



Auckland Women
Lawyers' Association Inc.

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CALENDAR OF EVENTS ~ 2005

30 April – Corporate Wellness
Discussion (*to be confirmed*)

25 May – Careers Evening

24 June – Mid Winter Dinner
(*speaker Christine Gordon*)

Late July/early August –
Election Night Discussion

This issue's editors:
Lucy Hudson and Ronelle Barnes

NEWSLETTER

MARCH 2005

From the President...

Welcome to the first AWLA newsletter of 2005. The Executive were delighted to finish 2004 with the hugely popular and successful Christmas dinner at Hammerheads Restaurant, accompanied by the delightful stories and musical talents of Peta Mathias. It was a memorable evening. We also welcomed a number of new members to the Executive for 2005 and I can assure you that they have already been put to work at our first couple of meetings for the year.

The event calendar for the first half of 2005 has fallen into place very quickly. On 2 March we kicked the year off with a very pleasant "President's At Home", held at the ADLS premises in Chancery. There was a good turnout of members who enjoyed canapés and conversation, indoors and out. We are currently putting together a wellbeing seminar for April and will also hold our annual careers evening at the Law School in May. The dates for both of those functions have yet to be determined, but we have settled on a date for the mid-winter dinner (24 June) and are delighted to announce that Christine Gordon has agreed to speak on her experiences as Crown counsel in the Pitcairn Island trials. Mark your diaries.

At the Christmas dinner a number of you commented that it might be time to start thinking about a women lawyers' forum or conference along the lines of a similar event held some 10 years ago which was hugely successful and involved a number of high profile speakers from both New Zealand and overseas. The Executive has taken those comments to heart and we have established a subcommittee to investigate the possibility of a conference dedicated to women in the law either late this year or early next year. There is a lot of work to be done before we can proceed with confidence, but members can be

assured that we are actively pursuing the possibilities. Anyone with ideas to contribute should feel free to contact Usha Patel, Sue Gray or Jenny Cooper.

Other issues likely to feature prominently on the Executive's radar this year are the moves afoot to establish a national body of women lawyers in New Zealand. You might have seen a recent article in Law Talk which notes that representatives of the NZLS Women's Consultative Group and various women lawyer associations are currently investigating the concept. The impetus has come from the imminent passage of the Lawyers and Conveyancers Bill which is a timely opportunity to re-examine the structures that exist for women lawyers both to promote justice and equality for all women (particular in the context of legal processes) and for advancing equality for women within the legal profession. You can be assured that the AWLA is watching and contributing to this discussion and that we will continue to keep you advised throughout the year.

A highlight of this newsletter are extracts from the written work of our scholarship winner, announced at the Christmas dinner. Sabrina Muck won the Margaret Wilson Scholarship and also shared with Louise Waugh the AWLA writing prize.

Finally, I would like to remind those of you involved in the AWLA mentoring programme that this is a good opportunity at the start of a new year to get in touch with your mentors/mentees and to talk about the challenges and objectives of the coming year. Anyone who wants a mentor should contact Anita Killeen who has volunteered to run the mentoring programme after several years on the Executive.

Jennifer Caldwell

LEXISNEXIS REMINDER

CALL FOR WOMEN SPEAKERS

As a follow-up to last year's article, *Discussions with LexisNexis*, AWLA wishes to encourage women to both put themselves forward, and to nominate other women, to assist us compile a list of women who are expert in their field. We provide this list to organisations such as LexisNexis who then telephone the nominees from time to time for suggestions, or, to ask them to speak.

Remember, a number of benefits come from speaking at seminars such as those which LexisNexis organise. It provides the opportunity to gain a profile in an area and to have one's expertise recognised. It is also important for attendees to hear from a balance panel of speakers.

If you wish to volunteer or nominate another female practitioner/s, please email Sharyn Larkin (awla@xtra.co.nz) with the relevant name/s and topics of expertise.

AWLA Christmas Dinner and AGM 2004

by Lucy Hudson

The 2004 Christmas Dinner was held at Hammerheads Seafood Restaurant in Okahu Bay with its lovely views of Auckland harbour.

This was a very pleasant way to start the annual rollercoaster of pre-Christmas functions with delicious food and an entertaining after-dinner speech by Peta Mathias.

The evening commenced with the AGM and the outgoing President Mary Peters welcomed all members.

As there were no comments on the 2003 AGM Minutes, the first item for discussion was the Treasurer's Report.

Following a recent e-mail circulated to members of the Income and Expenditure Figures for 2004, the AWLA Treasurer, Laraine Vickars, reported that the balance of accounts as at 25 November 2004 stood at \$4,850.

Following the Treasurer's Report were the nominations for the 2005 Executive. Jennifer Caldwell was elected President, Linda Robinson Vice President and, Laraine Vickars Treasurer. The following people were also elected as members of the Executive: Sophie Anderson, Ronelle Barnes, Sarah Carstens, Jennifer Cooper, Nikki Dines, Susan Gray, Lucy Hudson, Tammy McLeod, Alex Rhodes, Lucy Riddiford and Louise Rooney.

The next item on the agenda was the issue of donations of surplus funds, which had been raised by the following Motion by Suzie Abdale: "That the membership of the AWLA considers it appropriate for the Executive to direct up to 25% of funds that it considers are surplus to its requirements for the 2005 calendar year to such charitable and/or educational purposes as it considers is in accordance with the aims and objectives of the AWLA constitution".

Some members commented that surplus funds should not be used for donations. Others commented that the figure of 25% was too light and should be raised as high as 50%.

Mary Peters was asked about how the figure of 25% was reached. She replied that the percentage of funds available for donation is difficult to predict as the association's surplus funds are dependent on the extent of sponsorship received on an ad hoc basis from the larger law firms. Therefore, it was preferable to keep the proportion conservative.

After all members had been given the opportunity to respond to the Motion, a

vote was taken and the majority voted against the Motion. Those in favour numbered 9, with over 15 against.

Jennifer Caldwell advised that although the Motion had failed, the Executive still has the discretion to use surplus funds for donations, hardship scholarships and the like because the Constitution permits the Executive to act in pursuit of the Association's objectives. Jennifer suggested that a prudent float was \$4000-5000.

One member asked why the discussion on the Motion was necessary if the Executive had a power to make donations or use surplus funds regardless of this discussion and vote.

Mary Peters responded that this discussion by all members was important in order to give members an opportunity to voice their opinion on this issue and allow the Executive to hear these opinions.

As there were no further issues raised, the meeting was concluded at 7 pm.

The AGM was followed by pre-dinner drinks giving everyone the opportunity to catch up with friends and colleagues before dinner.

After the main course, Peta took the floor looking as striking as ever with a stunning orange Trelise Cooper trellis pattern skirt and matching shoes.

Peta's theme for the evening was the importance of passion in our lives – for things we enjoy doing including our work.

Peta's background is in nursing and counselling. However, Peta explained to us that some time ago she reached a point in her life when she decided she needed to change direction. She has always been passionate about food, travel and meeting people and cleverly combined these passions into a brilliant new career starting as a chef in Paris.

As we all know, this career encompasses not only cooking and travelling but also presenting television programmes and writing.

Peta entertained us with several stories about her experiences travelling and cooking in strange and interesting places, including tales of intrepid journeys around Morocco and her experience working as a chef in Paris for 10 years.

As expected, whilst living in France, Peta embraced the French culture and language as well as the food and she displayed this in her usual flamboyant

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MEMBERSHIP REMINDER

**Have you paid
your subs for
1 January –
31 December 2005?**

If not, please fill out the attached application form and return to
AWLA, PO Box 6568,
Wellesley Street, Auckland.

Otherwise, this will be the last AWLA newsletter you will receive this year!

DINNER WITH CHERIE BLAIR

by Anna Fitzgibbon

On Monday 7 February 2005, I along with 799 other people, attended a charity fundraising dinner at Sky City Convention Centre at which Cherie Blair was promoted as being the main speaker. Marie Dyhrberg was good enough to organize a table of 10 women and we were all looking forward to hearing Ms Blair's *"insights into work-life balance as a working mother of 4, interesting observations from a high powered legal career which has seen her appointed as a Queen's Counsel, wide understanding of Human Rights issues as a patron for numerous organizations and first hand experience of life with one of the world's most pressured and powerful men..."*

Cherie Blair is indeed a talented woman. She remains the only person at her University to have graduated with a Law Degree with first class honours in all subjects! She has four children and in the late 1990's established a legal chambers, Matrix Law, specializing in human rights law. She is a Queen's Counsel and continues to practice as a barrister while being "First Lady".

It would have been hugely interesting for us lawyers to hear more about Ms Blair's legal career, some of the human rights cases that she took or takes and also to hear how on earth she obtains a work/life balance!!

However, Ms Blair largely spoke about the book that she had co-authored entitled *"The Goldfish Bowl – Married to the PM 1955–1997"*. Her address was interesting. A number of spouses of former Prime Ministers were interviewed for the book in order to give an insight in to their lives whilst living at Downing Street. It was pretty amazing to hear how living at Downing St essentially means that the Prime Minister and his/her family have no privacy. As Cherie Blair described it, you are *"living above the shop"* and there are 200 to 300 officials working in that shop.

This was a common theme for all spouses interviewed and they each had to find their *"own way"* of living at Downing Street with no privacy and with a huge amount of public interest in everything they did.

At Downing Street, there is no demarcation between the offices in which the officials work and the private quarters occupied by the Prime Minister's family. The doors between the office and the home quarters cannot be locked, phones cannot be taken off the hook and civil servants come and go as and when needed. Ms Blair quickly realized this when she was photographed in her nightie answering the door, shortly after moving into Downing St.

She described one of the spouses of a former Prime Minister, Norma Major, wife of John Major being woken up in the middle of the night with an official in the bedroom at the foot of the bed taking down dictation for a letter! This lack of privacy also extends into holidays. The Prime Minister must be instantly available at all times when taking a holiday, which is easier to achieve these days with mobile and email!

She described her role as being supportive to the Prime Minister, adding value to his work and she saw her position as being extremely privileged. She was able, because of her position, to be involved in events which would be historical occasions, and able to meet some extremely important people such as Nelson Mandela and the English football team. Her role also enables her to be involved in supporting charities.

Overall an interesting insight but I would have loved to hear a bit more on her legal career and work life balance, or some scandal from within the walls of Downing Street – but may be at a smaller dinner!

AWLA Christmas Dinner and AGM 2004 – Continued from page 2

style by breaking into a very impressive performance of Edith Piaf's La Vie en Rose.

It was a pleasure to listen to Peta, and I am looking forward to seeing her again in her next culinary expedition via the airwaves.

The dinner was also an opportunity to present the AWLA Margaret Wilson scholarship and AWLA writing prize. Sabrina Muck was awarded the Margaret

Wilson scholarship and Sabrina and Louise Waugh were joint winners of the AWLA Writing Prize.

To cap off the evening, we were served with delicious dessert platters which we enjoyed as Peta visited each table for an informal chat.

A thoroughly enjoyable evening!

Lucy Hudson

Scholarship & Writing Prize:

The 2004 AWLA Margaret Wilson scholarship was awarded to Sabrina Muck and the 2004 AWLA Writing Prize was jointly awarded to Sabrina Muck and Louise Waugh.

Sabrina and Louise are profiled in this issue followed by a synopsis by both Sabrina and Louise of their winning papers.

Congratulations to Sabrina and Louise!

PERSONAL PROFILE – SABRINA MUCK

I have almost completed a BA/LLB (Hons) degree at the University of Auckland. The BA component is completed, with a major in Spanish, and I am currently working on a dissertation in the area of international double tax conventions for the LLB (Hons) component. In March next year, I plan to start the Professionals course.

In the course of the LLB degree I have developed a particular interest in the areas of Employment Law, Evidence, and Taxation Law. I think my interest in these areas stems from discovering the intricate rules and regulations governing people's everyday lives and actions: in the workplace, in the courtroom, and in the workings of the public finance system.

I have recently been fortunate enough to win the AWLA Writing Prize for a paper I submitted entitled *Self-Interest or Security Interest? Women in Contract Law and the Wife as Surety*. This was originally completed for the 2004 Contract Honours Seminar. I have a long-held interest in feminist legal analysis and studies in gender issues, and I decided to write on cases where women act as surety for their husband's

business debts. I feel these cases reflect the perceptions of women in contract law, and indicate the emphasis placed on women's marital status, both in the past and the present day.

My plan for the next year is to bring both this paper and my dissertation up to publishable standard, and submit both pieces for publication in legal academic journals.

I am also currently employed at Inland Revenue and plan to join the in-house legal team there. This would mostly involve matters of private and corporate taxation, although I would also like to become involved in the prosecution of non-payment of Child Support debt. I have found working in the public sector to be a very positive experience for me, and I am interested in pursuing this, although I would also be open to gaining experience in private legal practice. I feel that understanding both sides of a matter between a public sector agency and a private individual will equip me well for any future career in the law.

PERSONAL PROFILE – LOUISE WAUGH

I have just completed my LLB and am due to commence Professionals (part-time online option) at the end of January. I have secured a position as a Solicitor with a Mt Eden law firm and I'm eagerly looking forward to starting my new career.

I am 41 years old, married, and mum to Brenna (11) and Lachlan (7). Prior to attending law school my background was as a Legal Secretary then Legal Executive. Having previously gained my Legal Executive diploma, moving to Auckland from Hawkes Bay five years ago provided me with the opportunity to strive for the ultimate in legal studies and apply to law school.

I have a particular interest in legal issues affecting women, health care law,

and family law. Accordingly my highlights at law school include studying these areas of the law. It was particularly valuable to have studied the Law of Family Property in 2003 when the new legislation was still in its infancy.

Another highlight was my 3rd year compulsory moot, where my topic related to suing for damages for costs of raising a child following a negligently performed and failed sterilisation, which encompassed my interests in health care law and issues within the law affecting women.

A major highlight of my legal studies, and a very special way to finish my degree, was being awarded this writing prize, and I thank the AWLA.

SELF-INTEREST OR SECURITY INTEREST? Women in Contract Law and the Wife and Surety

By Sabrina Muck

SYNOPSIS

The general theme of this paper was women in contract law. I specifically focused on what are known as "the banking cases", where a wife offers a mortgage over her property as security for her husband's business debts. Commonly in these cases, when the husband's business venture fails and the bank seeks to enforce the security, the wife raises such defenses as undue influence or misrepresentation, arguing that she did not understand what she was signing, or that she was pressured into signing. If these defenses are accepted, the court rules that the creditor cannot enforce the security.

The first part of the paper gives a brief introduction to the topic of women in contract law. Many scholars have argued that women and their experiences have been overlooked and discounted in the area of contract law. This is most likely the result of women's historical legal position.

In the past, women's specific destiny was marriage, the legal effect of which was to annex the wife to the husband, so that they were in law one person, and that person was the husband. The legal position of a married woman was therefore one of non-existence. She was deemed to lack contractual capacity because her will was not her own, but that of her husband, and she could not consent except in his name. Similarly, if the husband and wife entered into an agreement with each other, it was void upon the assumption that the consent of the wife was not genuine, but obtained by the husband by coercion or duress.

In the paper, I argue that women in contract law have been perceived as powerless. This powerlessness, together with the historical denial of married women's contractual autonomy, has caused women in contract law to be presented primarily as the defenseless victims of contractual obligations that they either failed to understand, or were forced to consent to.

Part II of the paper examines the case law from the premise that this perception needs to be challenged, because it can set a dangerous precedent. It can lead to situations where the wife's failure to understand the transaction provides her with a basis for relief. To succeed in such

situations, women would then have to present themselves as unable to understand the transactions and lacking in commercial acumen. This may not always reflect the true situation.

The seminal case in this area of the law is *Yerkey v Jones* (1939) 63 CLR 649. In this case, Justice Dixon in the High Court of Australia formulated what has come to be known as "the rule in *Yerkey v Jones*" which has heavily influenced later case law. The rule can be set out in the following terms:

"If a married woman's consent to become a surety for her husband's debt is procured by the husband and without understanding its effect in essential respects she executes an instrument of suretyship which the creditor accepts without dealing directly with her personally, she has a prima facie right to have it set aside."

A notable feature of this approach is that the wife's failure to understand the transaction provides her with a basis for relief. Unfortunately, this means that in order to succeed in having the transaction set aside, the wife must portray herself as unable to understand the transaction entered into, and lacking in commercial acumen.

Where this is accepted by the Courts, the wife's "success" is somewhat of a double-edged sword: although she can keep her property, she has only achieved this outcome by asserting her own ignorance; she has received a concrete benefit but her case has further entrenched the conception that women are easily misled or mindless of their own self-interest.

The paper then examines the main modern cases in this area: **Barclays Bank v O'Brien [1993] All ER 417**: Lord Browne-Wilkinson found that a special equity theory was not necessary for the protection of wives' legitimate interests. Instead, he formulated an approach where the security will be voidable if the creditor has actual or constructive notice that the husband has obtained his wife's consent to providing the security by some legal wrong.

Creditors will be put on enquiry by two factors:

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Women in Contract Law and the Wife as Surety – Continued from page 5

- 1) the transaction is not on its face to the wife's financial advantage; and
- 2) the relationship between borrower and surety is one where there exists a substantial risk that in procuring the surety's consent, the borrower has committed a legal wrong, such as undue influence or misrepresentation.

I accept that in situations where the surety's consent has only been obtained by the exercise of undue influence, the private pressure that exists in the relationship will rarely be overridden by the mere gestures the creditor is required to make, to assure itself that the pressure has not affected the surety's consent. However, I expressed concerns with certain feminist arguments (such as Belinda Fehlberg's in "The Husband, the Bank, the Wife and her Signature" (1994) 57 MLR 467), because their starting point is still the assumption that women by virtue of their marital status are in need of protection, and therefore the decision in *Barclays Bank v O'Brien* does not go far enough. This marital status is what has caused them their supposed ignorance in financial matters. In my view, if the female spouses were not acting as surety for their husband, or were in receipt of their own income, the argument that they are susceptible to emotional pressure because of their financial dependence, or their lack of financial acumen, would be much less probable.

Garcia v National Australia Bank [1998] 155 ALR 614: In *Garcia*, the High Court of Australia upheld the principle in *Yerkey v Jones* granting special protection in equity to women who guarantee their husband's business debts, and preventing the lender from recovering under the guarantee if the husband had procured her consent but the wife did not understand the effect of the guarantee. This decision represents the current position in Australia.

The Court found the rationale of *Yerkey* is based on the trust and confidence between marriage partners. It went on to say that because of the marriage relationship, it is not unusual for the surety to receive an explanation of the transaction that is imperfect and incomplete, if not simply wrong. Any lender therefore "is to be taken to have understood that, as a wife, the surety may repose trust and confidence in her husband in matters of business and therefore to have understood that the husband may not fully and

accurately explain the purport and effect of the transaction to his wife."

The most notable criticism of this relational focus is that contained in Justice Kirby's dissent in *Garcia*. His Honour reached the same decision as the majority to set aside the transactions in favour of Mrs. Garcia, but indicated that the Court should not endorse a principle that applies specifically to married women. Justice Kirby sought to identify a broader principle which would not be confined to one group, whose members have attributed to them particular needs and vulnerabilities which are not confined to that group and which often will not be present in members of that group.

In the paper, I express my agreement with the dissent of Kirby J in *Garcia* for the reasons that it is a clear and logical exposition of the law that does not resort to an anachronistic or paternal bias.

Royal Bank of Scotland v Etridge (No 2) [2001] 4 All ER 449: In *Etridge*, the House of Lords reconfigured the notice approach established in *O'Brien*. Lord Nicholls found that the *O'Brien* principle must be subject to wider application than only sexual relationships, because what is appropriate for sexual relationships ought also to be appropriate for other relationships where trust and confidence are likely to exist. The central issue raised by this wider application of the *O'Brien* principle concerns the circumstances which will put a bank on inquiry. Lord Nicholls concluded that a bank will be regarded as put on inquiry in every case where the relationship between the surety and the debtor is non-commercial.

Although the classification of relationships that will put a bank on inquiry as "all non-commercial relationships" is very broad, the decision in *Etridge* resolves the "genderised" issue raised by the application of equitable protection to only one class of persons, namely married women, by extending equity's protection to non-commercial relationships. This decision represents the current position in England.

The paper concludes that, if we accept that women in society today are no longer to be regarded as subject to the influence of their husbands and mindless as to their own interests, then it will be recognised that one way forward for the law in this area is to base any future decisions not on the surety's marital status, but rather on the actual circumstances surrounding the relationship and the provision of the guarantee.

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Legal Responses to Gendered Medical and Pharmaceutical Harms

By Louise Waugh

SYNOPSIS

Many important life experiences exist where women are more likely than men to encounter the medical profession and pharmaceutical industry, due simply to their reproductive biology. It follows that any harms resulting from these life experiences affect women only. The aim of my paper was to examine the extent to which a predominantly male-dominated medical profession has regulated and devalued women's bodies and thereby contributed to the power imbalance between the sexes, and the degree to which the law has responded to these harms.

In the first part of my paper I studied principles such as male domination in the medical profession, medical paternalism and the medicalisation of women's bodies.

Until relatively recently the medical profession was predominantly male, and although recent statistics show that females now represent over 50% at medical school entry level, women continue to be under-represented in 'prestigious' speciality areas which involve more demanding hours and are not conducive to family life. This corresponds closely with the legal profession, where women remain under-represented in higher levels of the profession and in the judiciary.

Medicine and law are two large and powerful institutions which have historically had a deep-rooted prejudice against women; in the case of the medical profession this prejudice is evident in women as both health care recipients and providers. This prejudice is arguably further complicated by the long-standing alliance maintained between these two professions. My research showed a common thread of opinion that this powerful partnership has produced a health care system that is particularly resilient to women's needs and views.

In a medical context paternalism can be defined as the view that the health professional is best placed to make decisions for the patient. Such decisions are based on the doctor's own values; values that the patient might not share. Many non-clinical considerations are relevant in diagnosing and treating patients, such as the patient's own values and moral preferences, areas where the doctor is no more qualified than the patient to decide. It is often difficult for a patient to have the courage

to assert her personal values & needs, thus making it easier for her doctor to assume a paternalistic stance. During the rights-conscious era of the 1960s a decline in medical paternalism was noted, with many patients no longer prepared to be 'seen and not heard'. It appears, however, that medical paternalism continues to linger on. In the areas of health-related harms I studied, the law, at least to a certain extent, endorsed the old view that 'doctor knows best'.

The latter half of the twentieth century saw an increased 'medicalisation' of women's lives, that is an increase in the medical profession's intervention in the normal workings of women's bodies. Every aspect of women's health & reproduction appears to have become the focus of 'medical gaze' and made a potential problem. As medicalisation became ingrained in society, women themselves became participants, seeking advice from doctors about normal aspects of their health. Many writers argue that medicine is being used as a way of regulating and restraining women, thus contributing to the power imbalance between women and men.

Intertwined with medicalisation is the concept of 'othering', ie, defining something by what it is not in relation to the dominant other. As doctors were predominantly male, they tended to view the male body as the norm, with any deviations from the male norm, such as menopause or childbirth, being viewed as being prone to weakness.

Similarly the law also has a tendency to treat women as the 'other' – consider the 'reasonable man' in tort law. My research revealed a widely-used Australian torts text that, when discussing compensation, assumes that female plaintiffs are housewives who plan to enter the paid workforce and ignores valuing the loss of a female plaintiff's capacity to work in the home.

In the second part of my paper I examined how these principles have combined to reinforce disadvantages to women in three specific areas where women have suffered gendered harms; namely the Thalidomide disaster, the Dalkon Shield IUD, and the cervical cancer 'unfortunate experiment'.

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*Legal Responses to Gendered Medical and Pharmaceutical Harms**– Continued from page 7*

Thalidomide began being used in the late 1950s to alleviate morning sickness in early pregnancy. By 1961 an unprecedented outbreak of foetal deformities was noted in several countries. The drug's manufacturer gave assurances that preliminary clinical tests and animal experiments showed the drug to be safe for use during pregnancy and lactation. However no tests were undertaken on pregnant animals.

Initially the only form of compensation available in Britain was the standard disability benefits. Parents who opted to bring personal injury claims through litigation faced huge delays due partly to the usual delays expected with any legal system, but also due to the complex scientific and medical evidence required. Delays placed many potential litigants outside the limitation period. In the end the particular facts of the Thalidomide cases were never fully litigated, with settlements in Britain eventuating largely due to factors other than the workings of the legal system. A pivotal factor was the involvement of The Sunday Times, inquiring into the adequacy of settlement offers and putting a considerable degree of pressure on the British distributors which culminated in a world-wide threat to boycott their products. A comprehensive six-page report by The Sunday Times was the subject of an injunction and not printed until four years after being written. During that period, however, pressure mobilised through the key role played by the media, eventually resulting in a satisfactory settlement for British victims. It took 14 years for agreement to finally be reached on compensation, and it is worrying that the press should have to substitute for a legal system in order to achieve a result.

Legal reforms in Britain came in the form of amending the Medicines Act 1968 to introduce tighter legislative controls over the production, distribution and advertising of prescription drugs. Britain also established the Committee on the Safety of Medicines in the wake of the Thalidomide disaster for the purpose of controlling and monitoring the use and affects of licensed drugs.

The United States was largely unaffected by Thalidomide. The application to introduce the drug to the United States was refused by an FDA doctor who had suspicions about inadequate data on the

drug. It is somewhat ironic that the United States, itself relatively unaffected by Thalidomide, is the very country where Thalidomide families would have had a much better chance of succeeding in a legal action against the manufacturer. The United States made amendments to its FDA legislation to provide for stricter controls and protect consumers from careless pharmaceutical manufacturing and marketing.

Incidents of corporate greed and victimisation are evident in the Thalidomide story. The FDA doctor experienced immense pressure and threats when she objected to the drug's introduction. The manufacturing company had also lied when doctors wrote inquiring whether certain side-effects had been encountered previously, attempted to suppress unfavourable reports, and attempted to prevent the drug being available on a prescription-only basis.

The AH Robins Company commenced selling the Dalkon Shield intrauterine device in 1971, touting it as the most superior, modern and safe IUD available. By the time the Shield was publicly recalled in 1984, 4.5 million of the devices had been distributed in 80 countries. Tens of thousands of women were injured by the Shield, with most suffering life-threatening forms of pelvic inflammatory disease which usually destroyed their fertility. At least 18 women in the US alone died from pelvic inflammatory disease resulting from the Shield.

In a similar fashion to the Thalidomide episode, pre-market testing of the Shield was inadequate. Robins' advertising misled women as to the contraceptive's effectiveness and safety. Elements of corporate greed are clearly evident – Robins were aware of dangerous design faults as early as late 1971 but chose to ignore the facts and dismiss warnings. It is difficult not to see the Dalkon Shield catastrophe as a Thalidomide sequel.

Claims began to trickle in to Robins' legal offices by mid-1972, and the first Shield trial resulted in a finding that the device was defective and the matter had been handled negligently by the corporation. By December 1983 a Minnesota Judge, Miles Lord, had been assigned 23 Shield cases. He appreciated the need to urgently cut through the legal thicket and get the

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*Legal Responses to Gendered Medical and Pharmaceutical Harms**– Continued from page 8*

litigation process moving, and took the unusual step of consolidating all cases. After depositions were completed Robins continued to engage in ongoing fraud by knowingly misrepresenting the safety of the device, together with withholding and destroying documents. Judge Lord ordered discovery of thousands of new documents.

During the litigation process it became part of Robins' strategy to ask the women inappropriate and degrading questions, attacking their characters in attempts to intimidate them, no doubt hoping they would be scared to take the court process any further.

Good settlements had been reached in some Shield cases but Judge Lord thought justice had yet to be done. He felt that Robins' executives had not faced up to their company's actions and requested three top executives attend a settlement hearing. Judge Lord read a strongly worded reprimand aloud in open court and in doing so was the first judge to openly attack the company's behaviour. The adverse publicity leading to the recall commenced with Judge Lord's speech. Several authors have described Judge Lord as one of the few true champions of the injured women.

The Dalkon Shield situation had been allowed to continue unregulated by the FDA due to an outdated piece of legislation – the Food, Drug and Cosmetic Act 1938 that classified IUDs as devices not drugs, meaning they were not subject to FDA regulation. New legislation was finally passed in 1976 in the form of medical device amendments to the 1938 Act. It is disturbing to note that during the 1960s the FDA attempted more than once to get new legislation passed to update the 1938 Act and give them stronger pre-marketing rights over devices. Although appropriate legislation was introduced to Congress it had always died quietly. The legislation had failed women.

On a positive note, however, the manner in which Judge Lord handled the litigation and addressed company executives gives some faith in the legal system. Sadly he was just one figure in this disaster. Although the degrading questioning was conducted by individual lawyers, it occurred during many of the trials and so reflects a legal system that, at least as late as the mid-1980's, failed to protect women adequately.

I am sure that no New Zealand woman

needs reminding of the terrible facts of the cervical cancer 'experiment' at National Women's Hospital. Unlike the Thalidomide and Dalkon Shield incidents, this gendered harm was New Zealand's own.

The 1987 *Metro* article alerted the public to the unethical study that had taken place. It is concerning that, as with the Thalidomide incident, again we see a health-related disaster of massive proportions coming to the public attention via the media rather than through the legal process.

A Commission of Inquiry followed which broadened to include scrutiny of other non-ethical practices. Sources consulted in my research were unanimous in their praise for (then) Judge Cartwright's very thorough investigation. The Inquiry coincided with an increasingly consumerist society – women were ready to ask questions and no longer assume their previous blind faith in the medical profession.

The Cartwright Report detailed a comprehensive list of recommendations to ensure such an event would never happen again. Reforms included the creation of the Health and Disability Commissioner Act 1986 which established the Code of Health and Disability Rights. New Zealand remains the only country that gives such a code the full force of the law.

An investigation carried out by the Federation of Women's Health Councils five years after the Cartwright Inquiry noted that initial interest in responding to recommendations had waned. Women reported improvements in the acknowledgment of patient rights but although informed consent principles had been accepted by the medical profession in theory, this was not always reflected in practice.

Many women affected by these disasters suffered loss of sexual enjoyment due to their injuries. I cannot help but wonder whether drugs or procedures that inhibited men's sexual enjoyment would have remained on the market as long as the Dalkon Shield did, or remain unchecked as long as the cervical cancer 'experiment'.

In the aftermath of a major health catastrophe it is natural to take comfort in the thought that valuable lessons have been learnt and such a disaster will not recur. Sadly my research in the three areas studied show that the institutions of medicine and law, together with the pharmaceutical industry, failed to adequately protect women.

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Executive Profiles

**Jenny Cooper**

I am a senior solicitor in Bell Gully's litigation department. I joined AWLA two years ago when I returned to New Zealand after working in the UK and the Netherlands. I have enjoyed meeting other women in the profession through AWLA and look forward to some great events this year.

**Lucy Riddiford**

Lucy Riddiford is in the in-house legal team at Telecom. She usually works for Telecom Mobile, but is currently seconded to the competition and regulatory team at head office, which has meant a temporary move to Wellington, with trips back to Auckland in the weekends. Prior to joining Telecom, Lucy was in the litigation team at Buddle Findlay for 5 years, and before that she lived and worked in London. Lucy lives in Grey Lynn. Like most lawyers she loves reading and film. She is also a keen mountain biker. Lucy is looking forward to adding the perspective of an in-house lawyer to the AWLA Executive

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Auckland Women
Lawyers' Association Inc.

APPLICATION FOR MEMBERSHIP

1 January 2005–31 December 2005

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