NZLR 441. In that case White J. held that proof of malice on the part of the host of a radio talk-back show would not destroy a plea of fair comment by the radio station itself. The host was an independent contractor not an employee. In the case of an employee the position would be different because vicarious liability would apply.

Finally Dickson J.'s consideration of the policy factors involved in the case should be mentioned. He emphasises the importance of the defence of fair comment in giving substance to the principle of freedom of speech and points out the consequences of only giving newspapers protection with respect to letters with which they agree. It is submitted that at this point the learned judge impliedly overstates the effect of the majority opinion in the case because that opinion does not insist on honest belief by the paper in the views expressed as the *only* basis for a successful plea of fair comment. It allows alternatively proof of honesty on the part of the writers. While this is a less serious restriction on the functioning of newspapers it is still an unjustifiable one, as was submitted above. It is to be hoped that the approach of Dickson J. ultimately prevails.

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THE EVIDENCE AMENDMENT ACT (No. 2) 1980

The Evidence Amendment Act (No. 2) 1980 which came into force on the 1st January 1981 comprises five parts, namely: admissibility of hearsay evidence; convictions, etc., as evidence in civil proceedings; privilege of witnesses; taking of evidence overseas or on behalf of overseas courts and proof of photographic copies of documents. Comments in this legislation note will be confined to the first three parts of the Act.

The law relating to hearsay evidence has been altered in several respects.

By s. 3(1) of the Act documentary hearsay evidence of fact or opinion is admissible in both civil and criminal proceedings. Documentary hearsay evidence of facts was allowed in civil proceedings under the rather more rigid rules of s. 3 of the Evidence Amendment Act 1945; in criminal proceedings such documentary hearsay evidence was limited by the Evidence Amendment Act 1966 to "certain business records". In neither Act was documentary hearsay evidence of opinion specifically allowed. Uncertainty prevailed as to whether it was permitted by implication. That uncertainty has been dispelled in this respect by the 1980 Act.

Documentary hearsay evidence admitted under the Act, whether of fact or opinion, must be first hand hearsay unless the document in question is a "business record" when the admission of second hand hearsay is a possibility. A "business record" is defined in s. 2(1) of the Act as:

> "a document made—
>
> (a) Pursuant to a duty; or
>
> (b) In the course of, and as a record or part of a record relating to, any business,—from information supplied directly or indirectly by any person who had, or may reasonably be supposed by the Court to have had, personal knowledge of the matters dealt with in the information he supplied:"

The retention of the requirement in s. 2(1)(a) of duty to record from s. 3(1)(a) Evidence Amendment Act 1945 (although it was notably omitted in the 1966 legislation) will, it is submitted, be little used under the 1980 Act. Because the definition of "business record" in the Act is so wide s. 2(1)(a) may well be virtually redundant while the disjunctive s. (2)(1)(b) covers the entire field.

The new definition of "business record" is noteworthy in another respect too: it rids the law of the onerous requirement found in s. 3(1)(a) Evidence Amendment Act 1945 that the document be part of a "continuous record". The 1966 legislation, by contrast, merely stipulated that the document be, or be part of, a record. The 1980 Act, by decreeing the same test for civil and criminal proceedings serves the dual purpose of introducing an element of consistency and disregarding a requirement of questionable value. Whether a record was "continuous" or not tended to obscure the real point of issue, namely, was the document made methodically, in accordance with usual business practice, so that it was unlikely to be untrue? Customary, rather than continuous, records form a more coherent basis for the introduction of evidence under this head.

Other aspects of the law of documentary hearsay evidence have been streamlined by the 1980 Act. For example, a burdensome requirement imposed by s. 3(4) of the Evidence Amendment Act 1945 demanded that a statement in a document be authenticated by its maker before it could be received in evidence under that Act.

> "For the purposes of this section a statement in a document shall not be deemed to have been made by a person unless the document or the material part thereof was written, made, or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible."

Nonfulfilment of this provision could lead to the exclusion of a document despite it appearing entirely reliable to the Court on inspection. If the admissibility of hearsay evidence ought to depend on its reliability, as to which the Court must be satisfied then it appears a travesty that a lack of authentication could preclude the introduction of such evidence into Court. The 1966 Act avoided the weight of such criticisms by not requiring any authentication. The 1980 legislation follows suit: no authentication is required in either civil or criminal proceedings.

In the matters discussed thus far the 1980 Act has unified the law of documentary hearsay evidence for civil and criminal proceedings. Mention must now be made of aspects of the new law where differences obtain.

First, by virtue of s. 3(1)(c) of the 1980 Act, in civil proceedings only a first hand hearsay document may be admitted of a person is "available" to give evidence *but* "undue delay or expense would be caused by obtaining his evidence". This section allows the same latitude in civil proceedings as did s. 3(2) of the Evidence Amendment Act 1945. No corresponding section exists to cover criminal proceeedings. But, it is submitted, an extension of s. 3()1(c) to criminal proceedings, closely monitored, would overcome unnecessary time loss and cost in circumstances where the documentary hearsay statement is reliable and unlikely to be challenged, although its maker remains technically "available" within the meaning of s. 2(2) of the Act.

Secondly, s. 3(2) of the 1980 Act stipulates:

> "Nothing in subsection (1) of this section shall render admissible in any criminal proceeding any statement in a document that—
>
> (a) Records the oral statement of any person made when the criminal proceeding was or should reasonably have been known by him to be contemplated; and
>
> (b) Is otherwise inadmissible in the proceeding."

This provision is designed to reduce the possibility of a fabricated defence being concocted once proceedings are recognised as a likelihood. As long as oral first hand hearsay cannot be introduced into criminal proceedings as a general rule, it is thought that this provision will remain to prevent manufactured documentary first hand hearsay reaching the Courts. If the oral hearsay ban is removed, however, this provision will, in all probability, be redundant. No provision similar to s.3(3) of the 1945 legislation now exists in respect of civil proceedings.

The most important provisions, perhaps, of the 1980 Act are those effecting changes to the law of oral hearsay evidence.

By s. 7 oral first hand hearsay of fact is admissible in civil proceedings of the maker of the statement is unavailable to give evidence. By s. 2(2) a person is unavailable if he:

(a) Is dead; or

(b) Is outside New Zealand and it is not reasonably practicable to obtain his evidence; or

(c) Is unfit by reason of old age or his bodily or mental condition to attend; or

(d) Cannot with reasonable diligence be found.

By imposing the "availability" restrictions on the admission of oral hearsay evidence original evidence is encouraged whenever possible. The restrictions are similar to those imposed by the rules of the Supreme Court pursuant to the Civil Evidence Act 1968 in England. (Although Order 38 Rule 25 also deems a person unavailable if he "cannot reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statement to which the notice relates".)

In England, the Rules of Court provide for a system of notice (and counter-notice) to be complied with by parties intending to give a hearsay statement in evidence. A notice, normally served within 21 days of an action being set down for trial, warns the other side that its opponents intend adducing evidence of a hearsay statement admissible under the Civil Evidence Act. The notice will also contain particulars of where, when, by whom and in what circumstances the statement was made.

The rationale of the serving of a notice is to remove, or at least reduce, the possibility of either party being caught unawares in respect of the hearsay evidence adduced. The effect of a counter-notice is to prevent hearsay evidence being admitted if direct evidence is available.

Notable by its absence in the Evidence Amendment Act (No. 2) 1980 is any provision whatsoever for advance notice as regards either oral or documentary hearsay in civil proceedings. Thus, objections under s. 18

of the Act can only be taken once a trial has begun. It is submitted that some effort designed to reduce the element of surprise at a trial ought to have been contained in the Act. The Law Reform Committee clearly envisaged such a provision as Clause 19 of the Bill more witness. That provision, however, which allowed pre-trial applications on the admissibility of evidence, was deleted from the Bill as reported back from the Statutes Revision Committee. It may well be that, in an effort to reduce the element of surprise at trial, Clause 19, or something akin thereto, will eventually find a place in New Zealand law of evidence.

A final point to notice on s. 7 is that it only allows in oral hearsay evidence of fact, not opinion. The distinction made between documentary and oral evidence on this point seems questionable, especially in view of the English uncertainty on the same issue which was only resolved by s. 1(2) of the Civil Evidence Act 1972.

Changes to the law in respect of hearsay evidence in criminal proceedings are effected by sections 8-14 of the 1980 Act. By s. 8 it is provided that:

> "In any criminal proceeding where direct oral evidence of a fact would be admissible, any oral statement made by a person and tending to establish that fact shall be admissible as evidence of that fact, if—
>
> (a) The maker of the statement had personal knowledge of the matters dealt with in the statement, and is unavailable to give evidence; and
>
> (b) The statement qualifies for admission under any of sections 9 to 14 of this Act."

Sections 9-14 comprise some of the erstwhile common law exceptions to the hearsay rule, namely; statements against interest; statements in the course of duty; pedigree statements; post-testamentary statements; statements relating to public or general rights, or Maori custom, and dying declarations.

The admissibility of dying declarations in criminal proceedings other than murder trials is to be welcomed. Previously, many such statements were reliable but could not be admitted as they failed to satisfy some other requirement which often did not affect their authenticity: for example, that the trial was not for murder. Although by virtue of s. 14(2) it is now immaterial whether the maker of the declaration entertained any hope of recovery; or whether the declaration related to the cause of its maker's injury or illness, or whether the declaration was complete, it is still necessary for him to know or believe that his death was imminent. Such a realisation, it is submitted, is formidable and would be better replaced by a looser requirement of knowledge of the severity of his injuries.

The second part of the 1980 Act concerns convictions, etc., as evidence in civil proceedings.

S. 23 permits convictions as evidence of the commission of an offence in subsequent civil proceedings. As far as proof of convictions in later criminal cases is concerned the rule in *Hollington* v *Hewthorn & Co Ltd* [1943] K.B. 587 presumably still obtains.

S. 23 applies only to convictions, acquittals, therefore, are of no probative value in later civil cases. Although an acquittal may always be proved

as a fact in issue, it cannot be admitted as evidence of innocence. The higher standard of proof in criminal cases does not necessarily indicate that an acquitted person is innocent: only that he has not been proved guilty beyond reasonable doubt. Thus, in the case of acquittals, the law recognises the effect of the different standards of proof by excluding evidence of an acquittal to prove innocence. As regards convictions in civil proceedings the situation is different.

In England by s. 11(2)(a) of the Civil Evidence Act 1968, a convicted person "shall be taken to have committed that offence unless the contrary is proved". A rebuttable presumption of law is thereby created which it is up to the convicted person to displace on the balance of probabilities. This, in effect, allows two courts to adjudicate on the same set of facts while applying different standards of proof.

In New Zealand no presumption is created, but, s. 23(3)(a) states that, where any evidence is admitted under that section—

> "Any party to the proceeding may nevertheless adduce evidence tending to prove that that person did not commit the offence of which he was convicted."

Such evidence will also, presumably, only have to satisfy the balance of probabilities test. Both jurisdictions can, therefore, be criticised for allowing issues to be tried for a second time at a reduced standard of proof.

A further two salient points arising out of s. 23 are: first, that a conviction can be used under the section whether it came after a guilty plea or not. The higher standard of proof required in criminal trials ensures the reliability of this course. Secondly, it is irrelevant whether the person was convicted before or after the commencement of the Act.

S. 24 of the Act allows evidence of a previous conviction as presumptive evidence of the commission of that offence in defamation proceedings. Being presumptive only, it is therefore open to a person convicted of a previous offence to bring evidence tending to show his conviction was wrongful. Such evidence would only have to be proved on the balance of probabilities in the defamation proceedings. Again, therefore, it is open to the courts to arrive at decisions on identical facts by the application of different standards of proof. This, it is submitted, lacks consistency, coherence and equity. A preferable path, in defamation cases at least, and that chosen in the original Bill of the 1980 Act, is to be found in s. 13 of the Civil Evidence Act 1968 in England. That section creates an irrebutable presumption of law in such situations by stating that a conviction shall amount to "conclusive evidence" that the person committed the offence. It is interesting that the English Law Reform Committee also recommended that an acquittal be equally conclusive in defamation proceedings. That view, however, found favour neither in England nor New Zealand.

The final part of the 1980 Act to be discussed in this note, Part III, deals with privilege of witnesses.

At page 1 of its Report, the Law Reform Committee described privilege as:

> "the right to refuse to disclose in court, or to allow another person to disclose in court, evidence otherwise admissible that is relevant to the matter in issue. It arises out of the conflict between the need to preserve confidence on the one hand, and the need to ascertain the truth on the other."

The Committee then itemised four citeria for the grant of privilege which "have seemingly won universal acceptance". These are:

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Against this policy background Part III of the 1980 Act was drawn up. Part III contains both consolidating and innovative measures. Consolidation can be seen, for example, in the re-enactment in s. 29 of the 1980 Act of s. 6 of the 1908 Act relating to communications during marriage. Likewise, a consolidation is effected by the re-enactment in s. 30 of the 1980 Act of s. 15 of the Evidence Amendment Act 1945 regarding evidence of non-access. And, s. 8 of the 1908 Act, insofar as it relates to Ministers, is re-enacted in s. 31 of the 1980 Act.

The innovative sections of Part III begin with s. 32. That section involves disclosures in civil proceedings of communications to medical practitioners. S. 32 replaces s. 8 of the 1908 Act insofar as it relates to medical men.

By s. 32 a registered medical practitioner cannot disclose in civil proceedings any "protected communication" except with the consent of the patient. By s. 32(3) "registered medical practitioner" is given a wide definition to include:

> "any person acting in his professional character on behalf of the registered medical practitioner in the course of the treatment of any patient by that practitioner."

Nurses, for example, therefore now fall within the ambit of the privilege. A welcome advance on s. 8 of the 1908 Act, which only extended a limited privilege to physicians and surgeons, is thereby attained.

A "protected communication" is defined by s. 32(3) as:

> "a communication made to a registered medical practitioner by a patient who believes that the communciation is necessary to enable the registered medical practitioner to examine, treat, or act for the patient:"

Again, an improvement on the restrictive provisions of s. 8 of the 1908 Act is achieved. That section only afforded privilege to a communication by a patient made to a physician or surgeon in his professional character, which was necessary "to enable him to prescribe or act for such patient".

Three exceptions operate to exclude the general rule of privilege in s. 32. These are: where the sanity or testamentary or other legal capacity of the patient is in dispute; where the communication is made in the course of effecting a policy of life insurance, and where the communications are made for a criminal purpose.

A major step forward in the law of privilege is taken by s. 33 of the 1980 Act. That section extends privilege to protected communications

made by patients to registered medical practitioners in the course of criminal proceedings. "Protected communication", however, has a different meaning in s. 33 to that ascribed to it in s. 32. By s. 33(3) a "protected communication" means—

> "a communication made to a registered medical practitioner by a patient who believes that the communication is necessary to enable the registered medical practitioner to examine, treat, or act for the patient for—
>
> (a) Drug dependency; or
>
> (b) Any other condition or behaviour that manifests itself in criminal conduct;—"

By the latter provision the Committee contemplated such things as sexual deviation, kleptomania and "baby-bashing".

Given that candour is necessary to ensure a proper diagnosis, and that the proper administration of the most effective treatment is at the root of this type of privilege, then it seems strange that a greater liberality of privilege is allowed in one type of proceedings as opposed to the other. It is assumed, however, that the public interest operated to limit the privilege of s. 33—not only in the aspects already discussed but also in the concluding part of s.33(3) which states that a protected communication does not include:

> "any communication made to a registered medical practitioner by any person who has been required, by any order of a Court, or by any person having lawful authority to make such requirement, to submit himself to the medical practitioner for any examination, test, or other purpose."

The lack of privilege in this situation may inhibit an offender's discussion with health officials both before trial and before sentence. Whilst the case for privilege in the latter situation is weak, that in the former, when criminal responsibility is assessed, is strong. The lack of pre-trial privilege in such circumstances ought, therefore, it is submitted, to be rectified in the interests of full disclosure on which adequately informed assessments can be made.

The final section of the 1980 Act which calls for comment is s.35 which gives the Court, in particular circumstances, a general discretion to excuse a witness from answering any question or producing any document if to do so would involve him in breaking a confidence. This section perhaps more clearly than any other, embodies the four criteria outlined by the Committee in their report, as is borne out by the emphasis in s. 35(2) on public interest coupled with confidentiality. Whether this section will prove to be simply a statutory enactment of the common law found in such cases as *Rogers* v *Home Secretary* [1973] A.C. 388, *Alfred Crompton Amusement Machines Ltd* v *Commissioner of Customs and Excise (No. 2)* [1979] A.C. 405 and *D.* v *N.S.P.C.C.* [1977] 1 All E.R. 589 remains to be seen.

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