Book reviews

STATUTORY INTERPRETATION : PROBLEMS OF COMMUNICATION, by Jim Evans. Oxford University Press, Auckland, New Zealand, 1988. xi + 318 pp (including Table of Cases and Index). Price NZ $40. Reviewed by C E F Rickett.*

A recent visitor to this Faculty, Dr Roderick Munday, examined, in a study published in 1983, recent judicial pronouncements in England regarding approaches to statutory interpretation. He commented that although it would be premature to declare the literal approach dead, nevertheless[1]

> some judges are prepared to abandon the strict constructionism practised hereto and to embrace a more liberal style of interpretation.

The position in New Zealand has recently been the subject of an excellent 62 - page study by Professor J F Burrows, published last year by the New Zealand Law Society, titled "Recent Developments in Statutes and Their Interpretation." Burrows has examined the range of court decisions interpreting and applying statutes (including leading British material) under various headings which include statutory context (both internal to the statute, and external - use of extrinsic aids, etc.), the purposive approach, natural and ordinary meaning, common law and statute, and the future. The purposive approach has long had statutory recognition in New Zealand in s. 5(j) Acts Interpretation Act 1924, although it is only relatively recently that s. 5(j) has begun to be a "dominant force" in the courts.[2] Burrows shows how the vigorous practice of purposive interpretation has resulted in a redefinition of the literal approach, giving it a more reasonable form.[3] Statutory interpretation in New Zealand is entering a new age. Burrows points to three factors which will impact both the theory and practice of statutory interpretation. First, the introduction of a Bill of Rights (even in its currently mooted non-entrenched form) will perhaps mean our judges must become more "politically" aware. Secondly, there is a move towards "plain English" drafting, which may force the courts to depart even further from strict constructionism, and will require different attitudes to the function and place of "legal language" vis-a-vis "ordinary language." Thirdly, the activity of the Law Commission both in the specific area of statutory interpretation law reform and possible "codifications" of substantive areas of law may have much impact. I would add a fourth. The increasing reference to the principles of the Treaty of Waitangi in various statutes will, I suggest, require the courts to become more sociologically, historically and anthropologically aware when

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1 Roderick Munday "The Common Lawyer's Philosophy of Legislation" Rechtstheorie 14 (1983) 191-203, 203.

2 New Zealand Law Society Seminar, May - July 1988, "Recent Developments in Statutes and Their Interpretation", Professor J F Burrows, 33.

3 Above n 2, 41.

"interpreting" (ie understanding and applying) the impact of such statutes in concrete situations.

These developments make it important for our law schools to think seriously about, and plan effectively for, the teaching of statutory interpretation philosophy and skills to future generations of New Zealand lawyers. I have a sneaking suspicion that Dr Munday is correct when he suggests that "[t]he supremacy of judge-made, unwritten law ... is imprinted deep in the [New Zealand] lawyer's soul."[4] He writes:[5]

> The general attitude today still is that legislation is something that students will pick up as they go along and requires little, if any special attention. Small wonder, then, that students, lawyers and judges can sometimes make the most elementary errors when handling legislative materials. However, the tide may be beginning to turn. Recent years have witnessed the publication of a new generation of textbooks: uncharacteristically, these place the accent on statute law and stress the importance of a thorough grounding in legislative materials and techniques.

Dr Jim Evans has sought to produce one of this new generation of textbooks. He wants it to be unlike others, which deal mainly in descriptions of maxims, general principles and rules (ie techniques) whereby sense is attempted to be made of statutes by applying to them long received and well developed "tricks." These "tricks" reflect and reinforce the strict constructionism which has long been dominant. Evans believes there are problems of communication in statutory interpretation which are better dealt with by a clearer grasp of the philosophy of language (and to a lesser extent linguistics), of the logical structure of rules, and of the nature of deliberation about action.

The book is designed as an "introduction to statutory interpretation for students at the beginning of their study of law."[6] About a third of it consists of Evans' own text; the rest is selected readings and case materials, with useful questions and observations on most of them, designed to illustrate and in some instances take further the points Evans has made.

There are three sections. Evans admits that Part One will be difficult for introductory students. It certainly is that! Here we meet the philosopher in Evans. I would be interested to see how a cross-section of students might cope with the material. Good ones will enjoy the discussion, although even for them I suspect some of the readings will be too much. Others, perhaps the majority, will simply be lost unless the teacher expounds the meaning and purpose of Evans' material in a committed and thorough manner. How many of the total of twenty-five to thirty lectures which Evans suggests will need to be taken up on this material? Although Evans suggests a quick initial reading of chapters two and three and a return to them later on, my own perception is that a student needs to grasp them well from the outset if she is to be able fully to appreciate what Evans is trying to achieve in Part Two.

4 Above n 1, 201.
5 Above n 1, 197.
6 At ix.

The opening chapter in Part One, titled "Introduction", sets out in a fairly succinct five paragraph statement the prevailing common law doctrine of statutory interpretation, and goes on to refer to the accepted judicial pronouncements on the mischief, golden and literal rules, and to s.5(j). So far, so good (and simple). Chapter Two discusses the nature of meaning, especially in the context of classification. Chapter Three goes on to elaborate on meaning in relation to purpose, so as to aid in proper purposive interpretation. Here, Evans introduces difficult, but important, jurisprudential concepts - the nature of a rule, and the scope of human behaviour, amongst others. By the end of the chapter he announces his findings - there are three different ways to follow rules. First, there is *the method of intended meaning* (the application of rules to all and only those cases to which its intended meaning applies), which seems to equate with Burrows' understanding of the redefined literal approach of natural and ordinary meaning. The second and third methods can each, or perhaps together, provide a philosophical underpinning for the purposive approach. *The method of desired scope* holds that:[7]

> [w]e apply the rule to all, and only, those cases to which the legislature's reasons for the rule apply and which we believe it intended to include in the rule on account for these reasons.

The method of developed judgment holds that:[8]

> [w]e apply the rule to each case within the compass of the cases covered by method two, which we believe a rational person who had made the judgment upon which the rule was based (and not retracted it) would want the rule to apply to if they were aware of any exceptional circumstances existing in the particular case.

Evans believes how a society works out what a purposive approach really means depends on a judgment of the merits of these approaches.

Part Two contains the bulk of Evans' work - detailed discussions of the major problems of communication in statutory interpretation. The chapters on ambiguity, vagueness, and conventional shorthand deal with problems often encountered in ascertaining the intended meaning of a statutory provision. Evans is committed to maintaining the public reliability of the statute books. The intended meaning of words employed in a public document like a statute is obviously foundational. Nevertheless, the purposive approach can take us beyond the intended meaning. The chapters on restrictive interpretation (can an exception be made to the intended meaning of a rule to exclude some unforeseen exceptional case?), extensive interpretation (can a rule be extended to apply to a case not within its intended meaning?), and legislative mistake all are concerned with asking whether and when it is even legitimate for courts to follow a method of interpretation other than intended meaning. It is in these chapters in particular that one would expect to find clear discussion about, and conclusions on, the second and third methods outlined in Part One. However, they are written almost to stand alone, without reference back to the issue, and this is to be regretted. The last two chapters in Part Two deal with implications, and breach of procedural rules.

7 At 67.
8 At 69.

Evans suggest that if anything be omitted from a course using his book, it should be Part Three. This is surprising, since some of the type of discussion I have lamented as missing from Part Two is to be found in Part Three, especially on pages 281-289. Part Three is titled "Legal Doctrine", and examines evidence of legislative intent (so foundational to understanding purposive interpretation), and a number of maxims, presumptions and detailed rules.

Let me conclude with some observations about the strengths and weaknesses of Evans' book. Evans is to be commended for producing a book which attempts to reveal to law students (and perhaps to more than a few law teachers?) the nature of the language and communication exercise which lawyers are engaged in. It is also encouraging to see the combination of good philosophy with solid, practical law. More books are needed which rescue "jurisprudence" from the realms of abstraction and place it, as a discipline, right back where it belongs, in the rough and tumble of the practice of law.

Evans does, however, try to do too much with introductory students. Perhaps this is the result of practical pressures on him - producing a book for a course where only thirty hours are allowed for teaching "all of statutory interpretation"? If teaching statutory interpretation means teaching skills rather than merely feeding information, and "skills" includes the making of both linguistic *and* philosophical judgments, I suspect that after thirty hours even the good students have only begun to discover the complexities (and fun) of uncovering the *intended meaning* of a provision, let alone coming to grips with the different skills applicable to purposive interpretation which extends beyond intended meaning. Do we need to give sixty hours to statutory interpretation?

Incidentally, Evans claims his book is not simply a New Zealand book. He is correct - it can be read profitably in the context of any common law jurisdiction.

AIDS: A HANDBOOK FOR PROFESSIONALS, eds Donna Snowden and David F Cassidy. Carswell, Toronto, Canada, 1989. xiii & 241 pp (including Index). Price $US43. Reviewed by C E F Rickett.*

One of the essayists in this collection of papers summarises the AIDS issue thus:[1]

> "There is little doubt that AIDS is of great public health importance. The reasons for this can be summarised as follows: (1) AIDS is a serious infection with a high rate of mortality; (2) there is no effective vaccine or treatment for AIDS; (3) a high proportion of injected individuals become chronic asymptomatic carriers; these individuals are potentially infectious and are at considerable risk for

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1 Robert S. Remis "The Epidemiology of Aids", 61.

developing disease; and (4) cases of AIDS are continuing to increase at an exponential rate."

New Zealand of course has not been spared this problem. At the time of writing (14 April 1989) the statistics for New Zealand were as follows: 126 reported cases; 58 deaths; an estimate of 800-1000 people carrying the virus, with 424 having already tested positive.

AIDS is not just a medical problem. It impacts society at numerous other points - practically, in education, welfare, economics, to name a few; and theoretically, in philosophy, ethics, sociology, etc. A growing library of AIDS literature is appearing in these non-medical areas.

What of AIDS and the law? AIDS gives new scope for law to reassert its roles as the helper of people in need, and as the protector of people under threat (both PWAs - persons with AIDS - and others not infected). Various efforts to overcome or control the spread of AIDS have highlighted issues of the proper extent of coercive measures. The sexual aspect to the transmission of the disease has rekindled the public/private morality debate and issues of how and to what extent the law might intervene.

Much of the periodical literature comes from the USA, as do many of the present books in this area. Such material has some value in New Zealand - especially in relation to general issues - but the detail is often irrelevant to us because of the constitutional differences between us. British and Australian materials have more relevance, but even so the lack of a distinctively New Zealand perspective is obvious. Indeed, it is to be hoped that increasingly homegrown viewpoints and responses will be developed as the problems of AIDS are felt more keenly in our midst, and as more legal research is done in New Zealand in this important medico-legal area.

The book under review is a Canadian collection of essays, grouped in three sections. There are fourteen papers on Medical Aspects, ranging from general introductory work to chapters, for example, on dentistry, ocular manifestations of AIDS, drug use and AIDS, nutrition, home care of PWAs, and holistic nursing. Some of this type of material is of value to interested lawyers, since a basic knowledge of medical issues must be a prerequisite to legal responses and involvement. From this point of view, the chapter on epidemiology by Robert Remis is the most interesting, but even here the material is readily available in the introductory parts of most of the longer articles now being published with regularity in American law reviews. The third section, on the Human Aspect, contains three papers which, in my view, actually trivialise the human aspect, because they fail to face the issues of disease and death with a deep awareness of not only of the physical and emotional issues at stake, but also of the spiritual issues.

The second section, on Psychological and Social Aspects, should ideally be of more interest to lawyers. However, only three of the seven papers deal in any way with legal matters. The other four are more general, although the paper titled "Sexological Commentary" by Donna Snowden raises some issues relevant to the law and morals debate, issues of sexual orientation and sex education. The papers on "Legal Aspects" and "The Will" are too specifically Canadian to be of much interest in New Zealand.

Margaret Somerville's paper "AIDS : A Challenge to Health Care, Law, and Ethics" is of some jurisprudential interest, and could profitably be republished in a law journal. It is in danger of disappearing otherwise.

Overall, this is a disappointing book. It certainly does not live up to its description as a "handbook" - some of the essays are far too theoretical for that! The range of "professionals" for whom it is intended is really very narrow - doctors, nurses, psychiatrists, and perhaps the personal lawyer of a PWA in Canada.

It is perhaps not quite proper to end a critical review of one book, with a recommendation of others not being reviewed, but at the risk of breaking with convention, I mention three publications of much greater value to lawyers than the present one. First, *AIDS and the Law : A Guide for the Public*, eds Harlan L Dalton, Scott Burris, and the Yale AIDS Law Project[2] ; and, second, *AIDS and the Law*, ed WHL Dornette.[3] Although both are very American in their detail, they discuss the basic underlying issues with clarity and depth.

The third book is a fascinating monograph analysing the manner in which the AIDS problem is perceived in society. It provides a gripping portrayal of the power of social metaphors, and is of prophetic importance for lawyers and legal policy makers concerned with the AIDS problem. It is Susan Sontag's *AIDS and its Metaphors*.[4] The tendency for legal policy, as for medical policy, has been, argues Sontag, to regard the AIDS epidemic as an invasion of an alien to be met by all-out war - the military metaphor. This metaphor dehumanises, as Sontag argues:[5]

> ... [I]t is highly desirable for a specific dreaded illness to come to seem ordinary. Even the disease most fraught with meaning can become just an illness. It has happened with leprosy, ... It is bound to happen with AIDS, when the illness is much better understood and, above all, treatable. For the time being, much in the way of individual experience and social policy depends on the struggle for rhetorical ownership of the illness: how it is possessed, assimilated in argument and in cliche. The age-old, seemingly inexorable process whereby diseases acquire meanings (by coming to stand for the deepest fears) and inflict stigma is always worth challenging, and it does seem to have more limited credibility in the modern world, among people willing to be modern - the process is under surveillance now. With the illness, one that elicits so much guilt and shame, the effort to detach it from these meanings, these metaphors, seems particularly liberating, even consoling. But the metaphors cannot be distanced just by abstaining from them. They have to be exposed, criticized, belaboured, used up.
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> Not all metaphors applied to illnesses and their treatment are equally unsavory and distorting. The one I am most eager to see retired - more than ever since the emergence of AIDS - is the military metaphor. Its converse, the medical model of the public weal, is probably more dangerous and far-reaching in its consequences, since it not only provides a persuasive justification for authoritarian

2 Yale University Press, New Haven, 1987.
3 Wiley, New York, 1987.
4 Farrar, Straus and Giroux, New York, 1988, 1989.
5 Above n 4, 93-95.

> rule but implicitly suggests the necessity of state-sponsored repression and violence (the equivalent of surgical removal or chemical control of the offending or "unhealthy" parts of the body politic). But the effect of the military imagery on thinking about sickness and health is far from inconsequential. It overmobilizes, it overdescribes, and it powerfully contributes to the excommunicating and stigmatizing of the ill.
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> No, it is not desirable for medicine, any more than for war, to be "total." Neither is the crisis created by AIDS a "total" anything. We are not being invaded. The body is not a battlefield. The ill are neither unavoidable casualties nor the enemy. We - medicine, society - are not authorized to fight back by any means whatever ..... About that metaphor, the military one, I would say if I may paraphrase Lucretius: Give it back to the war-makers."

This is the sort of material which urges us on to produce creative and responsible policies - because it *expects* us to have dialogue ..... to understand ..... to care ..... to act.

PACIFIC COURTS AND LEGAL SYSTEMS, edited by Guy Powles and Mere Pulea, Institute of Pacific Studies, University of the South Pacific, Suva, 1988, xvi + 376 pp including index. Paperback $US 14.00 or hard cover $US 19.00. Reviewed by Rosemary Gordon.*

This publication brings together material written by 56 people working in the legal systems of the Pacific. They were asked to write about their work and in particular to address areas where the contributors could see the need for improvements. The result is a valuable reference book, particularly since material of this nature is not readily available.

Many eminent people have contributed to this volume and it is the wide range of interesting contributions which makes *Pacific Courts and Legal Systems* a unique, practical and appealing book. The contributors have first hand experience of their subject areas since they are local people with specialist knowledge of their systems. This is in accordance with the publication policy of the University of the South Pacific to promote works on the Pacific by the people of the region and to make the material available at a reasonable cost.

The book's predecessor was *Pacific Courts and Justice*[1]. While some of the material remains substantially the same for both volumes, a breakdown of the sections reveals the introduction of much new material effectively broadening the scope of the book geographically and subjectwise. Additionally all chapters published in the 1977 book

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1 Institute of Pacific Studies, University of the South Pacific, Suva, 1977.

and carried through into the new book have been revised[2] so the evolution of the systems can be followed.

The book commences with an introduction by Sir Gaven Donne KBE. Chapters 2 and 3 are general articles by the editors. Guy Powles is a senior lecturer in law at Monash University in Melbourne and a former magistrate in Western Samoa. Mere Pulea is a lawyer and social welfare specialist at the Institute of Pacific Studies in Suva and the author of the seminal publication *The Family, Law and Population in the Pacific Islands*.[3] Both editors are well known for their valuable contributions to the area of law in the Pacific.

The book is then divided into 2 parts. Part 1, which comprises the bulk of the book, contains 55 chapters of varying lengths centred around 7 main sections: "adjudicators"[4]; "local courts and land courts"; "lawyers and prosecutors"; "public legal services"; "law, custom and settlement"; "court structure and administration"; and "training for effective justice".

The first section in Part 1 of the book discusses the position of adjudicators in Niue, Tonga, Tuvalu, Papua New Guinea, Western Samoa and the Cook Islands, commenting on, among other things, adjudicators' functions and training and the problems faced by adjudicators in carrying out their jobs. The final chapter in the section is a general article on adjudicators and their responsibilities to the community.

Solomon Islands, Fiji[5], Rotuma, Vanuatu, Tonga, the Marshall Islands and Nauru are new entries in the "land courts and local courts" section. This is one of the lengthier sections of the book, giving a wide-ranging look at the functions and operations of land courts and local courts in the stated jurisdictions. A general chapter on land courts appears in this section.

The "lawyers and prosecutors" section includes 4 new chapters, 2 of which are on Western Samoa and 2 on Fiji. Interesting accounts are given on the role of lawyers and lay lawyers. The section includes a general article on professional legal standards in New Zealand and another general article on the question of prosecution in Pacific jurisdictions.

A section entitled "public legal services" has been created and discusses the topic in the jurisdictions of Niue, Kiribati, Vanuatu and Solomon Islands. This is followed by

2 It is particularly interesting to compare chapters on jurisdictions which became independent between the publication of the two books, eg Tuvalu.

3 Institute of Pacific Studies, University of the South Pacific, Suva, 1986.

4 To encourage "comparative understanding" the book uses various standard terms which are defined in the book. "Adjudicator" for example is used to cover recognised judicial officers such as magistrates and judges but also includes members of councils and committees which have a judicial function.

5 The chapters on Fiji were written prior to the 1987 military coup d'etats. This should be borne in mind when reading the Fiji material.

an interesting section focussing on the relationship between custom and law which has been expanded to include entries on New Caledonia, Tokelau and the Cook Islands.

The remaining two sections in Part 1 of the book have also been expanded considerably. "Court structure and administration", in addition to 2 general articles which appeared in the earlier book, now includes chapters on the legal systems of Fiji, New Zealand, Vanuatu, Kiribati, Tuvalu, Easter Island, French Polynesia and Palau. "Training for effective justice", which looks at the training of legal personnel, has 6 new chapters incorporating Papua New Guinea, Western Samoa and Vanuatu in addition to 2 new general articles on training para legal personnel and the Pacific Law Unit.

Overall the chapters in Part 1 are lucidly written[6] and very readable. Some chapters tend to be descriptive, others are more analytical but all impart useful information.

Part 2 gives brief but cogent summaries[7] of the legal systems of 26 jurisdictions providing for each information about government, sources of law, courts, assistance in court and lawyers. This expands the 1977 book which addressed court systems only. The inclusion of entries on American Samoa, Australia, the Federated States of Micronesia, Guam, Hawaii, the Marshall Islands, New Caledonia, Norfolk Island, the Northern Mariana Islands, Palau, Pitcairn and Wallis and Futuna considerably extends the jurisdictions covered by the earlier book. Part 2 contains in a compact form some highly useful reference information which is for the most part very up to date.

Pacific Courts and Legal Systems is a thought provoking book which covers a diverse range of topics and through a multitude of views shows the reader how jurisdictions and individuals are coming to terms with their legal dilemmas and problems. It cannot help but raise a number of questions in the reader's mind.

There is for example an obvious problem of reconciling customary law with what may be termed the western notion of law. Many of the chapters touch on this in one way or another and the impression is that many jurisdictions are developing western laws while also retaining elements of customary law. The success of this reconciliation is another matter. The area is a potential minefield and the problems only too apparent. The law, custom and settlement chapters are particularly pertinent to this theme.

Another issue frequently raised in the book is the question of the independence and impartiality of personnel working in the legal area. Pacific communities are often small and isolated and of necessity peoples' lives and business become interrelated. Theoretically, adjudicators should retain some distance from the community. In reality this may be almost impossible to achieve and the stress which this can create is apparent. Questions of independence and impartiality could arise in any legal system but the problem is clearly accentuated in small Pacific communities.

6 English is the second language for many of the contributors.

7 Summaries should be read with the relevant chapters for a full appreciation of the book.

Lack of resources also creates a myriad of problems. There is a need in the Pacific as in any legal system for effective and ongoing training programmes for those involved in the law area. Many jurisdictions lack access to basic legals materials, for example statutes and law reports, and this problem must be addressed. Money should be expended to assist in these areas.

The main criticism of the book is that it is not as comprehensive as it may at first glance appear. While 26 jurisdictions are summarised in Part 2 of the book, 9 of the jurisdictions have no entries in Part 1, a further 11 have between 1 and 2 entries only. A reader who wished to be informed about Norfolk Island, for example would, apart from brief references in the text, be reliant on the summary in Part 2. Conversely heavier emphasis has been placed on Fiji, Vanuatu and Western Samoa with about 5 entries each. The editors refer to the fact that Australia and New Zealand are not given extensive treatment because the study seeks to focus on what is commonly known as the Pacific Islands, but that does not adequately explain the uneven coverage of the jurisdictions. Further attention to some of the jurisdictions which have only been touched on would have been desirable in order to provide a fuller coverage, especially since material relating to some of these jurisdictions is scarce.

The tendency with this book is to read all the information on one jurisdiction together. This involves isolating the available material, reading the summary, then returning to the relevant reference points interspersed throughout the book. This cross referencing was sometimes a source of irritation. A diagram setting out exactly the coverage of each jurisdiction would have been useful, although the contents list and the index go some way towards achieving this. Another solution would have been to place the summaries closer to their relevant chapters but this would have involved grouping material by jurisdiction not subject matter and this would have been unsuitable because of the unequal weight given to the jurisdictions.

The editors comment that space factors militated against other than brief notes about the contributors. This is a pity as some further biographical detail would have been interesting and would have placed the commentaries fully in context.

The running heads which assumed either the name of the book or the major section heading were a minor annoyance. Even in a book of relatively short chapters it is useful to have detailed running heads for identification of pages.

From a presentation angle this book is far more sophisticated than its predecessor. The size and style of type for example is a vast improvement on the small print of the 1977 book. The volume is basically free of typographical errors although a number appear in the tables and in the index.

This book would be useful to lawyers and lay people alike interested in gaining a first hand knowledge of the Pacific courts and legal systems. It would also be a useful reference book for students[8] of legal systems of the Pacific and could be used to provoke

8 It is for this reason a prescribed text for the Pacific Legal Studies programme at Victoria University of Wellington.

thought and discussion on a number of issues critical to an understanding of law in the Pacific.