JOSHUA WILLIAMS MEMORIAL ESSAY 1979

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We publish below the winning entry for 1979.

DEFAMATION LAW REFORM— A SPECIAL DEFENCE FOR THE NEWS MEDIA?

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Recently, in company with most other common law jurisdictions, the New Zealand government appointed a special committee to review the state of the existing law of defamation and to make recommendations. The Committee's 175 page *Report*[1] which was released in December 1977 recommends a number of changes, the most important of these being the creation of a new qualified privilege defence for the media— a proposal designed to strike a "new balance" between the interest of the individual in his reputation and the conflicting public interest in freedom of speech and communication.

THE NEW DEFENCE

The essential feature of the new defence (similar to that recommended by the British "Justice" group[2] and, significantly, by a minority of the United States Supreme Court in *Rosenbloom* v *Metromedia*[3]) is that the media shall enjoy qualified privilege where certain prerequisites have been satisfied: namely

(a) that the subject-matter of the publication was one of public interest at the time of publication; and

(b) so far as the matter consists of statements of fact, the person by whom it was published at the time of publication took all reason-

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1 *Report of the Committee on Defamation* (December 1977) entitled *Recommendations on the Law of Defamation* (hereinafter referred to as the *Report*). The Committee consisted of Mr I L McKay, Barrister (Chairman); Mr M P Conway, Secretary of the New Zealand Journalists' Union; Mr S C Ennor, Barrister; Mr B McClelland, QC, Barrister; Mr W F Page, Parliamentary Reporter; Professor G W R Palmer, Professor of Law at Victoria University of Wellington; Mr G T Upton, Chairman of Directors of New Zealand News Ltd; Mr D Hull, Parliamentary Counsel; Mr C J Booth, Secretary.

2 See 1965 *Report of Joint Working Party of "Justice" and the British Committee of the International Press Institute.*

3 403 US 29 (1971).

able care in all the circumstances to verify the truth of the statements of fact; and

(c) so far as the matter consists of an expression of opinion[4]

(i) the opinion was at the time of publication the genuine opinion of the publisher; and

(ii) the opinion was at the time of publication capable of being supported by any statements of fact to which paragraph (b) applies, either by themselves or in conjunction with any other facts known at the time of publication to the person to whom the publication was made; and

(d) the publisher has given the person who claims to have been defamed by the publication an opportunity to have a reasonable statement of explanation or of rebuttal, or of both explanation and rebuttal, published in the same medium as the publication complained of, with adequate prominence and without undue delay.

In addition, the defendant can only avail himself of the new defence where:

(a) after receiving a written complaint from the aggrieved person he has, within thirty days of receiving that complaint, supplied to that person a statement in writing[5] specifying:

(i) the grounds on which the defendant believed that the statements of fact in the publication were true, and

(ii) the steps, if any, that the defendant had taken to verify the accuracy of those statements of fact, and where

(b) in giving the aggrieved person the opportunity to have a right of reply published the defendant offered to pay:

(i) the costs of publication of the statement, and

(ii) the solicitor and client costs of the aggrieved person, and

(iii) all other expenses reasonably incurred by the aggrieved person in connection with the matter complained of.

As compliance by the defendant with the prescribed terms of the proposed section is a complete bar to the recovery of damages, the incentive to act within its boundaries is obvious.

A radical departure from existing law, the recommended qualified privilege certainly ranks as the most novel of the *Report*'s recommendations. Greatly expanding the scope of protection available to the defendant, it places the media in a special position compared with the private individual—a notion which the common law has always resisted with some vehemence.[6] Further evidence of the radical nature of the new

4 Thus the present defence of fair comment is also affected.
5 The purpose of the requirement of a statement in writing is to enable the plaintiff to examine the merits of the defendant's case and so plan his own course of action.
6 See eg *Arnold* v *King Emperor* (1914) 30 TLR 462, 468.

defence is provided by provision for a right of reply which, if implemented, will be the first of its kind in the Commonwealth.

FACTORS SUPPORTING THE NEW DEFENCE

Clearly the inclusion of such a special media defence is a direct response to the trenchant criticism levelled at the law of defamation by representatives of the media. In recent years there has been considerable agitation for reform because of the inhibitive publishing environment which the present defamation law is said to have created. It has been argued that the law imposes unnecessary and undesirable restrictions (both procedural and substantive) upon the freedom of reporting on matters of public interest. The result—so the argument goes—is a chilling self-censorship and a consequent inability of the media to maintain their proper function in a democratic society as watchdog and catalyst of robust public debate.

An area of particular concern to the Committee, and one which was undoubtedly a motivating force behind the proposal, was the vulnerability of the media due to the inadequacy of the defence of qualified privilege in the situation of "accidental defamation"—viz the situation where the newspaper or broadcasting authority publishes facts which it genuinely believes true but which turn out to be false, or which may be impossible to prove true.[7]

Under the existing law it would seem that in such circumstances the publisher is afforded little protection. At common law a communication made by a person in pursuance of a legal, social or moral duty to a person who has a legitimate interest in receiving the communication is the subject of qualified privilege.[8] However, according to the Committee, the media can very rarely use such a defence. The Committee point to a series of cases where the courts have consistently refused to recognise either that news disseminators have a duty to publish matters which are of public interest and importance, or that the public have a legitimate interest in learning of such matters.[9] In *Truth (NZ) Ltd* v *Holloway,* for example, the New Zealand Court of Appeal emphatically declared that:[10]

> [T]here is no principle of law, and certainly no case that we know of, which may be invoked in support of the contention that a newspaper can claim privilege if it publishes a defamatory statement of fact about an individual merely because the general topic developed in the article is a matter of public interest.

Thus, the law compels the publisher virtually to guarantee the truth of his statements of fact. The climate engendered by this state of affairs is said to sound the death knell for investigative journalism, forcing newspapers, radio and television stations to suppress stories of public interest or to so dilute them that they lose all impact.

7 It was felt that other media problems arising from "gagging writs" and printer's liability necessitate specific reforms.

8 *Adam* v *Ward* [1917] AC 309.

9 *Truth (NZ) Ltd* v *Holloway* [1960] NZLR 69; *Dunford Publicity Studios* v *News Media Ownership Ltd* [1971] NZLR 961; *Brooks* v *Muldoon* [1973] 1 NZLR 1.

10 Ibid at 83. The Court rejected submissions that qualified privilege exists for the press if the matter is of legitimate common interest to the whole community either because it is part of the community and shares in the common interest or because it may be seen as having a duty to communicate to the public.

Another related source of anxiety concerns liability for the publication of comments made by one person about another, the repetition of rumours. The general rule is that, apart from the statutory exceptions detailed in section 17 of the Defamation Act 1954, it is not enough for the defendant to show that the quote was accurately reported or that there were in fact such rumours. He must also show them to be true, and this is so notwithstanding that the very fact that the comment was made at all may be of public interest and importance. According to many critics too great a burden is thereby placed on the media.

A further inhibiting factor considered by the Committee was the unpredictable and excessive nature of damages awards in defamation actions. Described as extravagant and as out of all proportion to the actual harm suffered, they are asserted to be the result of an emotive and prejudiced reaction by juries imbued with the popular notion of "the little man" versus the wealthy media empire.[11] For many members of the news industry a heavy damages judgment may be a crippling blow and may possibly lead to bankruptcy.

One of the difficulties associated with damages awards in the defamation context is, of course, the problem of fixing an arbitrary money value on intangible loss such as that to reputation.[12] For many critics the retention of damages is an anachronism. They argue that monetary payment is an ineffective and inappropriate means of redeeming the individual's reputation—a failure to respond in kind to the injury. While money may salve the plaintiff's own hurt feelings, it does little to inform those in whose esteem he has fallen that the allegations were without foundation. Litigation will be prolonged and the media will be reluctant to publish news of the decision and awards. Thus, say the critics, the majority of those who read or heard the publication remain under its influence.

The cumulative effect of all these factors is claimed to have rendered defamation law an instrument of oppression. Clearly the Committee felt convinced of the need to better accommodate the law to the free flow of communication. Enactment of their proposal, it is said, will free the media from anxiety and thereby encourage greater ventilation of public issues. Orientated towards the investigative journalism situation, it will also alleviate some of the problems encountered in reporting the statements of others.[13] Finally, according to its sponsors the defence has the beneficial effect of introducing an element of simplicity and certainty into an area plagued by complexities.

Critical Evaluation of the New Defence

1. *Does the defence represent too great an erosion of the individual's interest in his reputation?*

It is submitted that, contrary to the beliefs expressed in the *Report*, the new defence is one that should not be welcomed with open arms, particularly in view of the Faulks Committee's decisive rejection of a

11 The Committee was divided on the issue of abolition of juries either as an alternative means of striking a "new balance" or as an addition to the new defence.

12 See eg Farwell J in *Jones* v *Hulton & Co* [1909] 2 KB 444, 483.

13 The defence will provide limited assistance in this situation since the publisher must believe the statement to be true. Cf the Australian defence of fair report. Note that extensions to s 17 were also recommended.

similar proposal.[14] For many it will be viewed with alarm as undermining the value of reputation and as affording too much latitude to the media. Proponents of this argument would probably agree with the assertion that:[15]

> A great newspaper—if it believes that some villainy ought to be exposed—should expose it without hesitation and without regard to the law of libel. If the editor, his reporters and his advisers are men of judgement and sense, they are unlikely to go wrong; but if they do go wrong the principle of publish and be damned is a valiant and sensible one for the newspaper and it should bear the responsibility. Publish—and let someone else be damned—is a discreditable principle for a free press.

The danger is that with a media insulated from the deterrent of damages irresponsible journalism will abound. Newspapers, TV and radio, free to malign with virtual impunity, will unleash a torrent of defamatory material and may even be more inclined to engage in deliberate publication thereof on the assumption that the victim will be reluctant to commence proceedings.

This argument must of course be tempered by the realisation that damages are still recoverable if the publisher either knew the statement was false or acted negligently. However, it is a commonly held belief that the media are sometimes disposed to take a rather philosophical view as to the extent to which people should resign themselves to vilification. Arguably, the Committee's recommendation does not reflect the high value which the ordinary citizen places on reputation, nor his preference for restraint and courtesy. The immense emotional and financial suffering involved in being thrust into the public gaze as the result of publication of an untruth is not confined to those endowed with an excess of sensibility and should not be underestimated. Moreover, it must be remembered when considering attacks made by the press lobby—who after all are not entirely uninfluenced by the profit motive—on the existing law of defamation that there is no organisation to present the views of potential plaintiffs. While the resources of the New Zealand media may well be meagre in comparison with those of the United Kingdom, their ability to bear the loss would generally be greater than that of their victim. In any case the media can insure, whereas the private individual has no similar means of protection.[16]

Clearly the institution of a right of reply was intended by the Committee to counter such criticisms, and indeed the *Report* stresses that the interest in reputation will still be sufficiently protected.[17] However, this

14 *Report of the Committee on Defamation* (1975 Cmnd 5909). The New Zealand Committee felt able to dismiss the Faulks Committee's objections on the ground that the publishing environment in the two countries is quite different —the British media are larger and wealthier and therefore better able to withstand the stringent effects of the present law. However this distinction does not dispose of all the English Committee's criticism.

15 Lord Goodman, Chairman of the Newspaper Publishers' Association—cited by the Faulks Committee, ibid at 54.

16 Arguably the Committee failed to take sufficient account of the insurance factor, a surprising omission particularly in view of the recent heightened judicial awareness of such factors.

17 The Committee also claim that both parties are given more than they have ever had before—this would only seem true in the sense that while the defendant is relieved of liability for damages, the plaintiff is not left without remedy as he is under the present law when met with a defence of privilege undefeated by malice.

assertion is rather tenuous. In the writer's opinion the provision of a right of reply is an inadequate safeguard and of little benefit to a defamed person. The proposed remedy repairs the plaintiff's reputation only to the extent that his response is persuasive. And as the audience will recognise the reply as the statement of an interested party it will do little to restore his good name. The stigma remains—hardly a viable substitute for an apology[18] or the judicial correction order envisaged by the Australian Commission,[19] both of which tend to carry greater conviction in the eyes of the public.

Practical difficulties in administering the right of reply would also seem probable: for example, the problem of its adaptation to media other than the press for which it is principally designed. In addition statements of explanation or rebuttal are, it seems, almost invariably unacceptable to the publisher in the form in which they are submitted.[20] Finally, the defence does not ensure the same exposure for the reply as was afforded the defamatory publication. Originally, the Committee had contemplated that it should, but rejected this idea in favour of the lesser standard of "adequate prominence" on the ground that "it [would be] unlikely, however, that a newspaper would lead its edition with a statement of explanation."[21] Such reasoning is unlikely to appeal to a defamed person. After all, if the media choose to make defamatory allegations about a person which turn out to be false, surely it is only fair that they should be tolerant of some inconvenience in redressing that wrong. As the defence now stands the defamed person is left, to a certain extent, at the mercy of the publisher. The term "adequate prominence" can only be contrasted adversely with the detailed requirements governing the manner of publication found in the European codes. Accordingly, it seems somewhat specious to claim, as the Committee does, that the form of the new proposal answers the criticism that a statutory privilege would place newspapers and broadcasting authorities in a special position.[22]

Moreover, even assuming that general damages may be inappropriate in a defamation context, the omission of any provision for special damages also appears unsatisfactory and is surprising in view of the Australian Commission's concern, in formulating its new media defences, to preserve the obligation to correct and pay any proved monetary loss.[23] Few would deny the justice of allowing an aggrieved party to recover for damage, such as the loss of his job or a contract, suffered as a direct result of the defamatory statement. Since, as the Committee itself conceded, special damages claims will seldom arise, surely the inclusion of such a provision in addition to the right of reply would not impose a crippling burden on the media.

2. Are media claims of oppression justified?

Criticism that the proposed new defence, by eroding the traditional tort policies of compensation and deterrence, tilts the balance too far in favour of freedom of speech, is supported by assertions that the existing

18 Cf the *Report,* supra n 1 at 85.
19 See Law Reform Commission of Australia, Discussion Paper No 1, *Defamation—Options for Reform* (1976) 13-15.
20 See Goddard, "The Committee Reports" [1978] NZLJ 96, 98.
21 Supra n 1 at 62.
22 Of course, as Goddard points out (supra n 19 at 98), the defendant is not precluded by the right of reply from publishing the material complained of again or from responding to the reply.
23 Supra n 19.

law is not as restrictive as the Committee appear to think, and that the flexibility of the common law *can* be relied upon to adapt to changing social conditions. According to the Faulks Committee there is a lack of concrete evidence that newspapers or broadcasting authorities are handicapped in their proper function by the present law. In support of this submission, they cite a statement made by Lord Goodman, Chairman of the British Newspaper Publishers Association:[24]

> The absorbing question is the one whether the present law prevents editors and publishers from printing material which ought to be printed in order to expose villainy and protect the public from villainy. I have heard this contention over many years and remain unrepentantly sceptical of its truth.... [T]he frequent assertion that newspapers have in their archives hundreds of files which would reveal dreadful goings-on has never been established to the satisfaction of any conscientious witness.

The validity of this statement is of course limited by its British context. However it may be of some significance that even the majority of those members of the news industry who responded to the Committee's questionnaire regarded the law as only moderately restrictive and were opposed to giving the media special protection over and above that accorded the ordinary citizen. The statistics relating to the number of court actions, their outcome and the number of settlements, do not appear to support the existence of an inhibiting atmosphere. Certainly the damages awards in this country cannot, on the evidence provided in the Committee's own tables,[25] be classified as excessive.

A more pertinent inquiry for determining the inhibiting effect of the present law is the extent to which material, the publication of which would have been in the public interest, has been excluded. The Committee's survey indicates that this problem is common,[26] although unfortunately the number of occasions on which material was excluded does not appear. However the question remains: should reliance be placed on the unsubstantiated assertions of an interested party, especially when those assertions are themselves contradicted by another aspect of the same survey? For, as the *Report*'s own statistics show, there has been a decline in the number of newspapers taking out liability insurance.[27] The validity of cries of media oppression must surely be questionable in the light of this development; yet the Committee failed to discuss it in any detail. In any event a significant proportion of the news industry failed to reply to the questionnaire at all. Its silence or apathy can also be interpreted as belying the existence of an "unduly restrictive publishing environment". One commentator,[28] after surveying the state and criticisms of the law, concludes that "there is nothing in the law of defamation which should make the press afraid to speak out in a responsible manner on matters which the public should know." She later adds: "the press in New Zealand has substantial freedom to speak out effectively on all the important issues of our times."[29] Thus, the basic premise on which the new defence is founded is at least open to question.

24 Supra n 15.
25 See *Report* Appendix III, Tables I-O, pp 137-139.
26 Ibid, Table R, p 140.
27 Ibid, Table P, p 139.
28 Quentin-Baxter, "The Freedom of the Press" in *Essays on Human Rights* (ed Keith 1968) 88.
29 Idem.

Another published paper[30] suggests that the climate of judicial opinion has changed considerably since *Holloway*.[31] *R Lucas & Son (Nelson Mail) Ltd* v *O'Brien & NZ Social Credit Political League Inc*[32] is cited as an example of the modern trend. In that case the Court of Appeal refused to strike out a defence of qualified privilege based on a duty in the media to convey matters of public interest to the public. Significantly, Richmond P seemed to regard as crucial the question whether the "allegations . . . were of a sufficient public importance to give rise to a social or moral duty to publish them in a newspaper."[33] This statement seems to run counter to the very basis of the earlier decision. What importance can be attached to this judgment is of course open to conjecture, particularly as the court was not dealing with the merits of the dispute. If it is correct that by broadening the concept of "public interest" this decision signals the demise of *Holloway,* then it may render unnecessary a special statutory defence of privilege with its attendant difficulties of rigidity and complexity.[34]

The decision of the House of Lords in *Horrocks* v *Lowe*[35] provides a more conclusive example of relaxation of the traditional common law approach to the scope of qualified privilege. The case made two important extensions to the scope of common law qualified privilege. First, it was held that juries must be directed to exercise caution in inferring an indifference to truth on the part of the defendant, and that where the question of mixed motives arises a finding of malice is justified only if the improper motive was the dominant one. Secondly, in a departure from traditional thinking, their Lordships stated that the inclusion of irrelevant defamatory allegations in a statement prima facie protected by qualified privilege does not necessarily deprive the defendant of the protection of privilege in respect of those irrelevant allegations. The only effect of inclusion of irrelevant material is that it provides evidence of malice in respect of the whole statement. Significantly, this approach would have resulted in victory for the publisher defendant in *News Media Ownership Ltd* v *Finlay*.[36]

3. *Will the new defence achieve the aims of the Committee?*

Even conceding that the media does face serious problems under the existing defamation law, the more fundamental[37] question arises whether statutory reform is the answer and, if so, whether the particular reform envisaged will be effective to ameliorate those problems. It can be argued that good investigative journalism cannot be created by statutory amendment, and that the solution to the difficulties which are said to confront the press at the present time is in the hands of the media—it lies not in law reform but in the education and training of responsible

30 See Burrows, "The Law and the Press", F W Guest Memorial Lecture, University of Otago, October 1978. Published in (1978) 4 Otago LR 119.
31 Supra n 9.
32 Unreported, Court of Appeal, Wellington, 7 September 1978 (CA 102/77), Richmond P, Woodhouse and Somers JJ.
33 Ibid at 13. No reference was made to *Holloway*.
34 Infra p 378.
35 [1975] AC 135.
36 [1970] NZLR 1089. In view of this decision, adoption of the *Horrocks* v *Lowe* approach to the effect of inclusion of irrelevant material in NZ may require legislative intervention.
37 More fundamental in the sense that the validity of the above criticism depends on one's personal preference as to where the balance ought properly to lie.

journalists. Similarly, it has been contended that non-legal attitudes such as the need for tight budgeting and general community attitudes have a far more inhibiting effect on what is reported and how it is done than the law of defamation.[38] Accordingly, it is extremely doubtful whether the quality and style of the New Zealand press will change in the beneficial way contemplated by the law reformers. In particular, economic constraints will continue to prevent in-depth investigative journalism irrespective of the defamation laws.

Quite apart from these extra-legal considerations, it seems unlikely that implementation of the new defence will achieve the desired result of providing the media with comprehensive relief. The requirement that the publisher must reveal why he believed the statements were true and what steps he took to verify their accuracy would seem to offend against the media tradition of non-disclosure of confidential sources. Continued adherence to this tradition would clearly render the defence unworkable. Significantly the Faulks Committee regarded this as an important objection to the creation of a special media defence—an objection which cannot be adequately dismissed by the response that British newspapers are larger and wealthier than their New Zealand counterparts. The New Zealand Committee did not ignore the "source" issue but denied its general validity, asserting that "as in most cases the initial source merely alerts the journalist to a matter which he then follows up elsewhere, [the] defence would then be available without any need to rely on the initial information."[39] However, this is not borne out by the concern expressed by the United Kingdom Press Council to the Faulks Committee that the requirement of a statement in writing would render the defence ineffective.

4. Will the new defence create additional complexities?

Another objection raised by the Faulks Committee was that the proposed defence, far from achieving its avowed aim of simplification, would add greatly to the complexity, length and costs of defamation actions.[40] Undoubtedly, the courts will be called upon to determine the meaning of the new statutory phrases—"matter of public interest", "reasonable care", and "adequate prominence". It requires little imagination to envisage the interminable interlocutory motions arising from these and other matters such as the adequacy of the statement in writing. Another possible source of contention and uncertainty in New Zealand is the recommended statutory definition of malice[41] to which the media privilege, on a plain reading of the draft statute, is presumably subject. In replacing common law malice with a statutory formula, the Committee's concern was to avoid confusion. However it appears they may well have exacerbated it. The Committee's definition seems to ignore the important developments enunciated by the House of Lords in *Horrocks* v *Lowe*[42] relating to the effect of inclusion of irrelevant material and

38 Lisk, "Defamation and Its Effect on Freedom of Speech" unpublished LLB (Hons) dissertation, University of Auckland, 1974. Although this dissertation was written prior to the Committee's *Report,* it discusses a similar proposal.

39 Supra n 1 at 60.

40 The incentive to settle in borderline cases will obviously be less.

41 See clause 15 of the draft Bill, Appendix VII of the *Report.*

42 Supra n 33. There is also the added difficulty of the conflict in approaches between *Adam* v *Ward* and *Finlay* as regards the issue of relevancy. The *Report*'s failure to refer to this matter is somewhat disquieting.

mixed motives. The Committee made no reference to the English decision in its discussion of the problems associated with common law malice.

CONCLUSION

The proposed special media privilege is open to objection on the grounds that it is undesirable, unnecessary and unworkable. If it is operated in the manner envisaged there can be little doubt of the important social and legal implications. One possible by-product resulting from the greater freedom afforded the media may be an awareness of the need to create a new tort of privacy, the critical question being not whether publication happens to injure reputation but whether it causes unjustified distress and embarrassment.[43] At the 1978 Law Society conference, Mr Justice Kirby, Chairman of the Australian Law Reform Commission, expressed surprise at the New Zealand Committee's failure to deal with the question of privacy in its *Report*. By way of contrast the Australian Commission treated the problems of defamation and privacy as allied questions, taking the view that it is undesirable to relax media liability without also making some express provisions for protection of privacy.

Recognition in New Zealand of a right of privacy has been declared unworkable.[44] Undoubtedly the problems involved in defining its extent and application are great, the main difficulty being one of demarcation between those matters private to the individual and those of sufficient public interest to merit publication. The Australian answer is to provide limited protection against the wrongful publication of certain statutorily defined private facts.[45] Whether this country will follow suit is a question that cannot be answered with any certainty—what is more certain is that enactment of the Committee's proposal will provoke discussion as to the desirability of so doing.

Although the exact nature and extent of the proposed statutory qualified privilege for the media could only be determined by subsequent judicial interpretation, there can be little doubt that it represents an extremely important development in the law of defamation—indeed a turning point and one that New Zealand would be most unwise to adopt without further deliberation and reflection.

43 For example, where aspects of the private life of an individual are reported which are totally unrelated to the conduct of or fitness for his public office. Some American jurisdictions have recognised a right of privacy; similarly the French *droit d'intimite*. The truth of the material complained of is irrelevant.

44 According to Professor G W R Palmer at the New Zealand Law Society Triennial Conference, Auckland 1978 (as reported in the Conference Courier Final Issue at 39) this assertion is borne out by the American experience. However Professor Burrows, supra n 30, states that the American courts *have* developed a "reasonably effective" tort of privacy and further that Canadian judges are thinking along similar lines.

45 See discussion of Australasian proposals by Mr Justice Kirby, "Defamation Reform: New Zealand and Australian Style" [1978] NZLJ 305.