened for signature in 1989, came into force only in 2001 with the support of none of the major state powers. In January 2008 it had only 30 ratifications, almost exclusively third world states,[122] while no-one has yet been prosecuted under this treaty. This has led some to suggest that it acts almost as a form of "anti-customary law" in that, as a treaty, it weakens the norm it has set out to protect.[123] It is widely acknowledged, furthermore, that IHL is an ineffective possible regulator of PMC activity. As Cameron argues, because the vast majority of PMC employees will have the status of civilians,[124]their accountability falls on domestic criminal justice systems, not international law. This in turn is problematic given that most PMCs operate and commit otherwise punishable abuses in states with weak or non-existent legal systems,[125] and cases brought before national courts of PMCs would likely be long and difficult.[126] The fact that international law has not evolved to restrict these companies reflects the role colonialism plays in its development and formation, as well as the moral framework that is cultivated to justify it. International law's toleration of PMCs furthers the civilising mission by allowing the

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[121] Singer, above n 96, 533; Zarate, above n 10, 114.

[122] *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of People to Self-Determination* UNHRC 7th Sess UN Doc A/HRC/7/7 (2008) [52]. Interestingly, many OAU states that originally pressured the United Nations to end state use of mercenaries no longer support the convention that resulted from their efforts: they do not wish to efface for themselves the option of hiring military contractors when it is in the interests of their governments to do so – usually to suppress rebel movements intent on loosening their grip on power. See Milliard, above n 8, 64. This, perhaps, is an example of Anghie's observation that the post-colonial government reproduces the civilising mission *internally* in its attempt to control and assimilate minorities in order to create a coherent nation state. See Anghie, *Making of International Law,* above n 1, 10. As the nation state is the primary actor in international law, cementing it as the key political entity – as opposed to smaller community or tribal groupings – strengthens and extends the reach of international law and thus its civilising influence. For Anghie's perspective on the relationship between the state and minorities in post-colonial state see Antony Anghie "Nationalism, Development and the Postcolonial State: The Legacies of the League of Nations" (2006) 41 Tex Int'l L J 447, 458–460.

[123] Singer, above n 96, 531.

[124] Cameron, above n 78, 594.

[125] Frye, above n 12, 2646.

[126] Cameron, above n 78, 595.

values and causes Western states support to be enforced in the developing world. It also allows multinational interests to gain access to developing world resources, thus causing poor states to fall under the West's economic control – perpetuating a third world sovereignty constrained by powerful economic forces. This is justified through the rubric of development. The activities of PMCs in the developing world, unlike those of mercenaries, are not morally reprehensible for seeking to profit from foreign conflicts or unduly interfering with the internal affairs of developing countries; rather, they operate for the benefit of poor "uncivilised" states by ensuring "legitimate" governments can maintain sovereign control and economic interests can be freely developed. It is in this way that racial superiority and economic dominance are embodied in this area of international law.

Conclusion

This article has tracked the development of international law in relation to mercenaries and private military companies. It has argued that, from international law's exclusion of non-Europeans from its protection in the 19th and early 20th century, to weak and unworkable law to regulate the use of mercenaries, to a tacit legitimisation of the use of PMCs, Anghie's thesis of the "civilising mission" remains pertinent throughout. Far from upholding the rights of all nations and their citizens, international law in this area has carried with it a colonial imperative that has privileged those who are regarded as civilised, to the detriment of those who are seen to be not. Instead of protecting weak nations and weak groups within nations from the predatory designs of those in greater positions of power, it has worked to further and strengthen these divisions and reinforce the status quo.

Yet there is nothing surprising in the claim that international law has been shaped to suit the wills of the more powerful states to the disadvantage of the weaker; it has long been made about law in general, and, indeed, Anghie is not the first or only one to argue in this way.[127] Furthermore, it must be noted that this is a theory that began through reflection upon the Mandate System and the process of decolonisation, and that has since been extended to apply to further and increasingly

[127] See e.g. Martii Koskenniemi *From Apology to Utopia* (Cambridge University Press, Cambridge, 2005).

various areas of international law.[128] The test of the theory, therefore, could be seen to be how far the model can stretch; that is, the number of different areas of international law to which it can be applied and still offer lucid explanations for the particular structures that are in place. It could also be argued that this theory is only as good as the way in which specific areas of law are chosen for analysis. However, it would not appear that the essence of Anghie's claim is that international law is absolutely and purely, now as it has been always, a colonial tool. Rather, his broader statement seems to be that not only is it important to study the past to derive better methodologies to analyse the structures of the present, but also that the study of history, and law as well, must be undertaken on the basis that commonly accepted narratives are monolithic and hegemonic, and thus must be challenged and dissected if they are to be more than superficially understood. The resonance of his argument does not lie in his claim that international law is imperial; indeed, he seems to regard this as an obvious and recognised fact. Anghie's thesis is focused instead on the various means and mechanisms by which hierarchies of value can shift, consolidate, and reproduce within disciplines – such as law – that are judged to be disinterested. The message to take from his work, therefore, is that it is only through real critique and scrutiny, through being alive to the capacity for veiled ideologies within discourse, and through a desire to learn from the experience of the past, that the foundation can be laid for better modes of thinking and more equitable structures of international law.

[128] Anghie, *Making of International Law*, above n 1, 1–4.

THE MAORI LAND COURT: A PREFERENCE FOR DEFERENCE?

DANIEL PANNETT*

Introduction

In the inherently discretionary realm of administrative law, applications of finite, discrete doctrines are understandably somewhat counterintuitive. Judges will often be wary of explicitly labelling a new approach for fear of being drawn into a conceptual straitjacket, and will instead prefer to justify differing levels of intervention as pragmatically as possible.

However, notwithstanding this apparent reticence, developments in New Zealand, including the return of the doctrine of jurisdictional fact[1] and the discussion of the novel concept of proportionality,[2] have greatly altered the methodology in which administrative law operates. This is particularly clear in relation to varying standards of review that may be applied by a court. In Canada, this development has manifested itself in the idea of *deference*, understood generally as the lowering of a traditional "correctness" standard on an alleged error of law made by a specialist tribunal to one of "patent unreasonableness". This approach has culminated in explicit curial recognition of the constitutional importance of these tribunals through a lowered level of intervention in an area of law where the courts had previously taken an interventionist approach.

No New Zealand court has yet openly applied a deferential approach on review. Indeed, as recently as last year, the Court of Appeal was notably brisk in dealing with the concept[3]:

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1 *Discount Brands Ltd v Westfield (New Zealand) Ltd* [2005] 2 NZLR 597.

2 *Wolf v Minister of Immigration* [2004] NZAR 414.

3 *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, Hammond J at para [379].

> Another concern is that things like spectrums of response and "deference" in this subject area are ultimately quite unhelpful, and even unworkable. To say that something rests somewhere on a "continuum" is a conclusion, not a principle; it does not tell us how that point in a spectrum is reached. And courts do not defer to anything or anybody: the job of courts is to decide what is lawful and what is not.

Statements such as this underline the courts' reluctance to move from their perceived orthodox role as strict interpreters of statutes and the administrative bodies established by them. However, there have been a number of statutory tribunals established in New Zealand with a significant amount of specialised expertise in their own legal field, with the Maori Land Court the clear paradigm example. This may be indicative of an emerging constitutional order where administrative tribunals exercise their own discreet legal interpretations. Accordingly, this article examines the possibility of "deference" forming a new part of the administrative law landscape in New Zealand, both on a broad principle level, and in relation to specific institutions.

This article is in two parts. Firstly, Part A will outline the conceptual basis for a doctrine of deference so as to explain how the doctrine might operate in New Zealand. This involves a historical description of the doctrine's roots in Canada and New Zealand, followed by identification of some factors that can give rise to a "deferential" approach. Part A then goes on to define under the heading "Deference to What?" the exact ambit of a proposed doctrine in New Zealand: namely, errors of law only. Many different aspects of an administrative decision have been said to attract deference – this part of the article makes clear that the narrow focus here is on error of law.

Part B involves a case study of *Attorney-General v Maori Land Court*[4] and Te Ture Whenua Maori Act 1993.The analysis of this case will examine the reasoning of the Court of Appeal in determining a jurisdictional section of the Te Ture Whenua Maori Act 1993. That Court's conclusions will then be critically compared against a comparative conclusion using a more deferential mindset, so as to give the reader a full appreciation of the material differences the doctrine of deference

[4] [1999] 1 NZLR 689 (CA).

can produce. Part B aims to give the reader a tangible example of how deference could, and arguably should, apply in a New Zealand context.

A. Identifying a Coherent New Zealand Approach

1. Introduction

The roots of a principled concept of "deference" stem from the Canadian jurisdiction. This "profoundly deferential attitude towards administrative interpretations of statutes"[5] emerged from the keystone case of *CUPE v New Brunswick Liquor Corporation*.[6] In that case, the court was faced with a complaint against the Public Service Labour Relations Board – a statutory tribunal created to rule on questions of Canadian labour law. The question for the Supreme Court was whether the Board could interpret the meaning of the term "other employee" in a particular way. Until this point in Canada, the standard of review would have been correctness. However, *CUPE* marked a departure from this, ceding a "wider range of administrative lawmaking to the board".[7] Dickson J stated the standard to be applied:

> Was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

Accordingly, the decision – that is, the interpretation of the legal phrase "other employee" – must be "more than wrong"[8] to justify a reviewing court intervening and replacing the interpretation of the decision-maker. This approach was justified for several reasons. Firstly, the position of this labour board as a "specialised tribunal which administers a comprehensive statute [meant it] has developed [...] accumulated experience in the area".[9] Moreover, the existence of a privative clause in the statute provided a "compelling"[10] rationale for

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[5] Michael Taggart, "Lord Cooke and the Scope of Review Doctrine in Administrative Law" in Paul Rishworth (ed) *The Struggle for Simplicity in the Law: Essays for Lord Cooke of Thorndon*, (Butterworths, Wellington, 1997, pp189-219), p204.
[6] [1979] 2 SCR 227 (Hereafter referred to as *CUPE*).
[7] Taggart, above n5, p206.
[8] *The Attorney-General of Canada v Public Service Alliance of Canada* [1993] 1 S.C.R 941, p955.
[9] *CUPE*, above n6, p235-6.
[10] Ibid.

non-intervention. Judicial restraint in the form of curial deference followed accordingly in this case.

Therefore, *CUPE* had created two "threshold" standards: correctness and patent unreasonableness, and was initially regarded as "encapsulating an entire approach to judicial review".[11] Stemming initially from the context of labour relations tribunals[12] but spreading also to other areas of "inferior" tribunal decision-making,[13] courts undertook what they described as a "pragmatic and functional analysis",[14] which included factors such as the wording of the statute, the nature of the problem, and the expertise of the decision-maker.[15] Following this analysis, the decision for the Court was a binary one: simply to defer (patent unreasonableness) or not to defer (correctness).[16]

Following this watermark, however, the "spirit" of *CUPE* underwent some challenges in interpretation and application.[17] These concerns were mainly around whether the doctrine should include an "intermediate" stage of unreasonableness. Accordingly, very recently, the Supreme Court in *Dunsmuir v New Brunswick*[18] has clarified its approach in determining the application of deference. The approach affirmed a binary decision between "correctness" and "reasonableness".[19] Accordingly, the Court recognised that questions of

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[11] Christopher Taylor, "Curial Deference and Judicial Review" *Advocate's Quarterly* ([1991] Vol 13) pp78-89, p78.

[12] See, for example, *CAIMAW, Loc. 14 v Pacaar Canada Ltd* (1989) 62 DLR (4th) 437 (hereafter referred to as *CAIMAW*).

[13] Such as the Canadian Tribunal established to control and regulate imported goods into that country, as well as many other administrative tribunals. See, for example, *National Corn Growers v Canada (Canadian Import Tribunal)* (1990) 74 DLR (4th) 458.

[14] See, for example, *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R 982, p991.

[15] Lorne Sossin and Colleen M. Food, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law", *University of Toronto Law Journal* (*Special Issue: Education, Administration and Justice: Essays in Honour of Frank Iacobucci*, 2007, Vol 57, pp581-606), p586.

[16] Ibid., 587.

[17] See *CAIMAW*, above n12, p 479; *Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 S.C.R 748; *Toronto (City of) v. CUPE, Local 79* [2003] 3 S.C.R 77, at para [63]; Christopher Taylor, "Curial Deference and Judicial Review" *Advocate's Quarterly* ([1991] Vol 13) pp78-89, p81.

[18] 2008 SCC 9 (hereafter referred to as *Dunsmuir*).

[19] In doing this, Binnie J at para [139] recognises this "will shift the courtroom debate

degrees of deference – that is, how "reasonable" a decision must be depending on factors such as a privative clause or the expertise of the tribunal[20] - should become an issue only *after* the decision of whether to defer or not is made. The approach in *Dunsmuir,* representing a return to "base" *CUPE* principles, demands that the first question be a straight "yes/no" one: questions of degree arise only when that first question is answered in the affirmative.

2. New Zealand

In 1997, Professor Michael Taggart raised the possibility of deference operating as an explicit doctrinal tool for reviewing courts in a New Zealand context.[21] This was done, at least initially, through identifying certain aspects of Cooke J's approach in *Bulk Gas Users Group v Attorney-General.*[22] The issue for the Court in that case was the interpretation by the Secretary of Energy of the words "direct interest" in re-pricing of natural gas schemes in Auckland. Accordingly, the true question was "[w]hose interpretation of the statute should prevail – that of the Judge or that of the administrative decision-maker?"[23] This was answered to be the courts, "in fulfilment of their constitutional role as interpreters of the written law".[24] However, Professor Taggart notes that this was not the entirety of the reasoning in *Bulk Gas.* Rather, Cooke J recognised that where "there remains legitimate room for judgment in applying the [correct statutory] test [...] the decision will stand unless it is [unreasonable]".[25] This suggests that a "pure question of interpretation" might be subject only to a *Wednesbury* standard of review,[26] and points towards deference in New Zealand being potentially viable. In brief, Professor Taggart claims that "as the broad principles of administrative law are applied to particular parts of the

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from choosing *between* two standards of reasonableness that each represented a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference".

[20] Ibid., para [151].

[21] Taggart, above n5, p189.

[22] [1983] NZLR 129 (CA) (hereafter referred to as *Bulk Gas*).

[23] Taggart, above n5, p195.

[24] Ibid.

[25] *Bulk Gas Users,* above n 22, p136.

[26] Taggart, above n5, p196.

variegated administrative law landscape, accommodations of various sorts are made".[27]

Since this original claim, the idea of deference in New Zealand and around the common law world has increased in sophistication. Professor Taggart has, as recently as last year, again advocated for a doctrine of deference to gain a foothold in New Zealand, but as part of a "rainbow of review", with proportionality contemporaneously supplanting *Wednesbury* to complement deference.[28] In addition to this approach, there have been other commentaries on what it means to "defer" – these are useful in introducing deference, as they add richness and sophistication to the initial enquiry.

3. Deference as "Respect" and "Due Deference"

David Dyzenhaus in 1997[29] discussed the reasons *why* a judge may defer. Firstly, he describes "deference as submission" as reflecting a "democratic positivist" point of view: that "the legislature is the sole source of law and that its legitimacy is derived from its accountability to the people".[30] Accordingly, recognition of deference would flow only from a formalistic adherence to statutory direction – that is, a privative clause. However, as can be seen from the *CUPE* decision and others, this is not entirely accurate. Thus, Dyzenhaus presents another paradigm in which deference should operate: deference as respect: "a respectful attention to the reasons offered [...] in support of a decision".[31] This is done through "determin[ing] the intent of the statute, not in accordance with the idea that there is some prior (positivistic) fact of the matter, but in terms of the reasons that best justify having that statute".[32] This more realistic view allows a reviewing court to take into account factors such as a privative clause, as well as expertise, the question being asked, et cetera. Deference is then not merely bowing to the will of a superior law-making body, but can

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[27] Ibid., pp202-203.
[28] Michael Taggart, "Proportionality, Deference, *Wednesbury*" in New Zealand Law Society *Judicial Review: September 2007* (New Zealand Law Society, Wellington, 2007, pp23-67).
[29] David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart (ed) *The Province of Administrative Law* (Hart Publishing, Oxford, 1997, pp279-308).
[30] Ibid., p280.
[31] Ibid., p286.
[32] Ibid., p303.

"rearticulate the proper relationship between the legislature, administrative agencies and the courts"[33] through a more involved application of the doctrine. In 2005, Murray Hunt, writing in a United Kingdom context,[34] used "deference as respect" to articulate a concept of "due deference", aiming to improve some of the difficulties the doctrine was facing in the United Kingdom.[35] The "due deference" approach is similar to that of Dyzenhaus in that it asks for a number of different factors to be considered, although it does ask for "degrees of deference"[36] to be applied, an approach rejected in ***Dunsmuir***. Nonetheless, it is still useful to illustrate that a broader contextual approach is required.

4. What will indicate deference may apply?

When, then, should a court defer? Since the birth of the doctrine in ***CUPE***, certain factors have been identified as indicative of a deferential approach being appropriate, that can, and must, be examined in a New Zealand context. These factors are not exhaustive, but provide a strong starting point to undertake a contextual deference analysis.

(a) Expertise

Recognition of expertise as a relevant concern stemmed from the position of labour tribunals in Canada since ***CUPE***. These "high-powered" tribunals, consisting of members with significant amounts of specialist labour dispute knowledge, were recognised by courts as being capable of developing their own body of jurisprudence. In ***Dunsmuir***, where the Supreme Court reconciled previous law on determining whether deference should apply or not, the Court stated "deference may [...] be warranted where an administrative tribunal has developed particular expertise of a general common law [...] in relation to a specific statutory context".[37] This trend stems from the statutory

[33] Ibid., p286.
[34] Murray Hunt, "Sovereignty's Blight: Why Contemporary Public law Needs the Concept of 'Due Deference"' in Nicholas Bamforth and Peter Leyland (eds), ***Public Law in a Multi-Layered Constitution*** (Hart Publishing, Oxford, 2003, pp337-370).
[35] Namely, that in the context of deference as between the legislature and judiciary, there had developed an idea of a "margin of appreciation" where a court would not step, recalibrating deference as a mere justiciability enquiry. See Hunt (Ibid.) pp345-346.
[36] Hunt, above n34, p353.
[37] ***Dunsmuir***, above n18, para [54].

context that gave rise to *CUPE*, where it was stated that "[i]n the administration of that [statutory] regime, a board is called upon [...] to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system".[38] When an administrative body operates for some time within a specific and identifiable statutory context, building experience and expertise in that area, then deference may be appropriate.

(b) Statutory indications

If a statutory regime has been set up as a discrete dispute resolution mechanism (as was, and is, the case with Canadian employment law), or if that regime can be viewed as an alternative to an established and comparable system (such as Te Ture Whenua Maori Act 1993 and the Maori Land Court's contrast to the Torrens system), then deference might be more likely. This is because the greater level of "compartmentalisation" means that a reviewing court should recognise the unique role these decision-makers have in the "complex decision-making environments of the modern state",[39] and accordingly be less inclined to interfere in these specialised contexts. Moreover, if the determination in question involves questions of "broad policy",[40] or if "legal and factual issues are intertwined and cannot be readily separated",[41] deference should apply. However, if the question is outside the tribunal's expertise and is of "central importance to the legal system",[42] then the opposite conclusion might be reached.

(c) Privative clauses

Likely the clearest indicator of deference being appropriate, a privative clause can be seen as "evidence of Parliament or a legislature's intent that interference by reviewing courts be minimized".[43] The reasoning for this is self-evident: when Parliament drafts law to *prima facie* restrict the access of a reviewing court to a decision of an inferior tribunal, deference to that decision would follow as a matter of logic and

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[38] *CUPE*, above n6, p235.
[39] Sossin and Food, "The Contextual Turn", above n15, p584.
[40] *Dunsmuir*, above n18, para [151].
[41] Ibid.
[42] *Dunsmuir*, above n18, para [55].
[43] Ibid., para [52].

commonsense. Whilst not eliminating the inherent power of review altogether, privative clauses can at the very least be seen as indicating caution should be considered before a court undertakes a "correctness" analysis. It should be noted, however, that the absence of a privative clause is not determinative against the application of deference.[44]

(d) Rights of appeal

Rights of appeal are relevant for two reasons. In sitting alongside the inherent review power, they have an effect on how the exercise of review might work in practice. The more likely a party is to use the inherent power of review to "correct" a decision than appeal, the more likely deference is to apply. This is because the tribunal can be categorised as "administrative" in the true sense, as it is more likely to be subject to the administrative jurisdiction of the High Court. This is the case with the Maori Land Court. More specifically, the existence of an appeal right raises these two main questions:

1. Whether the existence of an appeal right necessarily ousts the possibility of review; and
2. Whether the granting of an appeal right necessarily equates to a correctness standard being applied.

In relation to the first question it is clear that in most cases, judges will exercise their inherent discretion to refuse review when an appeal right exists. This is because an appeal right can be viewed as a deliberate attempt by the legislature to allow an appellate court to "correct error and supervise and improve decision-making".[45] Thus, review (and the variable standards, including deference, it could bring) rests on shakier ground in this context, given that the "answer" lies in the appeal route.

However, it is worth noting that in some cases, appeal rights are simply not exercised. For example, Te Ture Whenua Maori Act 1993 makes explicit statutory provision for rights of appeal on "all or any part of the [initial] determination".[46] However, litigants have still preferred the inherent power of the High Court, such as in *Attorney-General v Maori*

[44] Ibid.
[45] *Dunsmuir*, above n18, para [52].
[46] Te Ture Whenua Maori Act, s58(1).

Land Court[47] and *MacGuire v Hastings District Council*.[48] This is an indication that review, with its inherent flexibility, could perhaps be retained alongside even robustly-drafted appeal rights. Where the governing statute also points towards a special "niche" for the decision-making body, as is arguably the case with the Maori Land Court,[49] this argument carries further weight, and may help to suggest review might in some cases still be available.

In relation to the second question, it is unsurprising that the exercise of most appeal rights would favour a standard of substitution. If an appeal right exists in respect of a decision made by a tribunal, appellate courts will be wary of applying anything less than a correctness standard in the face of clear legislative direction.

The claim for a correctness standard is strongest where the appeal right is limited to a point of law,[50] as the answer of how to correct an error has been explicitly dealt with by Parliament, and that answer involves a correctness standard. Parliament has considered the types of errors it wishes corrected on appeal and by identifying only questions of law as being subject to intervention, courts would be wary of departing from a correctness standard.

However, if a broader appeal right allows only limited grounds, involving the application of standards other than correctness, the issue becomes more complex. If an appeal right is less than absolute, then the existence of multiple "levels of appeal" suggest that review is not precluded merely because another route to correct the error exists. It is then arguable that if the appeal right is viewed as less than a straitjacket, the exercise of similarly flexible review standards should not then be precluded, as "room to move" still exists.

Shotover Gorge Jetboats Ltd v Jamieson[51] dealt with the breadth of an appeal from a specially created statutory body, the Lakes District Waterways

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[47] [1999] 1 NZLR 689 (CA).
[48] [2001] NZRMA 557 (PC).
[49] Part B will discuss deference with respect to a tangible example, the Maori Land Court.
[50] See, for example, s58 of the Film, Video and Publications Classifications Act 1993, which restricts appeals from the Film and Literature Review Board to the High Court on "questions of law" only.
[51] [1987] 1 NZLR 437 (hereafter referred to as *Shotover*).

Authority, to the District Court. In examining this question, Casey J stated that "appeal rights in respect of different authorities and tribunals depend very much on the meaning to be given to the particular statute conferring them".[52] Cooke J identified "another type of appeal [...] subject to a discretionary power to rehear the whole or any part of the evidence or to receive further evidence".[53] Such a right of appeal creates on the part of the appellate court a "customary allowance"[54] on matters of fact and discretion. It may be overenthusiastic to suggest that these types of comments could be stretched to apply to an appellate (or reviewing) court lowering their level of intervention on an error of *law*. Notwithstanding this, *Shotover* does seem to support the principle that the breadth and nature of appeal rights can vary, and will depend almost invariably on the nature of the statute conferring them.

The Supreme Court in *Austin, Nicholls and Co Ltd v Stichting Lodestar*[55] has very recently also considered the nature of appeal rights. The decision relates primarily to the second difficulty: the standard of intervention on appeal. The question was the breadth of the appeal under s27(6) of the Trademarks Act 1953.[56] In commenting on the nature of that appeal, the Supreme Court seems to favour a substitutionary standard. Elias CJ, writing for the Court, recognised the "customary allowance" point mentioned in *Shotover,* but did not hesitate in explicitly restricting its application to "findings of fact or fact and degree",[57] and made clear that "on general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case".[58] Generally, the approach of Elias CJ can be summarised at paragraph [16]:

> Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is a matter of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong only

[52] Ibid., p442.
[53] Ibid., p442.
[54] Ibid.
[55] [2008] 2 NZLR 141 (hereafter referred to as *Lodestar*).
[56] Ibid., para [1].
[57] Ibid., paras [5], [13].
[58] Ibid.

> in the sense that it matters, even if it was a conclusion on which minds might reasonably differ.

Thus, errors of law are to be assessed solely on correctness standards. These words have since been applied without hesitation in the High Court, pointing towards a trend of appellate courts having a much greater level of authority.[59] However, Ronald Young J in ***E v Director of Proceedings***[60] has recently applied a more principled analysis to ***Lodestar***, suggesting some flexibility in appeal may still remain. The High Court in this case was considering the breadth of appeal rights to be exercised in relation to s 109 of the Health Practitioners Competence Assurance Act 2003. Previous litigation had shown that s109 appeals were to be dealt with on a quite narrow basis, more akin to review than appeal.[61] However, Ronald Young J held that as s109 involved a "general appeal in that it is a right of appeal in the way of rehearing",[62] the approach in ***Lodestar*** should now apply. However, the decision then goes on to provide some indication as to ***why*** and ***how*** such an approach should apply to a particular right of appeal.

Firstly, it was noted that the decision made at first instance did not include the exercise of discretion, as the judgment involved a "comparison of the conduct of the practitioner against appropriate [identified] standards",[63] rather than a decision-making power based around policy implementation. Secondly, the court held it relevant that "there was no specialist medical expertise being exercised by the Tribunal,[64] requiring only an isolated application of given facts to known law – moving the Tribunal away from the notion of a truly "specialist" body. To reaffirm this point, the court noted that attention would have to be paid to this specialist knowledge if relevant to the initial determination.[65]

This approach may swing back towards ***Shotover***, letting "standard-varying" factors into an analysis, even when the context is as seemingly

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[59] See, for example, ***Hutton v Webb*** [2008] NZFLR 629 (HC), ***Barry v Police*** 3/4/08, Stevens J, HC Whangarei CRI-2007-488-29.
[60] 11/6/08, Ronald Young J, HC Wellington, CIV-2007-485-2735.
[61] Ibid., paras [8]-[9].
[62] Ibid., para [12].
[63] Ibid., para [15].
[64] Ibid., para [17].
[65] Ibid., para [18].

unpromising as a general right of appeal. This point addresses the second issue identified in respect of appeal rights: that correctness standards will invariably be applied. A possible explanation for this may be that the reasoning of the Supreme Court in *Lodestar* was descriptive without being explanatory. Even though there was a clear indication that "appeal means substitution",[66] no explicit methodology was identified by the Supreme Court as appropriate, opening the door to '*E*-like' reasoning. This could even be taken as an implicit recognition by the Supreme Court that the High Court will, when the context demands it, construe appeal rights in a less rigid manner. Therefore, even when the High Court has been "invited" by Parliament to correct an error, the invitation may not always involve a court substituting its judgment *de novo*. Accordingly, in a judicial review where a court is "uninvited" and may use its discretion more fully, standards become even more malleable.

5. Deference to what?

Deference has been discussed and applied in respect of many aspects of a first-instance decision-making body's reasoning. However, this has led to some confusion in scope of application, in that precisely which head, or heads, of review should attract the deference doctrine remains unclear. Accordingly, this article will only examine what it means to defer to an *error of law* made by an "inferior" tribunal. This will almost invariably (as was the case in *CUPE*) involve an alleged misinterpretation by the tribunal of their governing statute.

It is worth clarifying at this point precisely what this means. When assessing alleged errors of law, it is difficult to draw a clear dividing line between interpretation, application, and "mixed" questions of law and fact. This is because a reviewing court can describe an error as "legal" or "factual", depending on the focus given to either aspect. The construal of an alleged error is important, as varying levels of intervention will then be justifiable by a court. For example, an error of fact, which goes to the foundation of the decision, requires a significant "error" before intervention can be justified. This is to be compared with "pure" error of law, which applies a much more stringent "correctness" standard. In essence, a mistake of fact will allow for

[66] *Lodestar*, above n55, para [16].

degrees of correctness, but an error of law will not. Therefore, the focus here will be on the *interpretation* of a statute, as divorced from factual questions as conceptually possible. This removes the problematic "customary allowance"[67] of relaxed intervention on findings of fact, and enables a more principled examination of whether deference can apply on the doctrinal, rather than pragmatic, level.

This view is not, perhaps, *prima facie* the most fertile ground on which to base a deference enquiry. It is a long-established fact that courts will apply a "correctness" standard to alleged errors of law.[68] There is no way a decision-maker can interpret law "almost correctly". However, there are also conceptual advantages in examining deference in respect of error of law. This is explained through error of law's position as the "hardest" standard, or to use a metaphor, the biggest weapon in a reviewing court's armoury. Therefore, error of law seems to be the logical starting point: if it is arguable that a court should defer from this high standard, it would not be a huge jump in logic to then suggest that the same relaxation (in the appropriate circumstances) might be applied to other, lower standards.

Some support for this approach can also be found in *Bulk Gas.* Cooke J stated that a reasonableness test should apply where "there remains legitimate room for judgment in applying the [correct] test":[69] in other words, those questions of application of statutory standards may be deferred to.[70] There is support also in Canada, best illustrated by the opinion of Lebel J in *City of Toronto v CUPE*:[71]

> This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness [...] *even pure questions of law may be granted a wide degree of deference* where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention. The critical factor in this

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[67] *Shotover*, above n51, p439.
[68] For a recent example of the application of this standard, see *Major Electricity Users' Group Inc v Electricity Commission* (14 March 2008, High Court, Wellington, Wild J), where it was stated at para [80] in response to an alleged error of law on the part of the Electricity Commission that "there is only one standard of review in such a situation: correctness".
[69] *Shotover*, above n51, p136.
[70] Taggart, above n5, p196.
[71] *Toronto (City of) v. CUPE, Local 79*, above n17.

> respect is expertise [...] where an administrative adjudicator must decide a general question of law [...] that determination will typically be entitled to deference.[72] (Emphasis added).

This quote reflects the unique position administrative tribunals now hold in our constitutional framework. These bodies' specialist knowledge and expertise mean that parties using this specific medium should, and can, expect a valid determination of law in relation to their dispute. Indeed, when a tribunal is singled out as the appropriate dispute resolution mechanism, it makes administrative sense for this to be the case. Accordingly, deference may apply to alleged errors of law.

6. Summary

Some critical points can be taken from Part A in moving towards an applied interpretation of these broad conceptual underpinnings:

1. The question of deference, born in Canada, essentially asks whose interpretation of a statutory instrument is to be preferred: a reviewing court's or a first instance, specialist Tribunal's?
2. In this article, the focus is importantly on interpretation – that is, "pure" questions of law, as isolated from individual factual concerns so far as possible. This is for the purposes of conceptual clarity, as the focus on a purely legal question illustrates the doctrine's operation in the clearest case possible.
3. It is also important to note that the Maori Land Court's position as an administrative tribunal gives it a special position in New Zealand that may justify deference being applied. The fact that most litigants in that Court will prefer to "cure" an alleged error by review, rather than appeal, is evidence of this.
4. Factors that indicate a possibility of deference, such as expertise, are present in the Maori Land Court, making this Court a prime candidate for an actual application of the doctrine to a specific New Zealand context.

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[72] Ibid., para [71].

B. Walking the Walk – *Attorney General v Maori Land Court*

1. Introduction

To gain a fuller insight into the appropriateness of deference being explicitly recognised in New Zealand administrative law, examples of practical application must be considered. There are several administrative tribunals in New Zealand that may possess the requisite qualities to attract deference from a reviewing court. This part does not seek to answer the question of whether deference should apply to *all* administrative tribunals. Rather, the example of the Maori Land Court has been chosen to show in the clearest way possible how this theory would become a doctrinal reality.

2. The Maori Land Court (MLC)

(a) Jurisdiction and appeals

The Maori Land Court, along with the Waitangi Tribunal, occupies a unique niche in New Zealand's judicial landscape and seems one of the best possible examples of a "deference-appropriate" tribunal. There are some specific provisions in its governing statute, Te Ture Whenua Maori Act 1993 (TTWMA), that relate to the MLC's jurisdiction.[73] However, more broadly, it is sufficient to note that the MLC is mandated under statute to "promote and assist in the retention of Maori land [...] in the hands of the owners; and the effective use, management and development [...] of Maori land or General land owned by Maori".[74] Although there has been some litigation as to the precise ambits of this jurisdiction,[75] the MLC does bear the primary responsibility for Maori land in New Zealand. The jurisdiction has consequently been extended to the areas of fisheries, aquaculture, and the foreshore and seabed.[76] A Bill currently under Select Committee consideration would, if passed, "expand the jurisdiction of the Court

[73] See Te Ture Whenua Maori Act 1993 (TTWMA), ss18-20.
[74] Ibid., s17(1).
[75] See *Attorney-General v Maori Court* [1999] 1 NZLR 689 (CA).
[76] TTWMA, s26B; Maori Fisheries Act 2004 ss181-182, s260; Foreshore and Seabed Act 2004, s46.

into all areas of collective Maori asset ownership".[77] Chief Maori Land Court Judge Joe Williams sums up the jurisdictional situation of the MLC by stating "[i]n time, the Court will need a new name because land will be just one of its many foci",[78] underlining its appreciable levels of expertise.

Appeals from MLC determinations may be made to the Maori Appellate Court (MAC) and are not restricted to points of law.[79] MAC decisions may then be generally appealed to the Court of Appeal or directly to the Supreme Court with leave.[80] However, as discussed in Part One, it is more common for the inherent power of review to be relied on in "correcting" MLC determinations. Several significant cases relating to the Maori Land Court[81] demonstrate that review (and accordingly, perhaps deference) is the preferred avenue for aggrieved Maori Land Court litigants.

(b) Expertise

The existence of a separate Maori Land Court recognises the different cultural values and importance given by Maori to their lands, described in the statute as a "taonga tuku iho of special significance".[82] Accordingly, there are throughout Te Ture Whenua Maori Act 1993 several references to specifically Maori concepts, such as ahi ka, kaitiaki, whangai, and, most importantly, tikanga Maori,[83] somewhat briefly defined in s4 of TTWMA as "Maori customary values and practices". Therefore, much is left to the MLC itself to create a coherent jurisprudence on these terms, as Parliament has deliberately not done so in any detail.

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[77] Waka Umanga Bill: see Internet "Waka Umaga Bill" http://www.parliament.nz/en-NZ/PB/Legislation/Bills/0/7/8/00DBHOH_BILL8344_1-Waka-Umanga-M-ori-Corporations-Bill.htm, accessed 11 September 2008.

[78] Chief Maori Land Court Judge Williams, in *Te Pouwhenua*, Issue 45 (May 2008), p3 accessed on 11 September 2008 at http://www.justice.govt.nz/Maorilandcourt/pdf/Te-Pouwhenua-45.pdf

[79] TTWMA, s58(1).

[80] Ibid., ss58A-58B.

[81] See, for example, *Attorney General v Maori Land Court* [1999] 1 NZLR 689 (CA) and *Bruce v Edwards* [2003] 1 NZLR 515 (CA).

[82] Te Ture Whenua Maori Act 1993, preamble.

[83] Ibid., s4.

There are some statutory indications that "there is some scope for the Maori Land Court to apply Maori custom law in its special jurisdiction".[84] As well as unsurprisingly being able to rule on claimed ownership of Maori land,[85] ss29 and 30 enable the Chief Judge to advise on matters of tikanga. The Court's[86] specialist expertise also extends under s 61 to the High Court being able to refer any question of tikanga Maori back to the Maori Appellate Court, with the resulting opinion being binding on the High Court.[87] The s68 guarantee that "any party or witness" may address the Court in te reo Maori affirms this specialist nature. In exercising these specialist functions, s7(2A) TTWMA states that judges of the Maori Land Court must not be appointed to the bench "unless that person is suitable, having regard to the person's knowledge and experience of te reo Maori, tikanga Maori, and the Treaty of Waitangi". However, this expertise is not limited solely to TTWMA. Under s6A(1) of the Treaty of Waitangi Act 1975, the Waitangi Tribunal may ask the Maori Appellate Court to consider specifically Maori factors, including "Maori custom and usage". Moreover, s252 of the Resource Management Act 1991 allows the Chief Environment Court Judge to appoint an alternate judge to that Court in consultation with the Chief Maori Land Court Judge when it is necessary to do so – presumably when issues of tikanga Maori are before the Environment Court. Therefore, it can be seen that the Maori Land Court is as much a specialist tribunal as the labour relations board in ***CUPE***. The Court possesses a significant and specialised jurisdiction in relation to "the complex laws designed to replace customary tenure".[88]

The Maori Land Court is also of unique importance by virtue of its guardianship of laws that sit sometimes uneasily alongside the Torrens land system.[89] This conflict stems primarily from the MLC's supervision of alienation of Maori land,[90] where rules apply that would seem repugnant to the Torrens system. For example, certain types of

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[84] New Zealand Law Commission, "*Maori Custom and Values in New Zealand Law*" (Wellington, New Zealand Law Commission, 2001), para [258].
[85] TTWMA, s18.
[86] In this case, the Maori Appellate Court, but for the purposes of this comment, no distinction need be made.
[87] TTWMA, s61.
[88] New Zealand Law Commission, above n84, para [262].
[89] Ibid., para [100].
[90] See generally TTWMA, Part VII.

Maori land are considered inalienable, and the alienating of Maori freehold land is subject to strict statutory procedural requirements[91] that fetter the freedom of the owner or owners to alienate. Therefore, because "it is difficult to find one English word that encapsulates the Maori concept of holding land",[92] maintaining the independence of legal principles relating to Maori land falls largely to the Maori Land Court.

The argument must then follow that, in order for the MLC to be able to exercise these functions correctly, and to give effect to clear Parliamentary intent, deference should be granted to the MLC in the interpretation of specialised Maori land law. This has not occurred, however, and "the ability of Maori to exercise customary law has been restricted by loss of resources, by lack of recognition by the courts and by Parliament and by persistent and prolonged promotion of individualism and assimilation".[93] Accordingly, given the unique niche the MLC occupies in New Zealand, deference may be justified to overcome this systemic difficulty.

(c) *Attorney-General v Maori Land Court*[94]

This case concerned a block of General land only "4.2km in length and 37 ¼ acres in area",[95] highlighting the desire of the litigants to assert the Maori Land Court's jurisdiction in higher courts. The land in question was vested in the Wairoa District Council after having been earmarked in 1930 for a paper road[96] as General land, but the road was never built. The Maori beneficial owners of the land then claimed that it was held in a fiduciary capacity for them, and should be returned.[97]

This claim raised questions as to the Maori Land Court's jurisdiction to make such a vesting order, both in the case before the Court and, more importantly, in future cases dealing with the relevant provision,

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[91] Ibid., ss145, 147.
[92] New Zealand Law Commission, above n84, para [110].
[93] Ibid., para [116].
[94] [1999] 1 NZLR 689 (CA).
[95] Ibid., p690.
[96] Ibid.
[97] Ibid., p691.

s18(1)(i). In essence, the critical question[98] was whose statutory interpretation of the general meaning of s18(1)(i) should be preferred: the MLC's, or Court of Appeal's. Section 18(1)(i) is as follows:

> **18 General jurisdiction of Court**
> (1) In addition to any jurisdiction specifically conferred on the Court otherwise than by this section, the Court shall have the following jurisdiction: [...]
> [..] (i) To determine for the purposes of any proceedings in the Court or for any other purpose whether any specified land is or is not held by any person in a fiduciary capacity, and, where it is, to make any appropriate vesting order.

The Maori Land Court's interpretation of the meaning of s18(1)(i) was that it was sufficiently broad to justify vesting orders of General land in Maori owners as Maori freehold land. Judge Savage noted s18(1)(i) was on its face "an immensely broad jurisdiction",[99] but read it in the context of the Act to reach the conclusion that::

> However 18(1)(i) is interpreted, looking at it in the round, it must involve a grant of jurisdiction to this court where a party saying that notwithstanding that the land appears prima facie to be General land, it is in fact Maori freehold land or is held only by a fiduciary who has an obligation to return it to the status of Maori freehold land or General land owned by Maori and vest the title in the owners.[100]

Accordingly, the MLC could fetter title to General land by a fiduciary interest through an appropriate vesting order under s18(1)(i). The MLC saw s18 as being divided into "two conceptually different parts":[101] 18(1)(a)-(d) giving "primary jurisdiction" to hear and determine claims solely in relation to Maori freehold land, and from 18(1)(e) onwards (including s18(1)(i)), a secondary jurisdiction to examine matters "for the purpose of any proceedings", ancillary to the "primary jurisdiction" of s18. In particular, the MLC noted that s18(1)(i) "deals with 'any

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[98] The jurisdictional importance of which was affirmed by the Maori Land Court instructing counsel to defend its position in the Court of Appeal: see *Attorney-General v Maori Land Court*, above n81, p690.
[99] *In Re Tahora 2F2 Block*, MLC Tairawhiti District, Appln 9456, 2 October 1996, p3. I would like to acknowledge the generous assistance of Godfrey Pohatu at the Maori Land Court in Gisborne in locating a hard copy of this case.
[100] Ibid., p8.
[101] Ibid., p7.

land"'. This contrasted with earlier paragraphs of s18(1), which referred explicitly to Maori Freehold land. Thus, s18(1)(i) was recognised as having applicability to General land. Moreover, s18(1)(i)'s direction of jurisdiction for "any other purpose" was given tangible meaning in relation to General land, as "the Court should [...] hesitate before upholding such a proposition [the phrase "any other purpose" serves no meaning] in relation to an Act of Parliament".[102] Therefore, s18(1)(i) was held to be capable of relating to claims against General land by Maori beneficial owners.

The Court of Appeal, however, interpreted s18(1)(i) differently. The Court held that "the apparently broad language of s18(1)(i) must be read in its context both in relation to those provisions which immediately surround it, especially s17, and in relation to the scheme of the whole statute".[103] The reference to "any land" in s18(1)(i) could not be read literally, as "this wide definition is not to be applied when the context indicates a particular and more limited meaning".[104] The justification for this reasoning was primarily s17. This section, relating to the general objectives of the Court, states the Court's primary objective as promoting and assisting in the retention of *Maori land* and *General land owned by Maori* (emphasis added). Thus, later broad references to "land" in s17 were "plainly shorthand expression[s] for the categories of land which are the subject of the primary objective".[105] The same reasoning was applied to s18(1)(i), particularly when the only express power to change the status of General land to Maori land is through s133,[106] meaning s18(1)(i) had to be read narrowly. The question of the fiduciary relationship then did not even arise. In summary, the Court held that:

> if s18(1)(i) had really been intended to effect such a radical change [in the jurisdiction of the MLC] [...] it might have been expected that this would have been done explicitly, by words directly spelling out that the paragraph was to apply beyond Maori land.[107]

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[102] *In Re Tahora 2F2 Block*, above n99, p10.
[103] *Attorney-General v Maori Land Court,* above n81, p698.
[104] Ibid.
[105] Ibid., p696.
[106] Ibid., p699. The Court reasoned that as s133 was the only section expressly granting jurisdiction to change the status of land from General to Maori freehold, it would be a bizarre extension of jurisdiction to read s18(1)(i) as its equivalent.
[107] Ibid., pp701-702.

This was, arguably, an appropriate interpretation for the Court of Appeal to reach. However, as illustrated in an article by Nin Tomas,[108] there are also difficulties with the Court of Appeal's approach. Tomas claims that the difference in interpretation stems from the tendency of the Court of Appeal to "focus on and give importance to different aspects of the interpretation process [...] to attribute different meanings to the words [...] used in framing the statute, and to prefer one over the other",[109] which in this case led to an overly restrictive interpretation of s18(1)(i). For example, the Court of Appeal was prepared to read down the Long Title of TTWMA for its reference to "Maori land"[110] so as to contextualise s18(1)(i). However, the Long Title states TTWMA is "an Act to reform the laws *relating to* Maori land",[111] meaning that the MLC arguably "may incorporate actions which have a direct link to, or effect on, Maori land".[112] The basic conclusion may then be that reviewing courts "do not have sufficient knowledge and understanding of the Maori focus of [TTWMA] to properly conduct [s18(1)(i)] inquiries".[113]

Finally, it is important to remember that one need not claim that the MLC was "right" in their interpretation of s18(1)(i). All that is required is the conclusion that the reasoning of the MLC was *reasonable*: that a rational view of s18(1)(i) was taken. The fact that the Court of Appeal took a different view is not fatal. Reasonable people may disagree. It is what is *done* with that disagreement that matters. If the Court of Appeal was prepared to have accepted the Maori Land Court as an independent, "court-substitute" tribunal, for reasons such as its expertise, knowledge and specialisation, then a different result would have been reached. Certainly nothing would have stopped the Court of Appeal from interpreting s18(1)(i) in the manner it did: however, deference would demand that the Court recognise that, although they

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[108] Nin Tomas, "Jurisdiction Wars: Will the Maori Land Court Judges Please Lie Down", *Butterworths Conveyancing Bulletin*, vol9 no4, pp33-37. See also Stephanie Milroy's commentary ([1999] NZ Law Review 363), p363: "[The MLC] is part of the judicial arm of government; the Judges are required to have the same qualifications as those in other Courts; and it is a specialist Court and would seem appropriate to hear these kinds of matters".

[109] Nin Tomas, above n108, p34.

[110] *Attorney-General v Maori Land Court*, above n81, p702.

[111] TTWMA, Long Title.

[112] Nin Tomas, above n108, p35.

[113] Ibid., p37.

are in disagreement with the MLC, there are enough constitutional and institutional reasons to suggest that, barring irrationality, the MLC should be recognised as capable of forming its own interpretation.

However, a reviewing court still may claim that, if the MLC interpretation of 18(1)(i) is to be taken, fundamental rights would be affected. If under s18(1)(i) the Maori Land Court possesses the jurisdiction to vest General land as Maori freehold land, then the legal owners of the General land are denied their rights (as land owners) to the courts of general jurisdiction,[114] as Maori freehold land applications are heard only in the MLC. This is, at first glance, a strong (and orthodox) argument for a general court: in protecting "fundamental" rights, they should invariably apply a correctness standard so as to ensure that right it not curtailed. However, on closer examination, this argument holds little weight. If a vesting order is made, then the legal title possessed in relation to the General land was always fettered by the fiduciary relationship with the beneficial owners. Thus, the argument that the legal owner would have rights to general courts is wrong, as their rights as legal owners, in conjunction with the fiduciary relationship, require the land to be delivered to the beneficial owners.

However, the existence of a fiduciary relationship in the broader context – a question usually reserved for courts of general (and therefore equitable) jurisdiction – necessitates explanation of precisely what is being deferred to if the MLC's view is to be preferred, and why this is justifiable. In taking a broader view of s18(1)(i) (i.e., deferring to the MLC), two points of law emerge:

1. That s18(1)(i) gives to the Maori Land Court the jurisdiction to vest General land in Maori; and

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[114] New Zealand Bill of Rights Act 1990, s27:
(1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.
(2) Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.
(3) Every person has the right to bring civil proceedings against, and to defend civil proceedings brought by, the Crown, and to have those proceedings heard, according to law, in the same way as civil proceedings between individuals.

> 2. That the content or existence of that fiduciary relationship may have to be determined as a matter of law.

Given the wording of s18(1)(i), and the reasoning of the MLC in ***Re Tahora 2F2 Block***, the MLC would undertake to answer both these questions in a given proceeding. The Court of Appeal's deference would mean that the MLC's view of 18(1)(i) prevails and is the law of New Zealand, meaning the *existence* of the proceedings cannot then be questioned. This was all that would be decided on the reasoning of the Court of Appeal, as they were unwilling to engage the fiduciary point (the MLC was). However, the actual process, or *application,* of the jurisdiction – basically, whether a fiduciary relationship justifies a vesting order – was not dealt with by the Court of Appeal. Therefore, if a party disagrees with the Maori Land Court's construction of a fiduciary relationship as a matter of law, then it can still be reviewed. A good example of this might be where a statute allegedly precludes the existence of a fiduciary relationship.[115] On review, the deference analysis would start again in asking whether there are good enough reasons to allow the MLC's view of the law of fiduciary relationships to be deferred to. However, regardless of the answer, this enquiry does not impinge on the first point of law that has been deferred to. In fact, in examining this question on review, the High Court is impliedly affirming the MLC's interpretation of s18(1)(i). In assessing the MLC's assessment of a fiduciary point of law, the reviewing court affirms that the MLC is validly exercising its jurisdiction under s18(1)(i), a view that was born out of deference.

Conclusion

The apparent reluctance of a reviewing court to relax their ability to strike down alleged errors of law as they see fit will mean that deference faces a metaphorical mountain to climb before being introduced specifically into New Zealand.

However, as this article suggests, it may be that the seeds are already present in our administrative law jurisprudence. Put simply, deference seems a viable possibility in respect of the Maori Land Court. The

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[115] Perhaps the most pertinent example could be the Foreshore and Seabed Act 2004, which purportedly vests title to the foreshore and seabed in the Crown absolutely.

Court possesses a unique niche in New Zealand: the exclusive administration of an area of law – that is, Maori land – that is highly specialised and must co-exist with one of the most fundamental tenets of New Zealand property law. To ensure that the Torrens system does not overwhelm the existence of the Maori Land Court, it seems sensible to hand in good faith the Maori Land Court some independence in assessing the bounds of their own jurisdiction. Any fears against this move are mitigated through the robust experience and specialised knowledge of the court, as well as statutory indications of a purposefully defined, discreet jurisdiction in which to operate. *Attorney-General v Maori Land Court* is a convincing example of how the doctrine might operate in practice, and allays fears of rights to general courts being "stolen" by deference.

The Maori Land Court provides an opportunity for deference to grow. The Court is as good an example as the labour relations tribunal in *CUPE* and, as illustrated by the Canadian experience, the doctrine must be born somewhere. The doctrine would not be "stamped" across the breadth of all administrative tribunals: rather, the MLC should be recognised as the paradigm example of how deference can, and should, operate in different contexts in the future. Development of the doctrine would then simply be up to judges applying the concept in appropriate contexts as they arise.

It is perhaps inexorable that courts will be jealous of their orthodox constitutional role as strict protectors of the written law, and will turn to any number of factors, extrinsic and formalistic, to justify not stepping down from this pedestal. There are also other methodologies within the discretionary spectrum of judicial review that can justify a lowered level of intervention on points of law, and a court may even choose to recalibrate as they see fit to avoid the question altogether.

The ultimate conclusion, however, is that the potential for deference in New Zealand exists. There are good reasons why it should be applied, at least in an initially narrow context. Whether this potential is embraced or rejected by courts is dependent on their willingness to embrace novel constitutional realities, as adherence to old ones may merely beg the question of why a new approach is not taken. Deference may be counter-intuitive for judges, but until recognition of the developing landscape of administrative law occurs, the risk of relaxed

intervention on errors of law (and even questions application or "mixed" fact and law) becoming unprincipled and unpredictable remains.

A WRITTEN CONSTITUTION FOR NEW ZEALAND?

NICK MEREU*

Introduction

At the time of writing, New Zealand was one of only three countries in the developed world whose constitution was not written.[1] This, in itself, shows the modern passion for written constitutions. For countless years academic and public debate on whether New Zealand should adopt a written constitution – and the interrelated topic of whether we should cut our ties from the motherland by founding a republic – has been sporadic. This essay attempts to refine that debate in order to determine the legitimacy of such vast constitutional change for New Zealand.

Part A deals with the reasons for adopting a written constitution. I begin with matters of definition – first, I outline the general need for a constitution, and then proceed to indicate the differences between a "written" and an "unwritten" constitution. Pointing to the fact that written constitutions are globally the contemporary default setting I then ask if, and why, they are superior to their unwritten counterparts.

A brief outline of New Zealand's constitution ensues. Here, I ask why this country has remained relatively unaffected by a constitutional setup that is, in theory, highly conducive to abuse. In order to better answer this question I take an excursion into the laws of the United Kingdom and Israel; the other two countries that share unwritten constitutional camaraderie with New Zealand. At this stage, I offer a tentative conclusion – it is not the setup that matters, it is the actors.

Part B is concerned with the practicality of introducing a written constitution to New Zealand; impediments to and perils of such a change are discussed. I conclude by highlighting situations conducive

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[1] Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, 2007), p 135.

to constitutional change, and proffering a reason as to why such change is ultimately unlikely in New Zealand.

A. Written and Unwritten Constitutions

1. Definitional matters

(a) The need for constitutions

Before commencing argument on the merits and demerits of written and unwritten constitutions, I should elucidate the need for a constitution itself, regardless of semblance.

In the 17th century, Thomas Hobbes observed that the nature of man is comprised of three characteristics giving rise to quarrel amongst men: competition, diffidence and glory. This meant that without a "common power to keep them all in awe" men would descend into *bellum omnium contra omnes*: a war of "every man against every man", what political philosophers have subsequently termed the "state of nature".[2] This state, wrote Hobbes, meant the lives of men would be "solitary, poor, nasty, brutish and short."[3] In order to avoid the state of nature, men would form societal groups characterised by social contracts – the giving up of certain freedoms, such as the freedom to take the life of other human beings, in exchange for the protection of the group. Part of this social contract involved individuals relinquishing their right to self-govern; instead, an "assembly of men" would determine the direction of society.[4]

Hobbes wrote at a time when England was plagued by civil war and fear for individual rights was rife – an immense wealth of power did reside in the executive branch of government. In 1611, the English Courts recognised the need for a check on this executive power, holding proclamations made by the King purporting to be law that were not empowered by an act of Parliament to be illegal.[5]

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[2] Thomas Hobbes *Leviathan* (1651), Ch 13.
[3] Ibid, Ch 13.
[4] Ibid, Ch 18.
[5] *Case of Proclamations* (1611) 12 Co Rep 74.

This case recognised the need for what is now referred to as the "rule of law", which has many a manifestation but for present purposes can be defined as the obligation of the executive to act only in accordance with law – to treat others as they would treat themselves. Implicit in this notion is that members of the executive are not above the law, but rather below it and subject to it, just like ordinary citizens.

Ultimately, it is the rule of law that a constitution seeks to uphold,[6] and indeed in 1689 the English Parliament enacted one of the founding constitutional documents of that country – a bill of rights – in order to protect fundamental civil and political rights from interference by executive action.

Over time, while the notion of "rights" has expanded to include positive property and socio-economic rights,[7] the focus of constitutions is still in upholding the rule of law and founding "constitutionalism"[8] generally by preventing those with power from abusing the power given to them. The need for constitutions is evident: "government without a constitution is power without right."[9]

(b) What constitutes "written"?

With the myriad variations of written constitutions in existence, it is not hard to imagine the difficulties that come with imprecise categorisation by definition. No stark contrast can be drawn between written and unwritten; constitutions, by their nature, vary greatly in form and function. Suffice to note for current purposes the sharp definitional divisions I will draw are a far cry from the spectrum of manifestations a constitution can take in practice.

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[6] I should qualify this by adding "from the perspective of the people", who, in respect of government, would be more concerned with restricting the abuse of power rather than the other fundamental features of constitutions which legal scholars consider necessary, such as matters of due process.

[7] "Positive rights" are those empowering a state to interfere with the lives of individuals in order to guarantee basic living standards. This is opposed to traditional "negative" rights, which are focussed on keeping the state away from interfering with individual autonomy.

[8] "Constitutionalism" is the notion that the rule of law, judicial independence, and the existence of basic rights are present in a society, regardless of the presence or absence of a constitution itself.

[9] Thomas Paine, *The Rights of Man* (1795), Ch 4.

Paradoxically, it may be necessary to define what is unwritten before being able to define what is written. An academic perspective on point is that of Finer, Bogdanor and Rudden, who argue in the context of the United Kingdom that there are three common features of unwritten constitutions: they are indeterminate, indistinct and unentrenched.[10]

Indeterminacy is found in the inability to identify, with certainty, the content of any particular constitutional laws. Many matters of great importance to the daily running of a state (with an unwritten constitution) are left to customs, conventions, and Standing Orders of the House of Representatives.[11]

Unwritten constitutions have an indistinct structure because they identify no supreme law by which ordinary laws can be struck out. In other words, there is no order of precedence in the unwritten constitutional system. Constitutional laws in this sense are a "rag-bag of statutes and judicial interpretations thereof, of conventions, of the Law and custom of Parliament, of common law principle, and jurisprudence."[12]

Finally, Finer et al. cite the unentrenched feature of constitutional laws in the United Kingdom as a cause for indeterminate content and indistinct structure. These laws are not given any special status and can thus be changed, repealed, and amended in the same way as any ordinary Act of Parliament.[13]

Deducing from this useful definition, we can assume that a written constitution is an entrenched document containing a hierarchy of all the important laws pertaining to the configuration of the state it has jurisdiction over. I proceed on this basis.

2. The argument for a written constitution

Like a phoenix from the ashes, written constitutions appear to rise from nations in the wake of a crisis or exceptional circumstance of

[10] S.E. Finer, Vernon Bogdanor & Bernard Rudden, "On the Constitution of the United Kingdom" in *Comparing Constitutions* (Oxford University Press, 1995).
[11] Ibid, Para 4.
[12] Ibid, Para 7.
[13] Ibid, Para 8.

some sort.[14] Beginning in France and the United States of America in the late 18th century, there have been seven "waves of constitution-making" that have occurred as a result of these crises.[15] Each time, a written constitution has been chosen as the template for rebuilding the nation; the only country in the wake of a crisis that adopted the unwritten structure was Israel in 1948.

Why then are written constitutions the global 'default' setting? Written constitutions have obvious appeal to fledgling or recuperating nations – they are, by their nature, harder to change and easier to apply than their unwritten counterparts.[16] For a nation attempting to rebuild itself out of the tatters of crisis, choosing a lapidary code akin to the Ten Commandments seems far more practical than colloidal customary law.

An unwritten constitution that is heavily reliant on custom and experience would surely not win favour with a public that has had to experience first hand the abuse of previous constitutional actors. Written constitutions codify the rule of law, making it an immovable force that can withstand all forms of abuse. Therefore, it is the best launching pad for constitutionalism.

3. Are written constitutions working?

It is not possible to measure the desirability of written constitutions without having regard to their success in practice. Are written constitutions upholding the rule of law in nations that have adopted them? That is to say, is there constitutionalism where there are written constitutions?

The answer to this question is convoluted. For the sake of simplicity, I answer: in some countries yes, in others no. The United States of America, Canada, France and Australia are all obvious examples of the success of constitutionalism under written constitutions – I need not evidence their comparatively enviable democratic records here.

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[14] The exceptions to the rule are Sweden and Canada.
[15] Jon Elster "Forces and Mechanisms in the Constitution-making Process" (1995) 45 Duke L.J. 364, p 368.
[16] Due to the aforementioned inherent features of determinacy, distinctiveness and entrenchedness; see above Part A, 1 (b).

Africa is a different story, with a long postcolonial history of constitutions without constitutionalism. I need only make reference to the Rwandan and Sudanese genocides of the past decade as extreme examples of a complete lack of basic human rights. More recently still is the Zimbabwean presidential election turmoil.

Why has constitutionalism largely failed for Africa's nations? As the sun was setting on colonial rule in Africa, departing colonisers left bundled constitutional packages with the leaders of the African nations. They came, wrote H. Kwasi Prempeh:

> Complete with protections for opposition parties, individual rights, independent courts, and some measure of regional or local autonomy, Africa's founding constitutions … were supposed to lay the foundation for postcolonial constitutionalism. However, soon after the attainment of sovereign statehood Africa's new managers discarded their so-called independence constitutions.[17]

These "new managers" were the imperial presidents, who promptly set about ignoring the constitutions given to them and the principles contained therein – they were generally considered a hindrance to national development. Seen as liberators from colonial rule, the people did not object to the wayward decision-making of their presidents. With nothing to check the power in the newfound executive, the tyranny of authoritarianism emerged. On the African continent to this day, there has been at most incremental progress in certain countries towards constitutionalism and democracy in general.

This sharp divergence in the success of written constitutions is a strange anomaly, which I will attempt to explain later in this part.[18] I turn now to give an outline of New Zealand's constitution to compare with the written 'ideal'.

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[17] H. Kwasi Prempeh "Africa's "Constitutionalism Revival": False Start or New Dawn?" 5 Int'l J. Const. L. 469, p 473.

[18] See below, Part A, 6.

4. The New Zealand constitution

New Zealand's constitution is drawn from numerous legal and non-legal sources. In the words of leading constitutional academic Philip Joseph, it is an:

> informally organised framework of rules that establish and empower the three branches of government… define their functions, composition and relationships inter se, and provide for the rights and duties of citizens.[19]

Statutes are the premier legal source of New Zealand's constitution. The Constitution Act 1986 is the most fundamental piece of legislation as it attempts to bring together laws of constitutional significance into the one statute.[20] Nevertheless, there are numerous pieces of important legislation, such as the New Zealand Bill of Rights Act 1990[21] and the Electoral Act 1993.[22] Despite this significant constitutional change in the late 1980's and early 1990's, a simple Parliamentary majority could yet undo all the progress made in giving our constitution a greater degree of determinacy.[23] Other sources of the constitution include common law, royal prerogatives, delegated and subordinate legislation, international law, the Standing Orders of the House of Representatives and constitutional convention.[24]

Of particular note is the wealth of power that resides in the legislative branch of government. As Joseph notes, there are "no limits on legislative power in a unitary state with no federal divisions, no entrenched laws, and no constitutional Bill of Rights."[25] Parliament is supreme, having full power to make laws,[26] and thus "can do

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[19] *The Laws of New Zealand* Volume 7 (Butterworths, 2003), p 2.
[20] See Constitution Act 1986, Long Title.
[21] An Act protecting the rights of citizens from interference by the Government and those with public power.
[22] An Act outlining significant features of electoral law, including the way Parliament is to be structured and composed after an election.
[23] With the exception of six provisions in the Electoral Act 1993, which require a three-quarters majority in Parliament, or a national referendum.
[24] See generally *The Laws of New Zealand* above n19, pp 4-5.
[25] Ibid, p 13.
[26] Constitution Act 1986, s 15(1).

everything but make a woman a man, and a man a woman."[27] This concentration of power into one head of government is of concern; in theory, Parliament could pass any law they saw fit, no matter how oppressive or immoral.

It is this kind of potential for constitutional abuse that a written constitution remedies. While nothing quite as drastic as the African experience has happened in New Zealand as yet, there have been incidents in the past that outline just how conducive to abuse our unwritten constitution can be.[28] But these incidents have not resulted from poorly distributed power amongst the branches of government; rather they have been a result of manipulation of constitutional laws to suit the personal goals of a wayward member of the executive. I refer here of course to Sir Robert Muldoon, whose actions in 1975[29] and 1984[30] served to bring New Zealand the closest it has come to a constitutional crisis.

Despite these incidents, New Zealand's constitutional history is not rife with abuse by constitutional actors. Rather, it has had quite a placid existence. The question thus arises: how has New Zealand managed to keep such a clean record in light of this constitutional structure that is (in theory) so conducive to abuse? Perhaps international examples can shed some light on the issue. I turn in search of abuse to our constitutional kindred – the United Kingdom and Israel.

3. Selected international examples: an exercise in comparison

(a) The United Kingdom

An unwritten constitution has survived in the United Kingdom since the birth of the Magna Carta in 1215 – almost 800 years of survival on conventions and customs. Whilst it is regarded as an "incomplete system, consisting of piecemeal legislation, ancient common law doctrines, and constitutional conventions",[31] those indeterminate laws

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[27] Dicey, *Introduction to the study of the Law of the Constitution* (8th ed., 1915), p 41.
[28] See below, n 29 and n 50.
[29] See *Fitzgerald v Muldoon* [1976] 2 NZLR 615.
[30] See below, n 50.
[31] *Halsbury's Laws of England* Volume 8(2) (4th ed., Butterworths, 1996) 7.

have become so well-woven into the British constitutional tapestry that change has become almost unthinkable.

The main point of difference between the United Kingdom's unwritten constitutional format when New Zealand inherited it, and now, is the ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950). This document has heralded significant constitutional change; it is supreme, and thus takes precedence over the national legislation of member states.[32]

Prior to ratification of the Convention, when no domestic bill of rights existed in the United Kingdom, the common law was the main watchdog of executive encroachment onto fundamental rights and wayward administrative action. With regard to administrative action, the phenomenal growth of judicial review since the early 1980's[33] is indicative in itself of the willingness of the English Courts to approach such matters and award appropriate remedies, despite not technically having any legal power to do so.[34]

In terms of fundamental rights, the Courts took the approach that citizens had the freedom to act however they wished, provided the legislature had not explicitly curbed that freedom.[35] In the famous case of ***Entick v Carrington***[36] a trespass action was upheld against members of the executive who searched the Plaintiff's home and seized his papers. Unless the Defendants could point to some positive law authorising their action, they had no grounds on which to infringe the Plaintiff's property right. The legislature had given no such positive authority, and the Defendants were liable.

So in the past, the English Courts have acted as a fairly imposing check on any sign of constitutional abuse, and now that supreme European law has been adopted, the Courts have another significant weapon in their arsenal to prevent wayward executive (and now legislative) action.

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[32] Ibid, Para 24.
[33] A W Bradley and KD Ewing *Constitutional and Administrative Law* (12th ed., Longman, 1998), p 460.
[34] Robert L. Maddex *Congressional Quarterly's Constitutions of the World* (1997), p 296.
[35] *Constitutional and Administrative Law*, above n 33.
[36] *Entick v Carrington* (1765) 19 St Tr 1030; Ch 6.

(b) Israel

After declaring independence in 1948, Israel set about the process of vast constitutional reform. A constitutional assembly was formed in order to determine the structure of the new state, and in particular to determine whether a written or an unwritten constitution would be more beneficial. Despite the serious need to legitimise government, enshrine the doctrine of separation of powers and guarantee fundamental human rights in order to prevent abuse, an unwritten constitution was favoured for its flexibility; undoubtedly a paramount consideration in times of great change.[37]

So arose the "basic laws", which still provide the structure of the Israeli constitution today. Like New Zealand, these constitutional laws were not given any superior status to ordinary legislation and could be amended with a simple majority from the Israeli legislative authority, the *Knesset*. From 1948 to 1992, there were no basic laws regarding human rights. This did not stop the Israeli Supreme Court from protecting the individual; the doctrine that individuals were free to do as they please, except so far as the Knesset restricts that freedom[38] was formulated and upheld in a long line of case law.[39] Perhaps more important in the Israeli context, the Courts have strong powers of judicial review, with the ability to strike down administrative actions and decisions.[40]

The passing of the Basic Law: Human Dignity and Liberty in 1992 heralded significant constitutional change in Israel. Section 8 of that Basic Law provides:

> The rights according to this Basic Law shall not be infringed except by a statute that befits the values of the State of Israel and is directed towards a worthy purpose, and then only to an extent that does not exceed what is necessary.

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[37] This is not to undermine the immense difficulty in creating a single document that reconciles Arabic and Jewish laws and interests.
[38] *Kol Ha'am v Minister of Interior* (1953) 7 P.D. 871.
[39] David Kretzmer "The New Basic Laws on Human Rights: A Mini-Revolution in Israeli Constitutional Law?" (1992) 26 Isr. L. Rev. 238, p 239.
[40] Amos Shapira "The Status of Fundamental Individual Rights in the Absence of a Written Constitution" (1974) 9 Isr. L. Rev. 498, p 501.

While the Knesset awarded no special status to Section 8, the Supreme Court latched onto it, finding it has a "super-legislative"[41] status and any legislation infringing these human rights that does not satisfy section 8 will be declared invalid.[42] This judgment broke the floodgates, with the same approach being applied to the remaining Basic Laws.

The Israeli Courts have thus used their interpretive powers liberally in order to give Israeli constitutional laws supremacy. Despite this special status, there is still disparity between legal theory and practice in Israel, especially in relation to human rights. Even the President of the Israeli Supreme Court recognises the "gap between law and reality" in this area.[43] In addition, reports from the United Nations Human Rights Council have consistently expressed concern as to the standard of Israel's compliance with the International Covenant on Civil and Political Rights. The most recent of these reports, presented to the General Assembly in November 2007, identifies:

> Serious situations of incompatibility of [Israel's] obligations pertaining to human rights and fundamental freedoms…such situations include the prohibition of torture or cruel, inhuman or degrading treatment; the right to life and humanitarian law principles…the right to liberty and fair trial; and the severe impact of the construction of the barrier in the West Bank and associated measures on the enjoyment of civil, cultural, economic, political and social rights and freedoms in the Occupied Palestinian Territory. Addressing the full range of those situations is imperative, not only to secure compliance by Israel with its international obligations.[44]

To make matters worse, fresh allegations of "psychological torture" have arisen from the media in recent times.[45] The main protagonist is the Israeli Security Agency, who have applied the law as given to them by the Knesset with perhaps too heavy a hand. The concern is thus *quis*

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[41] Aharon Barak "Human Rights in Israel" (2006) 39(2) Isr. L. Rev. p 18.
[42] *United Mizrachi Bank v Migdal Agricultural Cooperative* [1995] Isr SC 49(4) 221.
[43] Aharon Barak, above n 41.
[44] Report available at http://www.ohchr.org/EN/Countries/MENARegion/Pages/ILIndex.aspx.
[45] Martin Asser "Israel 'using psychological torture'" last updated 1 April 2008, available at http://news.bbc.co.uk/2/hi/middle_east/7345025.stm.

custodiet ipsos custodes?[46] At present, no one – a constitution is present, but constitutionalism is absent.

4. A tentative conclusion

Theory is one thing, but as the above examples have shown, practical application is another. We have witnessed the long-standing superiority of the American and French written constitutions. We have also witnessed similar written constitutions allow anarchy on the African continent. We have witnessed the flexibility and adaptability of the unwritten constitution with great success in the United Kingdom, and a great degree of success in New Zealand. We have also witnessed the lack of efficacy that same system has had in upholding the rule of law for the people of Israel. What can we possibly conclude from this?

In response to suggestions by Mai Chen and Sir Geoffrey Palmer that a supreme constitution for New Zealand is likely in the near future, Solicitor Thomas Gibbons suggested that it is the actors, not the script, which needs change.[47] Gibbons notes the man at the centre of New Zealand's major historical constitutional crisis is Sir Robert Muldoon, a Prime Minister who "stretched the boundaries of constitutional propriety."[48] Therefore, he argued, the focus on amending the constitution in order to remedy abuse is flawed.

I take that distinction and expand on it here to argue that in general, it may not matter which constitutional format a nation takes; at the end of the day it is the will of society that enforces political and constitutional expedience. To quote the famous American jurist, Judge Learned Hand:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws, and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.

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[46] "Who will watch the watchmen?" from Plato ***Republic*** (360 BC).
[47] Thomas Gibbons "Rethinking the ***Constitution in Crisis***" (2005) NZLJ 359.
[48] Ibid, p 359.

> While it lies there it needs no constitution, no law, no court to save it.[49]

There may be significant force in this argument. If accepted, it will not make an iota of difference which constitutional format New Zealand adopts. We are a relatively placid society when compared with the violent factional conflict that still occurs in Israel. As is the United States of America when compared to the African nations that have attempted to graft the foreign concept of a written constitution onto their people. Constitutions are reflective of the society that gives birth to them. If society has a keen interest in democracy and upholding the rule of law, both written and unwritten constitutions will rise to the occasion in order to quell abuse – they will simply take different routes to achieve that goal.

B. Contextual Issues for New Zealand

From the preceding part of this essay, the question of need arises. That is to say, regardless of whether a written constitution would be beneficial to our nation in fact, *should* New Zealand get one? I argue three points that indicate, on balance, that this question should be answered in the negative. The first is that we do not *need* change, evidenced by our successful track record with informal constitutional structures, namely constitutional conventions and the New Zealand Bill of Rights Act 1990 ("Bill of Rights"). The second highlights the immense *difficulty* of change – the constitutional position of Maori and the Treaty of Waitangi. The third point is focussed on the *dangers* of change, particularly the redistribution of powers between branches of government. This third feature is divisible into two categories – the politicisation of an empowered head of state, and the monumental increase of power in the hands of the judiciary.

1. The lack of *need* for change: the success of informality

(a) Constitutional convention

Despite the serious shortcomings of constitutional conventions, I would argue that *in the New Zealand context* they are a sufficient check on

[49] Judge Learned Hand, speech, New York, 21 May 1944, cited in Gibbons, above n 47.

any abuse of power. They certainly have proved successful in the past; where New Zealand's constitution has looked like providing a loophole for abuse, constitutional convention has risen to the occasion. The most notable event is best recounted by Sir Geoffrey Palmer:

> In July 1984, immediately after the Labour Government was elected, a serious constitutional event occurred. It arose from the unwillingness of the outgoing National Prime Minister, Sir Robert Muldoon, to recommend to the Governor-General urgent financial measures concerning devaluation of the currency, which those who were forming the incoming government saw as essential. Under New Zealand law, there was real doubt whether the party that had won a general election but had not yet formally taken power could immediately form a government and take responsibility for the measures. In the event, a grave situation was narrowly averted – through convention rather than law.[50]

While not enforceable in the courts, conventions are flexible, and can thus adapt to new situations and ideas. Conventions "seek to restrain political adventurers. Their very existence may be denied or their relevance disputed. And when the political dust settles, no one may be the wiser."[51] Paradoxically, the fact that conventions are indeterminate means they can be the perfect shield against constitutional abuse.

(b) The Bill of Rights

The position of fundamental rights in New Zealand is sound, as the Courts have taken an expansive approach to the Bill of Rights since its enactment in 1990. The most notable example of liberal interpretation is *Baigent's Case.*[52] There, the Court of Appeal read in the ability to award remedies for breaches of the Bill of Rights in exceptional cases. This is notwithstanding the fact that such an ability was specifically rejected from inclusion by Parliament.[53] This approach has been affirmed in subsequent cases,[54] albeit rarely.[55] So long as the New

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[50] Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand's constitution and government* (Oxford University Press, 2004), p 7.
[51] See Joseph, above n 1, p 216.
[52] *Simpson v A-G [Baigent's Case]* [1994] 3 NZLR 667.
[53] See the Government White Paper: *A Bill of Rights for New Zealand* [1985] AJHR A.6.
[54] See *Brown v A-G* [2003] 3 NZLR 335.
[55] See generally Joseph, above n 1, Para 26.3.4.

Zealand Courts continue to act as a prudent watchdog of fundamental rights, the need for an entrenched, supreme bill of rights is assuaged.

(c) Restrained actors

For the majority of New Zealand's history, constitutional actors with significant power have not abused that power. Sir Geoffrey Palmer notes two exceptions: former Prime Minister Sir Robert Muldoon, and Governor George Grey.[56]

Palmer uses these examples as evidence of just how susceptible to abuse the New Zealand constitution can be. Whilst I do agree that our constitution is theoretically susceptible to abuse, I argue that such abuse is likely to be quelled before any constitutional crisis can occur, thanks to constitutional convention.

In addition, I note that these are but two incidents in 170 years of constitutional history – an enviable record for any democracy. Indeed, the actions of Governor Grey were regarded as "what must be surely one of the most extraordinary acts of disobedience by a civil servant to a Statute of the Imperial Parliament duly assented to by Queen Victoria".[57]

2. The *difficulty* of change: the Treaty of Waitangi and the constitutional position of Maori

In the past two decades, both the courts and Government have been increasingly friendly towards redress of historical injustices to Maori. Fiscally, Treaty settlements have now reached an astonishing $794,343,776, with a forecast of another $355,206,000 until the year 2011.[58] With the Clark Government abolishing the initial $1 billion cap in July 2000 in favour of an approach which treats each claim on its merits,[59] that number is set to continue its healthy rise.

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[56] See Geoffrey Palmer and Matthew Palmer, above n 50.
[57] Alex Frame in D Carter and M Palmer *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson* (Victoria University Press, 2002).
[58] *Four Monthly Report March – June 2007*, Office of Treaty Settlements, available at www.ots.govt.nz.
[59] Joseph, above n 1, p 86.

On the judicial front, the courts still only enforce the Treaty in so far as it is incorporated into an Act of Parliament.[60] But where there is statutory incorporation, that enforcement has been liberal: the focus has been on applying the principles and "spirit" of the document, rather than its provisions.[61] It has thus gained recognition as one of New Zealand's premier constitutional documents, a position which Maori would no doubt be very unwilling to renounce. It would be safe to assume that no constitutional change will occur without serious input from Maori – their position is far too important to be ignored. But is the Treaty important enough to warrant binding countless future generations as supreme law? Further, should the Treaty simply be adopted into the new constitution, or should it be rewritten altogether?

If the former were to occur, the courts would no doubt take the same approach they have already taken – to interpret the Treaty according to vague notions of principle and spirit, rather than the text itself. With the added feature of supremacy, the Treaty would become the single most powerful source of law in the country. This is troublesome, and in terms of determinacy would seem to defeat the entire purpose of formulating a written constitution.

Conversely, it is difficult to see how rewriting a constitutional document in order to recognise Maori would be any more practical. Such a task would involve years of widespread consultation with Maori nationwide. As Mason Durie suggests, without this exhaustive consultation; entrenchment of rights to land, culture, language, fisheries, forests, intellectual property and heritage; and 75 percent majority support in a national referendum on the matter, Maori would not be likely to agree to a proposed written constitution.[62]

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[60] *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308 (PC).
[61] *NZ Maori Council v A-G* [1994] 1 NZLR 513, p 517 (PC), *NZ Maori Council v A-G* [1987] 1 NZLR 641, p 663 per Cooke P (CA).
[62] Mason Durie "A Framework for Considering Constitutional Change and the Position of Maori in Aotearoa" in *Building the Constitution* (Colin James Ed., Brebner, 2000), p 414.

3. The *dangers* of change: the inevitable redistribution of powers

(a) The head of state

As both Australia and Canada evidence, it is still possible to retain a Governor-General as the head of state under a written constitution. Provided that New Zealand remained under the watchful eye of the monarchy, a wealth of power given to a newly appointed head of state (in the form of a president, no doubt) is not a major concern if the written constitution transition were desired.

However, since a written constitution would most likely arise as a result of republicanism,[63] the day of a non-partisan head of state may be numbered. Opponents of republicanism cite the inevitable politicisation of the head of state as a dire concern and the major reason for avoidance of change.

But is the head of state's role not already somewhat politicised? Currently, the Queen as sovereign appoints the Governor-General on the advice of the Prime Minister of the day, in accordance with constitutional convention. How is it possible to exclude the distinct probability of partisan political considerations on the Prime Minister's part, when he or she is determining who the successful candidate will be? We cannot be sure. In any case, this situation does not give rise to a great degree of political partisanship, at least not the extent that a president would inherit if he or she were required to campaign for public affection.

Aside of political partisanship, the real danger lies in the powers awarded to the new head of state; if a president will retain the largely ceremonial role of the current Governor-General, there is little need for concern. If, on the other hand, a New Zealand president were given veto powers to refuse assent to bills, there would exist a much greater probability for constitutional abuse than from any democratically elected parliamentary executive.

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[63] See below, Part B, 4 (a).

(b) The judiciary

Unlike the role of head of state, there is no question as to the significant wealth of power the Courts would inherit from a written constitution. Armed with supreme law, the sovereignty of Parliament would be at risk from judges who are appointed, not elected. In the process, democracy can be compromised. Citizens would be stripped of their right to have the law determined by a duly elected assembly, supplanted instead by the determinations of a potentially partisan judicial body. It is not difficult to see why this is a primary concern of opponents to a written constitution.

4. Situations conducive to change

Bearing in mind these arguments against a written constitution for New Zealand, I consider three ways in which constitutional change is likely to occur. First is a move to Republicanism, which is perhaps the most obvious and likely of the options. Second, there is always potential for a constitutional crisis, giving rise to recognition of the need for a written constitution. Finally, there could be widespread public recognition that our constitution is *in* crisis.

(a) Republicanism

The issue of whether New Zealand should detach itself from the United Kingdom often appears in close proximity to the written/unwritten constitution debate. Some argue vigorously for change;[64] others want to cling desperately onto the Monarchy and our British heritage.[65] Some take the more moderate stance that New Zealand will make the change when Australia does.[66] In all cases, it is accepted that at some point in the future, New Zealand will put this talk of separation into practice. Former Prime Minister Jim Bolger has said:

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[64] See the Republican Movement of Aotearoa New Zealand website at www.republic.org.nz/.
[65] See the Monarchist League of New Zealand Inc. website at www.geocities.com/cox_nz/.
[66] See Palmer, above n 50.

> … momentum for change will gather as we identify more with our Asia-Pacific region of the world and as our direct links to Britain decline. But the big reason will be that we want to be independent New Zealanders. This will not happen because of any lack of affection or love for our Queen in London, but because the tide of history is moving in one direction.[67]

At the time, Prime Minster Bolger felt the catalyst for such change would be the arrival of MMP. While this did not eventuate, the arrival of MMP was one event in a long list of incremental steps, having the effect of distancing ourselves further from the United Kingdom. The latest and perhaps most significant of these steps was the passing of the Supreme Court Act 2003, an Act which severed judicial ties with the Privy Council. Specifically, the Act noted as its purpose to "recognise that New Zealand is an independent nation with its own history and traditions…"[68] The building blocks have been put into place; it is merely a matter of time before New Zealand takes the plunge into republicanism.

A written constitution arising from a republican move is not by any means inevitable. If the Government wished, it could simply sever ties with the United Kingdom by passing an amendment to the Constitution Act.[69] Such an amendment would require substitution of the identification of the current head of state, the Sovereign in right of New Zealand, for another provision identifying the new head of state, although the legality of such a move is questionable.[70] This way, the Governor-General would retain largely the same role he presently has – ceremonial and non-partisan.

But I submit that this avenue is not likely, and if the move to a republic was made, New Zealand would contemporaneously make the move to a written constitution in order to elucidate and codify the role and powers of the new head of state – lack of clarity is not a risk proponents of change would be too willing to make to sell their product to the New Zealand public.

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[67] (8 March 1994) 539 *New Zealand Parliamentary Debates* 121.

[68] Supreme Court Act 2003, s 3(1)(a)(i).

[69] Namely section 2(1), which identifies the current head of state: "The sovereign in right of New Zealand is the head of state of New Zealand…"

[70] See Sir Robin Cooke "The Suggested Revolution against the Crown" in *Essays on the Constitution* (Philip A Joseph Ed., Brookers, 1995), p 28.

(c) Constitutional crisis

Would another constitutional crisis, akin to what happened in 1984, give rise to constitutional change? It certainly did then, resulting in the introduction of the Constitution Act 1986, an Act which elucidated a great deal of New Zealand's constitutional laws. This therefore would appear to be the likeliest route to constitutional change. However, in order for a crisis to arise, we would generally require an abusive constitutional actor taking advantage of some shortcoming in the law. This has happened in practice – to the best of this writer's knowledge – twice, in 170 years of constitutional history, in the 1840's and the 1980's. Thus it may be another 100 years before another such event occurs – not nearly as likely as the aforementioned republican move.

(d) Recognition of a *Constitution in Crisis*

This concept, formulated by Sir Geoffrey Palmer, is less indicative of emergency than is a constitutional crisis. Rather, it denotes the lack of efficacy of the rules under which government is conducted.

Prior to the arrival of a mixed member proportional electoral system ("MMP"), Palmer argued that New Zealand's rules enabled "massive changes rapidly with inadequate public consultation," as the constitution was too flexible and evolved too easily. The essence of our constitution in crisis lay in the "maldistribution of power between its component parts," namely "overwhelming executive power."[71] Palmer revised his opinion in light of the arrival of MMP – a system that provides an efficacious check on the overwhelming executive power he had in mind. Nevertheless, while New Zealand's constitution may not currently be in crisis (as was Palmer's concern), this does not prevent the possibility of a national recognition that an unwritten constitution is simply not up to scratch. Indeed, this is precisely what occurred in Canada – an experience that is the lifeblood of proponents for change in New Zealand.

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[71] Geoffrey Palmer *New Zealand's constitution in crisis: reforming our political system* (McIndoe, 1992), pp 9-14.

Canada's written constitution arose with relative ease, in the absence of a particular catalysing moment, inducing the need for such change. Would the simple national awareness, that New Zealand requires a written constitution, because an unwritten constitution is theoretically susceptible to abuse, suffice as a similar catalyst? Not in all likelihood. New Zealand's constitutional approach is characterised by "pragmatic evolution."[72] As explained by Joseph:

> Social Commentators have observed that the New Zealand temperament inclined more to pragmatism and physical environment, than to doctrines or theories of statecraft… New Zealanders do not take great interest in constitutional matters.[73]

The New Zealand public would thus not appear to be receptive of drastic constitutional change without the practical *need* for change. As a result, following the lead of Canada would be highly unlikely. Since I have argued for a lack of said need earlier in this paper, I do not propose to pursue this argument and the Canadian example further.

Conclusion

Alternate conclusions can be drawn from the observations in this essay. The first is that there will always be constitutional actors such as Sir Robert Muldoon who seek to tailor the system for personal gain. Just like a deadbolt can only slow a willing and cunning burglar down, checks and balances in constitutions can only serve to make it slightly harder for a constitutional actor to abuse his power. It is the goal of constitutions to kerb that ability. The more deadbolts, the less likely a constitutional burglar will succeed. A written constitution would surely satisfy this goal better than an unwritten constitution. Thus, in light of the uncertainty of our informality, New Zealand should favour a precautionary approach and adopt a written constitution, so that if a wayward constitutional actor does attempt to abuse the system, the repercussions of that abuse will be minimal.

But the superior view, in my opinion, is that New Zealand does not require this extra constitutional deadbolt. It is safe to draw from the

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[72] Constitutional Arrangements Committee, *Inquiry to Review New Zealand's Existing Constitutional Arrangements* [2005] AJHR I.24A, Para 26.

[73] See generally Joseph, above n 1, Para 5.5.4.

examples in Part A of this paper that constitutions are highly reflective of their circumstances. Thus, whatever shape New Zealand's constitution does take, it will inevitably be one that is unique and tailored to our needs. Indeterminacy and indistinctiveness contain sufficient constitutional flexibility to provide a hefty deadbolt in the event of constitutional burglary. So long as we remain democratic, any such attempts will be promptly dispatched. For a nation bursting with pragmatism, perhaps a written constitution is not for New Zealand – our unique unwritten variety is happily doing its job.