Book Reviews
Comptes rendus

Plain Language for Lawyers.

By MICHELE M. ASPREY.
Annandale, N.S.W.: Federation Press. 1991. Pp. iii, 188. ($48.00, paper)

Reviewed by T. Costello* and G. Davies**

Tired of the term "plain language"? Put your apprehensions aside and take a look at an enjoyable, well-written book. *Plain Language for Lawyers* by Australian lawyer Michele Asprey is an easy to read, easy to consult guide. Asprey made plain language the standard at a large international law firm based in Australia, Mallesons Stephen Jaques. From her experience, she avoids preaching and moralizing and gives instead a practical and realistic guide to plain language - as a customer service issue.

The best advice the book offers is in the first two chapters. Asprey says that we should be "drafting to communicate, not just to record". Lawyers are notorious, and for good reasons, for wanting things "on the record". Unfortunately, as Asprey points out, that record is usually in the form of correspondence, reports or agreements which our clients need to understand but cannot.

With a sense of humour and considerable understanding of the importance of tradition, Asprey describes what plain language is, why it is important, and what lawyers can do to make their legal writing and drafting clearer. Within the definition of "legal writing" Asprey includes letters, memos, agreements and statutes. For lawyers who do not believe that plain language principles can be applied to legal writing and drafting, this book shows why it works as well as how. One of the book's strengths is that every issue is rooted in example.

For example, Asprey deals with the "years of legal argument and precedent about the technical meaning" of some words - magic words. She gives examples of how the courts have ruled, such as on an exclusion clause in an Australian insurance case, over the word "canal". The judge of the Court of Appeal rejected foreign definitions which showed that a canal had to be navigable, and held with the common Australian definition which included a stormwater channel.

She also deals with fears about precision, showing how it is policy, not language, that leads to different legal results from two very similar sets of words. She goes on to show how many "precise" phrases are far from precise. One of

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Asprey's gifts is that she not only highlights the problem but also offers some straightforward solutions, as she does with the precision problem.

Lawyers worry about legal "terms of art" that form part of our profession. Those remain, according to Asprey. She shows that it is how they are used and defined that is critical. She then politely differentiates these from the "special language" the profession clings to, buzzwords and phrases like "jointly and severally", "further and better particulars", "goods and chattels", "save and except", "will and testament", and on and on.

What Asprey fails to point out, however, is just how badly most of us write. Many of the problems we attribute to a style of writing are really examples of bad grammar, poor sentence structure and unwieldy organization. She does offer practical tips in Chapter 7, Grammatical Structures to Avoid, and Chapter 9, Overused Words and Formulas. In Chapter 9 we also look at tired writing: "We refer to previous correspondence in this matter ..." and "Should you need any more information, please contact the writer." A non-legal friend who has been complaining about the poor letters and reports produced by his management team gave them a copy of Chapter 9, four pages long, and found it made a positive difference to the quality of their correspondence.

Asprey urges lawyers to "consider our readers". Those who read our work are just as important, she reminds us, as the message we are trying to convey.

Overall, this graceful book is a valuable reference on writing and plain language. It is short, to the point and precise, from a lawyer who practices as she preaches, and should occupy a handy spot on every lawyer's desk.

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Courts and Country: The Limits of Litigation and the Social and Political Life of Canada

By W.A. BOGART. Toronto: Oxford University Press, 1994. Pp. xviii, 334. ($24.94 - paper)

Reviewed by Patricia Hughes*

Grumbling about the courts, their heavy-handedness on the one hand, their reluctance to act on the other, their stepping in where angels fear to tread, should be considered a mainstay of Canadian political and legal culture. Recently, of course, opponents of an entrenched *Charter of Rights and Freedoms* condemned the idea that this unelected, unaccountable elite should have the power to override legislatures. Many of these opponents, particularly on the left, had hardly been champions of legislatures which had at best an erratic record in advancing or protecting the rights of workers and other disadvantaged groups

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(although these groups were not necessarily of great moment to these critics), but there had been some grudging legislative concessions, some experience of social-democratic electoral successes and the prospect of more, the development of a formidable union (lobbying) movement and, all in all, an acceptance that the devil you know is better than the one you do not.

Professor W.A. Bogart's contribution to this debate is, as he says in his introduction, "a book about the limitations of litigation in Canada". At least part of his concern is that too much emphasis on litigation will result in an abdication by the political (legislative) system of its responsibility in resolving "complex and difficult social and political questions". His argument does not rest on the *Charter's* significant intrusion into the tenuous balancing of decision-making between the courts and the legislatures, but obviously any scepticism about the courts' role in deciding such questions had to be heightened by the enactment of a constitutionally entrenched bill of rights in which the judiciary are explicitly given a crucial role.

Professor Bogart weighs the attributes of courts and legislatures, and usefully contrasts the results of their activities, across a range of diverse areas: the development of human rights, treatment of women and Aboriginal peoples, federalism, Québec, tort and criminal law. He does so against a backdrop of Canadian ideologies and the (related) assumptions underlying litigation. He suggests that the courts have inadequately balanced the liberal presumptions of the dominant legal regime ("individual responsibility, autonomy, choice, and respect for free markets capable of generating wealth") with the collectivist threads which have also run through Canadian ideological assumptions.

This is a book written firmly from the perspective of challenges to the *status quo*; although Bogart does not definitively state that that is the case, he explains that "much of this book is a plea against overreliance on litigation to achieve any kind of common understanding, perhaps particularly among those seeking reform". In making his "plea", Professor Bogart both challenges the idea that the courts have become the predominant decision-makers (although he needs to argue that there is a serious risk of judicial dominance) and argues that they should not be. He succeeds in both: the view that the courts have a significant impact on people's lives is based on a misunderstanding of the relations between judiciary and government, as well as on an over-emphasis in the media and elsewhere (including the judges themselves) on particular high-profile decisions; he equally shows that those who place their faith in the courts as neutral arbiters or, more generally, who are attracted to the "rights model" of decision-making, have been and will be disappointed.

Certainly, his assessment of whether the courts have been an effective instrument in the resolution of political questions is heavily influenced by whether their decisions have been progressive and whether they have advanced the cause of what are now termed "marginalized" groups or communities, specifically, Aboriginal peoples, women, visible and linguistic minorities, gays and lesbians and persons with disabilities, as well as the sovereigntists in Québec and the West and Maritime claims against the power of central Canada. In some

ways, this is less a book about whether the courts should resolve difficult questions than about how they have given the wrong answer to difficult questions.

This is to me a legitimate enterprise. Starting from the premise, as Bogart does, that Canadian political culture is characterized in part by a commitment to the advancing of equality and the decreasing of marginalization, albeit in a "liberal" fashion, it seems only fair to assess our institutions against a standard based on their willingness and capacity to reflect that quality. If there is a flaw in Bogart's thesis it is that he is almost forced to give more credit to the *legislative* capacity and willingness to respond to new claims by marginalized groups than either Parliament or the provincial legislatures deserve in order to validate more strongly his case against the courts. Reliance on the elected institutions, the "participatory model" of decision-making, also requires that citizens are prepared to engage in the political process; with few exceptions, I am less sanguine than Bogart seems to be about the participatory potential or desire of the electorate.

Professor Bogart has an important thesis, one which anyone committed to democratic principles (however imperfectly applied) or anyone who thinks that tools are best employed for those functions for which they are designed, must support. In trying to ensure that we do not get caught up in the judicial web, however, he necessarily wants to make the strongest case that a judicial web exists. As a result, *Courts and Country* comes close to setting up the courts and judicial decision-making as a "straw person" (or perhaps, given the composition of the judiciary and its dominant ideology, "straw man" is appropriate here), one which is easily knocked down. Few, particularly those of us committed to social and political change, would dispute that the courts have been overall less than enthusiastically responsive to demands for extension of rights and goods offered in a liberal-democracy. Yet with that point understood by most groups which have sought the assistance of the courts, we still need to recognize that many of the same groups embraced the *Charter* and the opportunity for litigating "rights". Given the courts' history, why would they do so? The answer is not difficult: they have also had an uneven relationship with elected bodies.

Ironically, some of his points of reference highlight the inadequacies of either the courts or electoral system alone in responding to the claims of the disadvantaged. For example, he chooses to focus in his chapter on women and the courts on abortion; yet abortion is a perfect example of the failure of Parliament to act. Women had engaged in lobbying on this issue for something like twenty years (since the law's enactment) before the abortion provisions in the *Criminal Code* were struck down by the Supreme Court of Canada in the *Morgentaler* case.[1] Bogart's point that this decision has done little to improve access is well-taken, but that simply reflects the continued resistance among legislators to ensure that women have access to abortion; indeed, some governments (Nova Scotia and New Brunswick, for example) have not merely

[1] *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30 in which the *Charter* was raised successfully as a defence to criminal charges; an earlier challenge, prior to the *Charter*, had failed: *Morgentaler* v. *The Queen*, [1976] 1 S.C.R. 616.

been passive, but have continued to fight a rear-guard action against access to abortion.

Similarly, his discussion of aboriginal rights is valid insofar as it illustrates the weaknesses of the courts' dealing with these issues and in particular, in marking out the perhaps irreconcilable conflicts not been aboriginal cultural assumptions and those of western litigation. The persuasive argument of Mary Ellen Turpel, to whom Bogart refers, that the *Charter* is not compatible with aboriginal cultural assumptions applies, as Bogart suggests, to the dominant litigation regime generally, but it also applies in some respects to the dominant ideological and cultural assumptions of Canada. Recognition of this takes us far down the road to doubting the efficacy of any "Canadian" institution to respond to aboriginal concerns.

For marginalized groups, grand notions about who ought to decide these questions, of interest to many of us in our academic garb, pale beside the need to use whatever forum will advance their (our) claims. Had Professor Bogart completed his book today, for example, he would have included the latest effort to reduce discrimination against gays and lesbians, adding to judicial decisions (which he has appropriately criticized) and to federal ambivalence on the subject, the Ontario Legislature's rejection of a bill to extend spousal benefits to gays and lesbians. All in all, in fact, after reading *Courts and Country*, a reader is most likely to conclude that for reformers a "principled", rather than strategic, approach to what institution should play what role will be doomed to failure as it confronts two institutions for whom "principle" may be an *ad hoc* term.

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Equity and Community: The Charter, Interest Advocacy and Representation

By F. LESLIE SEIDLE, (Ed.).
Montreal: IRPP. 1993. Pp. xii, 227. ($24.95, paper)

Protecting Rights and Freedoms: Essays on the Charter's Place in Canada's Political, Legal, and Intellectual Life

By PHILIP BRYDEN, STEVEN DAVIS, AND JOHN RUSSELL (Eds.).
Toronto: University of Toronto Press. 1994. Pp. 241. ($18.95, paper; $45.00, cloth)

Reviewed by Patricia Hughes*

After years of "discrete" lobbying by powerful groups, the appearance of "excluded", "marginalized" or "disadvantaged" groups, claiming authority in *Charter*-based rights, has led to warnings of the end of democracy as we know

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it (seen to be a bad thing) and the rise of judicial control of the political agenda. The *Charter* of Rights and Freedoms is usually given the "credit" for these drastic changes. *Equity and Community* concentrates more on the interest groups themselves, with the *Charter* playing a supporting role, while *Protecting Rights and Freedoms*, as the title suggests, focuses on the impact of the *Charter*.

It is not possible to assess the ramifications of constitutional entrenchment of rights, particularly since one reason for the *Charter* was to enhance Canadian national unity, without considering the nature of its welcome in Quebec and both volumes provide that viewpoint, although only one of the essays (by Law Professor Patrice Garant from l'Université Laval, in *Equity and Community*) is in French. On the other hand, only *Protecting Rights and Freedoms* gives us any substantial consideration of the compatibility of the *Charter* and Aboriginal legal culture, in McGill Philosophy Professor James Tully's elegant essay, "Multirow Federalism and the *Charter*", although some other contributors do include reference both to Aboriginal peoples and to Québec in the course of their essays.

Protecting Rights and Freedoms is the written record of a conference sponsored in part by the B.C. Civil Liberties Association to assess the *Charter* after its first decade (as one of its editors and contributors point out, if we ignore section 15's delayed judicial appearance); its mix of styles reflects that heritage: we are exposed to wryness bordering on glibness, often successful as an "oral" presentation, from Edgar Z. Friedenberg, Emeritus Professor in the School of Education at Dalhousie, as he contrasts the ease of stating guarantees, such as freedom of expression, with the reality of societal control (including control of and selectivity by the media), at one end of the spectrum, to Professor Tully's scholarly piece, definitely to be savoured, at the other end. The tenor of *Equity and Community* is more consistent: it is a compilation of academic articles, primarily based on detailed analysis of empirical data or case studies.

The on-going debate about whether the courts should be dealing with serious social and political issues (put more bluntly, whether they should be determining policy and usurping the legislature's role) permeates both collections. Most of the authors here take snippets of that debate, each marking out a little space of warning, of reassurance or of alternatives to the representation of minority groups through litigation.

Not surprisingly, two of the strongest statements of concern about judicial usurpation of policy-making come from Québec Journalist Lysiane Gagnon (whose regular column in the *Globe and Mail* presumably makes her a cultural translator of sorts) and Patrice Garant who downplays the Canadian *Charter*, maintaining that in the over one hundred (non-criminal) cases brought before Québec courts, it was nearly always supplementary to the plaintiff's main focus on the Quebec *Charter*. The Canadian *Charter* was not available to Québec litigants until 1987 and for nationalists, still lacks legitimacy.

Too often in these discussions, government is treated as if it were a neutral accommodator of conflicting interests. Journalist Jeffrey Simpson, for example,

bemoans the breakdown of "elite accommodation" and the rise of "rights talk" which "can gravely deform the nature of political discourse". This kind of not particularly thoughtful criticism is exactly why the "new" groups have sought the assistance of the *Charter*: not being "elites", they have had difficulty in being part of the "accommodation". Garant's study throws doubt on the notion that the *Charter* has really been that helpful to disadvantaged groups, however. (On the other hand, Kent Roach, Professor of Law at the University of Toronto, suggests in his chapter in the Seidle volume examining "The Role of Litigation and the *Charter* in Interest Advocacy", that "litigation may have its greatest impact in promoting the interests of diffuse and unorganized groups who would not ordinarily have lobbying power", as when an individual challenged electoral boundaries on behalf of underrepresented urban residents.)

To what extent has the judiciary actually seized the moment and carried out a bloodless political coup? A number of these essays reveal not only that the landscape has changed over the decade (to a less activist court), but that the goal should be an interplay between political and judicial actors. On the first point, these books allow us to compare different ways to assess the evolution of the Supreme Court of Canada's application of the *Charter*, in particular, in the section 1 analysis and the degree of deference shown the legislatures. Law Professor Andrée Lajoie and doctoral candidate Henry Quillinan's approach, in their essay in *Protecting Rights*, do a linguistic analysis of the phrase "free and democratic society" as it appears in the judgements of Justices Wilson, Dickson and LaForest. University of British Columbia Law Professor Robin Elliot draws on his own rethinking about significant concepts, such as the role of the state, freedom, equality and the private/public distinction (one hopes that the lack of thought he suggests he gave to them initially is merely false modesty), to examine the decisions of Justices Dickson, Wilson and Lamer; he suggests their increased willingness to defer to government can be found in their belated recognition that the state does not always play a negative role, but may have a positive function in protecting vulnerable groups. Monahan concentrates more on the cases as a whole, suggesting that there may be a distinction between those involving competing interests (of societal groups) and those between government and the individual (as in the criminal context), although he is, appropriately, not entirely satisfied that this distinction is easy to draw.

Christopher Manfredi, using educational litigation as his focus, and the NAACP's litigation for comparison, shows how litigation and political activity are related in his essay in the Seidle book. He points out that there are times the political actors will resort to the courts as a way, not of avoiding their responsibilities, but in order to strengthen their own hand, as did Ontario and New Brunswick when they intervened in cases involving the extension of minority language educational rights. University of British Columbia Law Dean Lynn Smith's careful analysis of whether the equality rights have made any difference (a cautious "yes") and Osgoode Hall Professor Patrick Monahan's considered assessment of "The *Charter* Then and Now", both in *Protecting Rights*, in their different ways provide a balanced appraisal, acknowledging the

"push-and-pull" which has and will inevitably occur between the judiciary and politicians. In his "Overview" to *Protecting Rights and Freedoms*, Philip Bryden suggests that the courts have broken political logjams, while giving government room to manoeuvre. Kim Campell, writing as Minister of Justice and Attorney General of Canada, warns that Parliament must be willing to deal with the hard issues if it is not to lose ground to the judiciary, a focus that is reflected in other essays such as the articles by the editor and by Leslie A. Pal, a Professor of Public Administration at Carleton, in the Seidle book; they explore the interaction between interest groups and legislative committees, suggesting how the political process might be more responsive to minority groups' claims.

Janet Hiebert, a Political Studies Professor at Queen's, also wonders "how . . . the language of rights affect[s] the political willingness to promote controversial and contested values" in "Debating Policy: The Effects of Rights Talk" (*Equity and Community*). Providing a clear and concise analysis of the process of amending the sexual assault provisions in the *Criminal Code*, she concludes that the judiciary should express greater deference to policies which have developed through the kind of consultative process evident in that instance than to those which have a more *ad hoc* flavour. Kent Roach shares this view, arguing that "legislative inertia", while it may be a form of policy-making, "does not deserve the same respect as carefully selected policies". Seidle explores process-related changes which could contribute to the legitimacy of political decision-making, but says little about the *Charter* which is merely glimpsed in his chapter. The optimism of these conclusions would carry greater weight if the sexual assault amendments did not seem to constitute almost the only successful example of Parliament's treatment of a "*Charter* volatile" issue (and one which presumably will see yet another judicial chapter).

Philosophy Professor Will Kymlicka proposes in *Equity and Community* that we build into the *legislative* process "interest representation" (different from the self-government he envisions for the Québécois and Aboriginal peoples, although the latter, in particular, may have a claim both to self-government, which entails less representation in federal institutions, and to group representation as a remedy for systemic discrimination, requiring greater representation). John Russell's concluding chapter to *Protecting Rights and Freedoms,* which pursues the question of whether liberal individualism can accommodate minority collective interests, comments constructively on Kymlicka's work. Here it is sufficient to point out that while Kymlicka tackles some of the difficult questions his proposal raises, he does not adequately respond to the criticism that group representation will "spiral" as a result of the current refining of minority identification; for example, reliance on employment equity legislation which has named four groups, women, Aboriginal persons, persons with disabilities and visible or racial minorities to confirm that the number of groups can be kept "manageable" does not assist: put bluntly, are all women white or are all members of racial minorities men? In fact, the new Ontario *Employment Equity Act*, which does identify only the four groups in the statute, also provides in the regulations that "sub-groups" can be identified.

Overall, the Seidle volume will appeal to readers desiring a broad view of interest group participation. *Protection of Rights* is more uneven and suffers from the usual problems of the "conference" book. One error it did not need to suffer from, however, is the reference to "Chief Justice Dixon's reasons" in *Keegstra* in a note to Harvard Law Professor Frank Michelman's piece on whether democracy is a constitutional right. For those who wish to protest that the *Charter* has not helped to "Americanize" our political system, this kind of error in the sole American contribution to a Canadian book will serve as an irritating reminder of the elephant's influence and the mouse's malaise.

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Donoghue v. Stevenson and the Modern Law of Negligence: The Paisley Papers.

Edited by PETER T. BURNS and SUSAN J. LYONS.
Vancouver: The Continuing Legal Education Society of British Columbia. 1990. Pp. xx, 316. ($75.00)

Reviewed by R.W. Kostal*

This book contains the written proceedings of a conference on the law of negligence held at Paisley, Scotland, in September 1990. The conference site was not chosen incidentally. There, on a summer evening in 1928, Mrs. May Donoghue consumed ice cream topped with snail-tainted ginger beer bottled by local manufacturer David Stevenson. The Paisley Papers concern the litigation that ensued, arguably the twentieth century's most consequential.

No case, certainly not in the law of torts, has been more cited, celebrated, and debated than *Donoghue* v. *Stevenson*. It is symptomatic of the blinkeredness of common law scholarship, however, that almost nothing of importance is known of the history of this litigation. Even at a distance of sixty years the most intriguing questions about it have yet to be asked, still less answered. What, for instance, explains the historical timing of the case? Why in 1929, in the face of recent and contrary legal authority, did a solicitor take the *Donoghue* case? What did her Scottish lawyer know or sense about judicial attitudes toward the law of products liability? Why did *this* case get to the House of Lords? On a different plane, little is known about the predicates of Lord Atkin's judicial philosophy. What social, political, and intellectual forces influenced his *legal* analysis of the *Donoghue* motion? Why did Atkin think this a suitable time and decision in which to promulgate a "neighbour principle? Did the neighbour principle issue from his belief in a British strain of the "social gospel"? How much impact did the decision have on the behaviour of consumers and

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manufacturers? Why was Atkin able to carry a majority of law lords with him? How did their judgments square with more general patterns of appellate decision-making in Britain? Did the majority overstep the traditional role of judges in a democracy? If so, why did it do so in this case and at this time?

The Paisley Papers, regrettably, leaves us waiting for answers to these and a host of other important questions. The potentially valuable historical contributions to the volume are devoted almost entirely to antiquarian trivia. Readers anxious to know what streetcar Donoghue took to Minghella's cafe, what kind of confection (pear and ice) Donoghue's companion ordered, about the appearance of Wellmeadow Street in 1928, or of the cleansing of ginger beer bottles in the same era, will be well satisfied with the work of Mr. Justice Martin Taylor and Professor William McBryde.. The papers are chock full of banal and wholly unanalyzed facts. Some of these facts, it is conceded, are well worth knowing. Walter Leechman, Donoghue's solicitor, also was a solicitor in the unsuccessful mouse-in-a-bottle litigation which concluded less than three weeks before the writ in Donoghue's lawsuit was issued. That Donoghue was poor, and could be declared a pauper by the courts, is also noteworthy: paupers did not have to post security for costs. Donoghue's poverty, paradoxically, enable her to undertake a highly speculative lawsuit with less risk than could a more solvent plaintiff. It also is interesting that Walter Leechman was known as a "campaigning" lawyer, a man renowned for his willingness to take on controversial cases. (Here is a legal career that cries out for further historical research). Donoghue's successful appeal to the House of Lords, it is well known, established only that her pleadings disclosed a good cause of action, and that she was entitled to a trial. That trial never took place. The defender Stevenson died before the litigation was set down. His executors settled the matter for £200.

The papers concerning the modern legal ramifications of *Donoghue* v. *Stevenson* contained in The Paisley Papers provide useful if rather cursory overviews of their subject matter. Clear summaries are provided on recent developments in the liability in negligence of public authorities, products liability, and with regard to the overlap of tort and contract. And for those who missed it in 1982, the book also contains a condensed reprise of Justice Allen Linden and Professor J.C. Smith's debate over the proper limits of the "neighbour principle". For those with more theoretical interests, there is an interesting analysis by Professor Neil MacCormick on the legal reasoning employed by the law lords who wrote speeches on the *Donoghue* appeal. The remainder of the book consists of short and disparate odds and ends from the conference's extremely eclectic proceedings.

The Paisley Papers is a difficult book (at $75.00 paperbound especially) to recommend for purchase. Legal historians will be frustrated by the want of scholarly analysis, tort lawyers by the superficiality of most of the legal articles. Those interested in *Donoghue* v. *Stevenson* should borrow the book from a law library and rummage guiltily through the interesting antiquarian material collected in its pages. Scholars can do so without fear that they have been scooped.

Advance Directives and Substitute Decision-Making in Personal Healthcare.

A Joint Report of the Alberta Law Reform Institute and the Health law Institute. Report No. 64. March 1993. Pp. 60. (Free of charge)

Reviewed by Stephen G. Coughlan*

The law surrounding patients who wish to give directions about their future health care has suffered from some understandable confusion. In effect, two essentially opposite general rules have both been taken to govern the situation. On the one hand, any treatment given without consent is an assault. On the other hand, it has generally been accepted that "living wills" are invalid unless legislation makes them valid - that is, it is acceptable to provide treatment not only in the absence of consent, but in the face of evidence that consent would not be given.

Of course, neither of these general rules is unproblematic. The conflict between them has given rise to litigation, forcing courts to deal with some of the cases at the intersection of the two rules. The ordinary rules of consent have been modified, for example by rules governing treatment in the case of emergencies. Any treatment given without consent is an assault, but an unconscious patient in need of emergency care is presumed to consent.[1] But if there is clear evidence that the unconscious patient would not have consented - a Jehovah's Witness who carries a card refusing any blood transfusions, for example[2] - then the presumption is overridden, and the treatment again becomes an assault. Similarly, if a patient has, while competent, clearly expressed a refusal to consent to a particular form of treatment, then legislation that would allow the treatment to be given to the patient while incompetent is a violation of section 7 of the *Charter*.[3]

As the Report of the Alberta Law Reform Institute and the Health Law Institute at the University of Alberta notes, it begins to be difficult to see where the line is to be drawn between these types of "advance refusals" of treatment and more complex living wills. If living wills are not valid, why do these advance directives have legal force? If consent to particular treatments can be refused in advance, in what sense are living wills not valid?

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The author thanks Diana Ginn of Dalhousie University for her comments.

[1] Gilbert Sharpe, The Law and Medicine in Canada (Toronto: Butterworths, 1986) at 32 suggests that a more accurate view is that healthcare professionals have a privilege to give treatment in emergency situations, rather than that there is a presumed consent. This approach might be a way to avoid the tension between the two general rules, though it has not been adopted by the courts.

[2] *Malette* v. *Shulman* (1990), 72 O.R. (2d) 417 (C.A.).

[3] *Fleming* v. *Reid* (1991), 4 O.R. (3d) 74 (C.A.).

The difference usually suggested is that refusals like that in *Malette* v. *Shulman*[4] are specific and precise, and therefore can be clearly followed. Living wills, in contrast, are said to be more vague, referring generally to avoiding the use of "heroic measures", and similar terms. One wonders to what extent living wills, even if phrased in these terms, are genuinely not clearly understood: it seems more likely that they are only imprecise enough for someone who wants to be unclear to make an argument that the patient's wishes cannot be ascertained with certainty. This degree of vagueness might be enough to seize on if one has a bias in favour of intervention[5] and wants to misunderstand, but it is not what we ordinarily mean by ambiguity.[6]

But whether this justification is valid or not, it is clear there is a need for legislative clarification of the area. The law concerning advance directives is behind the times in several ways:it has not caught up to advances in medical technology, to corresponding changes in public attitudes, or to changes in bioethical thinking.

Until relatively recently, the ethical principle that doctors should do everything possible to save a patient's life was uncontroversial. In large part, this result followed from the fact that "everything possible" was not necessarily that much. More recently, advances in resuscitation and life-support technology have made it possible to keep patients alive in ways that challenge our concept of what it is to be alive, and have led some people to question whether life by any means is worthwhile. In addition, biomedical ethics has seen a shift from a paternalistic model to one based on the wishes of the patient. For the most part, what the patient wants and what is in the patient's best interests will be the same. But in some instances, and in particular when a patient might be kept alive by artificial means, what healthcare professionals perceive to be in a patient's best interests and what that patient wants can differ significantly.

Advance directives need not be concerned only with the use of life-support equipment, but it does seem that a concern with being artificially kept alive is the major reason for widespread public interest in the matter. People want to see that their wishes are respected, and one assumes that the majority of people expressing wishes are trying to avoid what they perceive as the interventions that will otherwise take place.

There are a number of ways one might accommodate this public concern, and in a sense this Report chooses all of them. That is not a criticism: the various approaches proposed are not mutually exclusive, and have been designed to complement one another.

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[4] *Supra* footnote 2.

[5] As most healthcare workers seem to. Of course, in general, this is a good thing, and healthcare workers ought to have as their ordinary assumption that illness should be treated.

[6] Recall that in *Malette* v. *Shulman*, *supra* footnote 2, despite the plaintiff carrying a card saying in part "NO BLOOD TRANSFUSIONS ... I request that no blood or blood products be administered to me under any circumstances. I fully realize the implications of this position ... I have no religious objections to use the nonblood alternatives, such as Dextran, Haemaccel, PVP, Ringer's Lactate or saline solution", counsel for the defence argued that it was not sufficiently clear that the plaintiff would refuse a blood transfusion.

The Report makes several suggestions for how medical care should be decided in the case of incompetent patients. First, it proposes that an individual should be able to prepare a healthcare directive, indicating the person's wishes with regard to medical treatment: any clear directions would be legally binding. Second, a directive can appoint a healthcare agent, who will have the right to make healthcare decisions if the person becomes incompetent. The directive can in addition indicate that some particular person should *not* be consulted with regard to healthcare decisions. Finally, the Report proposes a statutory list of substitute decision-makers to be consulted when there is no directive, and the criteria by which they should decide on behalf of the patient.

The Report suggests that it takes elements of four different models for reform: the "professional judgment" model, the "nearest relative" approach, the "living will", and the "attorney for health" model. In a sense this is true, but more important than the models used is the philosophy underlying those models. Of those posed, the first falls into one camp - that decisions should be based on the best interests of the patient - while the other three fall into another camp - that the patient has the right to decide. In its approach, the Report squarely adopts the latter philosophy. It is the consistency in approach of this decision that should allow the variety of proposals put forward to work together.

First, providing by legislation that an advance directive concerning specific care is legally binding is clearly an instance of giving force to the wishes of the patient. Beyond that, where a patient has given no specific instructions, another person will be called upon to decide. Again, the wishes of the patient are respected by allowing the patient to appoint a particular person to make those decisions, rather than being forced to rely on the decision-maker from a statutory list. But whether the decision-maker is personally chosen or appointed by statute, the Report still supports the view that the patient's wishes are to be respected. Specific criteria are set out for the decision-maker[7] to apply in making any decision. First, the decision-maker must follow any clear directions given by the patient in an advance directive. Second, if there are no clear directions, the decision-maker is to make the decision that he or she believes the patient would have made. It is only when none of this is possible - that is, when there seems to be no way to determine and respect the wishes of the patient - that the decision should be made on the basis of the patient's best interests.

This consistent approach, respecting patient autonomy to the greatest degree possible, is a valuable contribution and a sensible way of resolving the current ambiguity about advance directives. It is not surprising that it should have the overwhelming public support that is noted in the Report.

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[7] The Report describes this decision-maker in two ways: as the healthcare agent, if appointed in a directive, or as the healthcare proxy, if chosen from the statutory list. It might have been convenient to distinguish between decision-makers appointed by statute. However the statutory list includes "a healthcare agent appointed by the patient pursuant to a healthcare directive" (recommendation 9), which means that all healthcare agents are healthcare proxies, and some healthcare proxies are healthcare agents.

A few more specific comments should be made about the Report. It generally speaks as though the important concern is one of obtaining consent to treatment. It is noted early on, for example, that there are two major concerns to be addressed: that of doctors in obtaining a valid consent before providing treatment, and that of patients in planning for their healthcare.[8] While this is true, these are two very different concerns. The doctor's concern is a technical one, trying to clear away an obstacle which is preventing treatment. The patient's concern, in contrast, is making clear that he or she *does not* consent to treatment.[9] While the same solution might address both concerns, it should be recognized that very different motives underlie those concerns.

Fortunately, the Report does recognize this difference, and satisfies the concerns of patients. Section 7(1)(b) of the draft legislation provides that the "healthcare decision may be made on the patient's behalf by the healthcare proxy". This wording can be usefully compared to, for example, section 54(2) of the *Nova Scotia Hospitals Act*.[10] That statute allows treatment to be given to an incompetent patient "upon obtaining the consent of his spouse or next of kin". The difference between making a decision on someone's behalf and consenting on someone's behalf is significant: the latter implies (and has sometimes been taken in practice to mean) that if the first person approached refuses to consent, another person can be asked, until ultimately consent is obtained.

One recommendation more addressed to doctors' concerns than those of patients deals with the situation where the healthcare proxy, according to the statutory list, is a group of people - the patient's children, for example. The Report recommends that such a group must nominate a spokesperson, who is to ascertain the decision of the group and communicate with the healthcare practitioners. If the group does not nominate a spokesperson, they lose the right to make the decision.

It seems reasonable to suggest that there can be a real problem for healthcare professionals in knowing who to listen to when a group is involved. At the same time, the Report solves that problem by creating a problem for the patient's relatives. They are already the ones likely to be under the most stress when decisions have to be made. The need to formalise the process, accompanied by the threat of losing decision-making power if they fail to do so, can only add to that stress. One wonders whether the difficulty for doctors is so great in practice that there is really a need for this recommendation.

Finally, the Report proposes that there should not be a standard form for advance directives, nor even a recommended from which was optional. The concern expressed is that a standard form might be inappropriate in some cases, and that individuals could be misled into thinking that they had to use the recommended form. This is a valid concern, but at the same time it is worth

[8] See pp. 4-5.

[9] The Discussion Paper had said, and the Report repeats, that the concern of the public is the "fear that they will be subjected to inappropriate and overly aggressive medical treatment during the end stages of life" at 15.

[10] R.S.N.S. 1989, c. 208.

recognising that many people are intimidated by drawing up legal documents. The Report notes that advance directives are under-used in jurisdictions where they are available: given this, one would prefer to put as few disincentives as possible in the path of anyone choosing to prepare a directive. This approach would be more consistent with that otherwise taken in the Report, to make directives as widely available and as easily executed as possible.[11]

These concerns, however, are essentially minor disagreements with a Report which in its general approach is consistent and progressive. If the recommendations of the Alberta Law Reform Institute and Health law Institute were adopted, the situation of patients, their relatives, and healthcare professionals would all be significantly improved.

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Evidence in the Litigation Process. Fourth Master Edition

By STANLEY A. SCHIFF
Toronto: Carswell, 1993, 2 Vol. pp. 1756. ($58.00, paper; $120.00, cloth).

Reviewed by Thomas A. Cromwell*

The publication of the Master Edition of S.A. Schiff's *Evidence in the Litigation Process* is cause for celebration. Professor Schiff's rigorous analysis of evidence doctrine is now fully documented; the fruit of his industry is there for the reading.

A generation of Canadian evidence students has "grown up" with Schiff's materials. The first published edition, which appeared in 1978, were preceded for several years by provisional, multi-lith versions that was widely used for teaching. The published editions, now four in number, have been the backbone of countless students' introduction to the subject. While many students criticize these materials for failing to provide succinct statements of "the rules", many evidence teachers value them for the unrelenting rigour of the analysis.

This challenging teaching resource, however, was seriously limited as a research tool. Most references and citations were omitted. This left the reader to wonder which "Canadian appellate court said exactly the opposite" or whether the Supreme Court of Canada "resolved a seemingly similar issue in the opposite way" as the student editions, without elaboration or reference, frequently put it.

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[11] Among other things, the Report suggests that anyone over the age of 16, rather than 18, should be capable to prepare a directive, that no declaration of capacity need accompany the directive, that there should be as few formalities of execution as possible, and that advance directives should be available in all cases, not just to the terminally ill.

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The Master Edition ends all that. It is richly documented by detailed references to statutes, case law and scholarly writing. The author, in his Preface, expresses the hope that "courtroom practitioners, judges and other researchers into evidence law will find the Master Edition useful". His hope, while perhaps unduly modest, will be fulfilled. The Master Edition is a key resource for anyone attempting to examine Canadian evidence doctrine on a principled basis. It will rarely provide the `quick fix' for a trial emergency; the book is simply too elaborate for panicked reference. But it will make the development of thoughtful and sophisticated argument much simpler and the preparation of principled reasons for decision considerably less burdensome. In short, it is probably not the best book to take to court, but it is an excellent one to read beforehand.

Schiff's work is grounded in the intellectual traditions of legal process jurisprudence. The student edition is dedicated to Henry M. Hart of Hart and Sachs fame and even the title, Evidence in the Litigation Process, acknowledges the book's intellectual roots. The key element of the legal process view of law may be described as follows:

> By looking to the principles and policies which are at work in any given area of the law, the sensitive observer can assess the justification for existing rules of law. If the rule (or standard) serves the relevant principles and policies of that area of the law, and if no other values are disserved in any significant way by the same rule, then the rule is justified. Moreover, understanding the values that underlie the system's rules enables a judge or lawyer to work with those rules. Appraising the policies and principles that justify the rule allows the judge to apply the rule in a useful way: the rule's application is warranted if applying that rule to the case at hand serves the values that underlie the rule. Conversely, if in some types of controversies the relevant values are badly served by the rule, then the court may need to distinguish the rule, or limit its application, or, in the rare case, overrule it. The principles and policies at issue can then indicate what is needed in the way of a new rule. Put briefly, and perhaps too simplistically, the craft of the legal community requires not only a knowledge of the legal system's rules and standards but also the principles and policies that render those rules and standards useful and coherent.[1]

Throughout Professor Schiff's book, the analysis is directed toward the discovery and critique of the "substratum" of evidence doctrine. Principle and reason are the watchwords.

This approach is particularly valuable given the revolution currently underway in Canadian evidence law. The Supreme Court of Canada has frequently referred to the need to approach the subject in a principled way. The Court has shown itself ready to return to first principles to make sense of evidence doctrine and, when this is not possible, to make doctrine that makes sense.[2] Professor Schiff recognizes this, commenting in his Preface that "what

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[1] Vincent A. Wellman, "Dworkin and the Legal Process Tradition: The Legacy of Hart and Sachs" (1987) 29 Arizona Law Rev. 413 at 420-21.

[2] See, for example, the Court' hearsay trilogy: *R* v. *Khan*, [1990] 2 S.C.R. 531, *R.* v. *Smith*, [1992] 2 S.C.R. 915 and *R.* v. *B. (K.G.)*, [1993] 1 S.C.R. 740.

lawyers need more than ever is a critical understanding of the substance, scope and rationale of evidence doctrine."[3]

Consistent with the process tradition, Professor Schiff emphasizes that the context within which evidence doctrine operates is crucial to its mastery. As he puts it in his Introduction, the emphasis is on "the ways in which the special demands for the litigation process shape presentation and use of information ... the governing legal doctrine must be understood - and fashioned - in the constant light of the process which alone gives it meaning."[4] The demands of good trial administration are thus central to his analysis.

Evidence in the Litigation Process exhibits another attribute of the process tradition. It is, as Neil Duxbury put it recently, "a decidedly casual attitude towards the social sciences".[5] While the insights of social science are referred to throughout Professor Schiff's work, they do not dominate and rarely guide the analysis. We are told in the introduction that the context of the litigation process renders "misleading indivious comparisons with fact-finding techniques in the sciences and humanities and in commercial relationships".[6] There is certainly no hostility to social science; but the implications of some of its insights for the fundamental assumptions of the adversary trial are left unexplored.

It is not Professor Schiff's goal to provide a fundamental critique of adversary trial practices. The search throughout *Evidence in the Litigation Process* is for internal coherence. The essential features of the advisory trial are assumed, not challenged. Moreover, the approach adheres to the traditional concerns with the presentation and admissibility of evidence, the standards according to which it is evaluated and when evidence may be dispensed with. This book, quite deliberately, is about evidence doctrine, not fact-finding in some broader sense. Not all will agree with this conception of the subject, but Professor Schiff has clearly stated and painstakingly pursued his purpose.

To conclude, this is a fine contribution to Canadian scholarship. Not all will subscribe to the definition of the subject or the assumptions which animate the analysis. But all will agree, I believe, that Professor Schiff has defined his purpose clearly and coherently, pursued it with industry and insight and fulfilled it splendidly.

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[3] At iii.

[4] At 1.

[5] Neil Duxbury, "Faith in Reason: The Process Tradition in American Jurisprudence" (1993) 15 Cardozo L. Rev. 601 at 606.

[6] At 1.

The Conduct of an Appeal

By JOHN SOPINKA and MARK A. GELOWITZ.
Toronto: Butterworths, 1993. Pp. xliv, 228. ($80.00 - paper)

Reviewed by Robert D. Gibbens*

There are very few books in Canada dealing exclusively with appellate practice. There are of course the chapters in most civil procedure texts usually near the back of the book, touching on basic appellate practise points. The book under review is solely concerned with the appeal process and is in many ways the appellate analogue to Mr. Justice Sopinka's book on trial practice, *The Trial of an Action*.[1] This book attempts to straddle the medium between a practitioner's "how to" manual and a substantive text on appellate litigation. The text for obvious reasons focuses on Supreme Court of Canada practise but also attempts to cover provincial appellate practise.[2] It also covers both civil and criminal appellate practise.

This book is divided into four parts. The first part is entitled "Appeals in Civil Matters". This part incorporates two chapters, one on appellate jurisdiction, the other on appellate powers. The former chapter examines the final and interlocutory order dichotomy and the issues that arise from it.[3] The latter chapter focuses on appellate powers and such issues as overturning findings of fact, discretionary orders and damage assessments are discussed. Also touched on are stays pending appeal, the introduction of fresh evidence and arguing new legal issues on appeal. The second part is entitled "Appeals in Criminal Matters", and covers the criminal side of appellate jurisdiction and powers in two chapters. The third part is entitled "Appellate Procedures" and concerns the Ontario and Supreme Court of Canada Rules on leave application, perfecting appeals and factums. The third chapter in this part is on interventions on appeal. The final part of the book is entitled "Advocacy on Appeal" and is one chapter on the strategy and style of factum writing and oral advocacy.

This is not a book that questions the existing order. The present trans-substantive appellate process whereby all types of litigation are channelled through the same appellate gates is assumed to be conducive to all entrants. Recently, however, the parameters of the appellate process have been tested.

Charter cases are just one example of the types of cases lining up at the appellate door which have required some changes in appellate practise. In these cases the paradigmatic two party self-contained retrospective dispute[4] is shifting.

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[1] J. Sopinka, *The Trial of an Action* (Toronto: Butterworths, 1981).

[2] It should be noted, however, that the dominant focus is Ontario appellate practice. Little time is spent examining the nature and differences of appellate practice in the other provinces.

[3] Today there is only one important issue that arises from this distinction and that is whether one needs leave to appeal.

Polycentric multi-partied policy based cases are taking a foothold. In fact, often times a case may begin at trial as the former two partied self-contained variety but by the time it reaches the Supreme Court of Canada it will have become much more multi-partied and policy oriented. Liberal rules on intervention[5] and on the introduction of social or legislative facts[6] can radically alter the face of a case and change how it may have appeared at trial. While *Charter* cases may have been the engine which initiated this approach, non-charter civil cases are now sometimes approached in the same fashion.[7]

In many areas of the law, the legal rules and principles are changing very fast. This issue can give rise to special concerns at the appellate stage. The introduction of facts at trial gravitates around the existing legal rules and principles. At the end of the trial these facts constitute "the record". If the law changes after the trial but before the appeal, the record is, in most cases, inadequate. There is now a constellation of facts gravitating around a new legal principle which are not captured by the record. There is a further complication. If the record is inadequate on this new legal principle then it is unlikely that the new legal argument can be raised.[8]

The record, however, may be inadequate in another respect, for the record only contains the "facts of the case". However, if the case has some "public importance" then by the time it reaches the Supreme Court of Canada the factums and appendices might supplement the record of the case to reflect the special context of the problem. The rules on this process, however, are still in their infancy.[9]

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[4] A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 Harv. L. Rev. 1281 at 1282 and 1283.

[5] C. 7.

[6] *Danson* v. *Ontario (Attorney General)*, [1990] 2 S.C.R. 1086. The authors however do not discuss the distinction between adjudicative and legislative facts but rather confine it to a footnote reference (see footnote 2 at 206 and footnote 17 at 211).

[7] The authors probably would disagree with this point for they state "The facts in a *Charter* case require special treatment" at 211, and later at 214:

> "In arguing a *Charter* case, counsel should be familiar with not only the facts and the law, but also the writings of sociologists, psychologists, and the like that bear on the issue."

Surely, this type of analysis should not just be confined to those cases which have a *Charter* element to them. The Supreme Court of Canada in fact noted in *Retail, Wholesale and Department Store Union* v. *Dolphin Delivery*, [1986] 2 S.C.R. 573 at 603 that,

> "the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution."

[8] On the issue of introducing a new legal argument at the appellate stage, see pp. 51-55.

[9] See *supra* footnote 6. The authors however do not discuss whether this distinction between legislative and adjudicative facts makes much sense and whether the legislative fact process is the most effective and fair way of getting this type of evidence before the court.

This book does not take as its brief a critical analysis of the present appellate system but rather it confines itself to an explanation of the rules of the system and in this area it is quite effective. The most informative discussion in the book is as to how the Supreme Court of Canada determines which cases shall be granted leave. [10] For counsel that have a practice in any way connected to the Supreme Court of Canada, the entire chapter on the procedure in the Supreme Court of Canada[11] and preparing and presenting the argument[12] are mandatory reading.

Ultimately, this book fills a void in the area of appellate practice, an area that has often been conveniently overlooked in the past.

[10] At 171-172.

[11] C. 6.

[12] C. 8.