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Extra judicial activities while a serving Judge: Community and Social Activities[1]

Justice Margaret Wilson

The rule of law assumes the existence of a judiciary that is in fact independent and impartial, and that is seen to be so by fair minded lay observers. In the words of Lord Bingham -

> "… a judge must free himself of prejudice and partiality and so conduct himself, in court and out of it, as to give no ground for doubting his ability and willingness to decide cases coming before him solely on their legal and factual merits as they appear to him in the exercise of an objective, independent, and impartial judgment."[2]

Ideals of judicial conduct and ethical principles are relatively easy to state, but their application can be problematic. Their application involves judgment calls, which must be made in the context of the community and the time in which the judge holds office.

Recently, the Prime Minister of Samoa addressed the General Assembly of the United Nations at its High-level Meeting on the Rule of Law. He said:

> "The rule of law does not exist in a void. Ultimately, it is how individual governments localize the international norms and behaviors (*sic*) that the rule of law has meaning and benefits ordinary people everywhere. Only then can the long term sustainability of the rule of law be assured." [3]

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1 I am indebted to the many colleagues and friends who have stimulated my interest in this topic. I acknowledge the particular assistance of Mr Aladin Rahemtula, the Supreme Court Librarian in Queensland and his staff; Ms Mere Pulea, a former judge of the High Court of Fiji; Mr Guy Holborn, the Librarian at Lincoln's Inn; Mr Mark Guthrie, Legal Advisor in the Legal and Constitutional Affairs Division of the Commonwealth Secretariat, London; and Dr Karen Brewer, Secretary General of the Commonwealth Magistrates' and Judges' Association.

2 Lord Tom Bingham, *The Business of Judging* (Oxford University Press, 1st ed, 2000) 74.

3 The Hon Tuila'epa Lupesoliai Sailele Malielegaoi, Statement delivered at the High-Level Plenary Meeting of the 67th Session of the United Nations General Assembly on the Rule of Law, New York, 24 September 2012, 2.

So, too, with ethical principles and guidelines: their application must be informed by context.

The delegates to this conference are judges drawn from many diverse communities – some small, some large, with different blends of traditional and western social customs, laws and procedures.

I propose to focus on a number of issues, to share with you the experiences of judges in various jurisdictions, and to allow you to reflect on how those issues might arise in your own communities – the ethical questions they might spawn and how those questions might be answered.

Apparent bias

From time to time there are cases of overt, easily recognisable conflict between a judge's judicial duty and his or her own interests. I am confident that in such circumstances 99.9% of judges would recuse themselves. But it is in the realm of apparent bias that problems are more likely to arise, and judges need to be always conscious of it when becoming involved in extra judicial activities.

In Australia and New Zealand the test for apparent bias is whether a fair minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question to be determined.[4] In England, the test is expressed in terms of a real possibility of bias rather than a reasonable apprehension of bias.[5] But as McGrath J of the Supreme Court of New Zealand has observed, in reality there is no significant difference between the tests. They both focus on the perception of a fair minded lay observer and emphasise the need for such a person to be fully informed of all relevant circumstances.[6]

What type of person is the fair minded lay observer? He or she is someone who –

> "…….. is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious nor complacent about what may influence the judge's decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings

4 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Saxmere Company Ltd v Wool Board* [2010] 1 NZLR 35 at [3] – [5].

5 *AWG Group Pty Ltd v Morrison* [2006] 1 WLR 1163 at [6] – [9].

6 *Saxmere Company Ltd v Wool Board* [2010] 1 NZLR 35 at [76].

> of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias."[7]

In Australia and New Zealand there are two steps in determining apparent bias –

(i) first, the identification of what it is that might lead a judge to decide a case other than on its legal and factual merits; and

(ii) second, an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits.[8]

Friendships and Acquaintances

Does a judge have the same rights to freedom of association, freedom of speech and privacy as other members of the community? Does the holding of judicial office affect the exercise of those rights? Should it do so?

As judges, our job is to pass judgment on the conduct of others. It is important not only to the understanding of human nature which we bring to our work, but also to our own wellbeing, that we have lives outside the law. As members of our communities we owe it to others to be active participants in those communities. Yet our extra judicial acquaintances and experiences can unwittingly affect our capacity to carry out our judicial functions.

While engagement with the community and social interaction are to be encouraged, there is an ever present need for caution and reticence in what a judge says and does, at least while he or she continues in office, and perhaps except in the company of utterly trustworthy and trusted friends. A gratuitous, indiscreet or unguarded comment can so easily be taken out of context and give rise to apprehension of pre-judgment.

Let me tell you about a Scottish case decided in 1985: *Bradford v McLeod*.[9]

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7 *Saxmere Company Ltd v Wool Board* [2010] 1 NZLR 35 at [5]; *Johnson v Johnson* (2000) 201 CLR 488, 508-9 at [52] – [54].

8 *Ebner* (2000) 205 CLR 337 at [8]; *Saxmere* at [2010] 1 NZLR 35 at [3].

9 1986 SLT 244; referred to in Lord of Hope of Craighead KT, 'What happens when the Judge speaks out?' (Address delivered at the Holdsworth Club, Birmingham, 19 February 2010). (His Lordship appeared in the case as counsel for the complainers.)

First, a little background.

In Scotland the Sheriff Courts are local courts which deal with most civil and criminal cases. The presiding judicial officer is the sheriff, who is usually a qualified advocate or solicitor. At least in the 1980's, the grant of legal aid was within the discretion of the presiding judicial officer in each case.

Curling is a popular sport in Scotland. It involves sliding stones across a sheet of ice towards a target area.

Some of you may remember the tumultuous miners' strike in Britain in the mid 1980's in which the General Secretary of the National Union of Mineworkers (Arthur Scargill) and the Prime Minister (Margaret Thatcher) were at loggerheads.

The Ayr Sheriff Court was located in a mining area. One of the sheriffs attended a dance organised by the local curling club at an ice rink. A local solicitor was present. He and the sheriff knew each other well, and were both members of the committee of the curling club. The sheriff knew that the solicitor acted for members of the National Union of Mineworkers. Late in the evening there was a conversation among the committee members about television images of violent exchanges between police and miners at collieries. The sheriff commented that he would not grant legal aid to miners.

Three months later a miner appeared before that sheriff charged with disorderly conduct, represented by that very solicitor. The solicitor asked the sheriff to disqualify himself for bias. The sheriff refused. He heard the case and convicted the miner. In 14 similar cases, the sheriff refused to disqualify himself and convicted the miners.

The High Court of Justiciary held that the sheriff had erred in not disqualifying himself, and set aside the convictions. Referring to what had happened late in the evening at the ice rink, Lord Justice Clerk Ross observed that no doubt the sheriff had considered he was conversing with friends on a private occasion. He may have been confident that others present would treat his remarks on the same basis, but, if so, his confidence in the solicitor appeared to have been misplaced. While satisfied that the sheriff had not in fact pre-judged the cases, his Lordship held that he had nevertheless erred in not appreciating that the interests of justice required not merely that he not display actual

bias, but also that the circumstances should not be such as to create in the mind of a reasonable man a suspicion that he might not be impartial.

The outcome in *Bradford v McLeod* was not dissimilar from that in the later Fijian case of *Takiveikata v State*.[10] The appellant faced four counts of inciting to mutiny and one of aiding soldiers in an act of mutiny. Three and a half months before the trial began, the judge was present at a cocktail party which was also attended by an expatriate businessman and his wife. During the course of social chat with them, the case was mentioned, and the judge said of the appellant "I will put him away." The trial was conducted before the judge and assessors. The assessors recommended that the appellant be convicted of only one count of inciting to mutiny and that he be acquitted on all other counts. The judge, as he was empowered to do, reversed the assessors' opinion. He found the appellant guilty of the four counts of inciting to mutiny and not guilty of the other charge. The Court of Appeal quashed the convictions and ordered a new trial on those counts. Their Honours said that, even without considering what actually happened at trial, any fair minded lay observer who knew what the judge had said to the businessman and his wife in relation to the up-coming trial would apprehend that he might not bring an impartial and unprejudiced mind to it.

These days we can all have friends and acquaintances not only in the real world, but also in the virtual world. Social networking sites like Facebook and Twitter have transformed the way we communicate, and with whom. As political commentators have observed, the widespread uprisings in the Arab Spring would not have happened but for social media. There can surely be nothing wrong in principle in judges embracing the new forms of communication. They have, at breakneck speed, become an integral part of contemporary society, and judges must have an awareness and understanding of their actual and potential use if they are not to be isolated from an ever widening proportion of those on whom they pass judgment.

The new forms are communication are instantaneous, and once a user clicks the "Send" button what he or she has written is potentially accessible by anyone anywhere. It can be extremely difficult, if not impossible, to ensure that a message will not reach unintended, even unimagined recipients, whether in whole or in some edited form. The ever-present need for caution and circumspection in what judges say and do in their

professional and private activities is heightened when they step into the virtual world. The likelihood that improper communications or other improper conduct will be exposed is also heightened when relevant communications occur over the internet.

It is generally accepted that judges may maintain friendships with practising members of the legal profession, although they must be astute not to speak about litigation over which they preside or are likely to preside with practitioners whose clients are parties to the litigation.

In North Carolina a judge was a Facebook friend of an attorney who was appearing before him in a divorce and custody case. The judge read and posted comments about the pending case on the attorney's Facebook page. He also conducted independent research into a party's business through the internet, without disclosing this to the parties or their attorneys. He was reprimanded by the Judicial Standards Commission of that State.[11]

In many jurisdictions it is considered only proper that ex-curial communications between a judge and lawyer friends be suspended while such litigation is pending.

Should there be some restraint on a judge's use of social media to communicate with lawyer friends on topics which have nothing to do with cases which come, or may come, before the judge? There is probably always a need for some restraint, because the frequency of communication, its scope or its intimacy may subsequently result in an assertion of apparent bias or prejudice.

In an opinion expressed about three years ago, the New York State Commission on Judicial Ethics found nothing inherently inappropriate about a judge joining and making use of a social network. There was nothing *per se* unethical about communicating via social networking technology rather than by using some other medium such as the telephone or a web page. The Commission concluded that "the

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10 [2007] FJCA 45.

11 Judicial Standards Commission of the State of North Carolina, Inquiry No. 08-234, at 1–3 (2009), http://www.aoc.state.nc.us/www/public/coa/jsc/publicreprimands/jsc08-234.pdf; referred to in Craig Estlinbaum, 'Social Networking and Judicial Ethics' (2012) 2(2) *St Mary's Journal on Legal Malpractice & Ethics* 1, 14 www.stmaryslawjournal.org/pdfs/Estlinbaum_Final.pdf and in Justice John Vertes, 'Why can't we be friends? Should judges be on Facebook?' (2011) 19(3) *Commonwealth Judicial Journal* 3, 6 www.cmja.org/downloads/cjj/cmjajournal19-2.pdf.

question is not whether a judge can use a social network but, rather, how he/she does so."[12]

Guidelines on the use of social networking sites have been issued in Ohio by the Board of Commissioners on Grievances and Discipline (under the supervision of the Supreme Court of Ohio).[13] In Britain the Senior Presiding Judge for England and Wales and the Senior President of Tribunals have recently issued guidance on "Blogging by Judicial Office Holders" to all courts and tribunal judicial office holders in England and Wales.[14] They said –

> "Judicial office holders should be acutely aware of the need to conduct themselves, both in and out of court, in such a way as to maintain public confidence in the impartiality of the judiciary.
>
> Blogging by members of the judiciary is not prohibited. However, judicial office holders who blog (or who post comments on other people's blogs) must not identify themselves as members of the judiciary. They must also avoid expressing opinions which, were it to become known that they hold judicial office, could damage public confidence in their own impartiality or in the judiciary in general.
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> The above guidance also applies to blogs which purport to be anonymous. This is because it is impossible for somebody who blogs anonymously to guarantee that his or her identity cannot be discovered."

Suffice it to say, experience has taught us that it is not always easy to balance the judge's rights as a private citizen against the strictures of judicial office.

Engagement in community organisations

In most jurisdictions judges' engagement in community organisations is viewed favourably, subject to some restraints. The *Guide to Judicial Conduct* published by the Council of Chief Justices of Australia and New Zealand and the Australasian Institute

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12 Craig Estlinbaum, 'Social Networking and Judicial Ethics' (2012) 2(2) *St Mary's Journal on Legal Malpractice & Ethics* 2, 15.

13 Justice John Vertes, 'Why can't we be friends? Should judges be on Facebook?' (2011) 19(3) *Commonwealth Judicial Journal* 3, 8 – 9.

14 Senior Presiding Judge for England and Wales and the Senior President of Tribunals, *Blogging by Office Holders* (August 2012) <www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/blogging-guidance-august-2012.pdf.>

of Judicial Administration Inc[15] encourages it, provided it does not compromise judicial independence or put at risk the status or integrity of judicial office. *The Guide* lists these limits –

- commitments should not be too numerous or too time consuming;
- they should not involve active business management;
- there is need to weigh the extent to which the organisation is subject to government control or intervention.

In *Webb v The Queen*[16] (a decision of the High Court of Australia about apparent bias on the part of a juror who arranged for flowers to be sent to the mother of the deceased victim of a crime) Deane J identified four distinct, though overlapping, categories of case where a decision-maker may be disqualified because of the appearance of bias – interest, conduct, association and extraneous information.

The *Pinochet* litigation in Britain a decade or so ago illustrates how personal beliefs and commitment to a cause may give rise to a reasonable apprehension of bias. In terms of Deane J's four categories, it was a case of overlap between interest and association.

Pinochet was the former Head of State in Chile. He was in Britain receiving medical treatment when the Spanish judicial authorities issued international warrants for his arrest to enable his extradition to Spain to face trial for various crimes against humanity. The House of Lords had to consider the validity of a provisional arrest warrant issued by Metropolitan Magistrates under the *Extradition Act* 1989 (UK).

Amnesty International was given leave to intervene to argue in favour of the validity of the warrants.

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15 Council of Chief Justices of Australia, *Guide to Judicial Conduct* (The Australasian Institute of Judicial Administration, 2nd ed, 2007) http://www.aija.org.au/online/GuidetoJudicialConduct(2ndEd).pdf

16 (1994) 181 CLR 41.

Amnesty International was an unincorporated association. It was a non-profit organisation with sections in different countries throughout the world. It had its international headquarters in London. The work of the international headquarters was undertaken through two United Kingdom companies – Amnesty International Limited ("AIL") and Amnesty International Charity Limited ("AICL").

AICL was a registered charity which had been set up for tax reasons to undertake charitable (cf. political) aspects of the work of Amnesty International – e.g., research into human rights issues. Members of AICL were all elected members for the time being of the International Executive Committee of Amnesty International. Its directors were appointed by and removable by the members in general meeting.

Lord Hoffmann sat on the hearing of the appeal. By a majority of 3-2 their Lordships upheld the validity of the warrant. Lord Hoffmann was in the majority. He did not write a separate judgment but agreed with the other two Law Lords who held the warrant valid.

His Lordship was not a member of Amnesty International, the unincorporated association which had intervened in the litigation. But, after the decision, it was revealed that he was a director and chairperson of AICL (for which he received no remuneration).

The Appellate Committee of the House of Lords, differently constituted, was reconvened. The decision was set aside and a rehearing was ordered.

In weighing the pros and cons of any particular involvement, a judge needs to give careful consideration to the way the organisation operates. In *Pinochet* the House of Lords looked at the overall picture. Amnesty International was in substance one organisation and their Lordships were not concerned with fine distinctions between the related bodies. As chairperson of AICL, Lord Hoffmann was so closely associated with Amnesty International that he could properly be said to have an interest in the outcome of the proceeding to which Amnesty International had become a party. Lord Hutton said:

> "The links… between Lord Hoffmann and Amnesty International… were so strong that public confidence in the integrity of the

> administration of justice would be shaken if [the] decision were allowed to stand".[17]

Their Lordships noted in passing that Lord Hoffmann's wife had been employed in Amnesty International's International Secretariat since 1977. However, in all the circumstances, her involvement did not have any bearing on the outcome of the case.[18]

In Australia the failure to disclose an association with a party or someone closely connected with litigation is not *per se* a disqualifying factor. But it may cast some evidentiary light on the ultimate question – whether a fair minded observer might reasonably apprehend the judge might not bring an impartial mind to the resolution of the question for decision.

In *Pinochet*, Lord Browne-Wilkinson stressed that a judge is not necessarily unable to sit on a case involving a charity in whose work he or she is involved. Generally it is only in cases where a judge is taking an active role as trustee or director of a charity, closely allied to working with a party to the litigation, that he or she should be concerned to stand aside or make disclosure. There may be other exceptional cases.

The burden of deciding whether there might be a reasonable apprehension of bias falls on the judge whose own conduct is in issue. Referring to the *Pinochet* litigation, the President of the Commonwealth Judicial Education Institute, Judge Sandra Oxner, commented –

> "Conflict of interest rules are complex. An English Law Lord recently misunderstood the conflict rules. How much more difficult must it be for a young magistrate in a developing country to be clear on the appropriate conduct in such a situation and have the courage to stand on principle despite the inconvenience and expense caused by the stance?"[19]

As a rule of prudence, if in doubt whether involvement may have a disqualifying effect, a judge should disclose it to the parties and receive submissions before deciding whether recusal is the proper course.

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17 *R. v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No.2*) [2000] 1 AC 119, 146.

18 *R. v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte (No.2*) [2000] 1 AC 119, 135, per Browne-Wilkinson LJ.

19 Sandra Oxner, 'The Quality of Judges' (Paper presented at the World Bank Global Empowerment, Security and Opportunity Through Law and Justice Conference, Saint Petersburg, July 2001) 45.

The *Guide to Judicial Conduct* contains a "disqualification procedure" – a number of steps which a judge should follow in deciding the recusal question.

A judge has an obligation to sit unless satisfied that the threshold of reasonable apprehension of bias has been reached. To refuse to sit where the threshold has not been reached may cause disruption or inconvenience to the court lists and to the parties. This can be so particularly in smaller jurisdictions and regional courts.

Litigation involving an organisation with which a judge is considering becoming associated may not be pending or even foreshadowed. Should the judge refuse to become involved because there is always the possibility the organisation will be involved in litigation? Generally not: a judge should not, and should not be expected to, retreat into isolationism. This is really a question of where the particular organisation stands on a spectrum ranging from a remote possibility to a real likelihood of its becoming involved in litigation. It is always a matter of judgment.

If a judge elects to become involved, should he or she restrict the nature of that involvement? What should the judge do if there is litigation?

I suggest that before becoming involved the judge should consider carefully the structure of the organisation and what role he/she proposes to undertake. Having become involved, if controversy or litigation erupts, generally the judge should not leave the organisation in the lurch, but steer a course through the minefield. It is important that there be a strong leadership team, so that if, in all the circumstances, the judge steps aside, someone is able to assume his or her role in the organisation.

Fund raising

What about fund raising? There is a fairly widely held view that a judge should not solicit funds or use the prestige of judicial office for that purpose. Donors may be intimidated into making donations when solicited by a judge, and/or they may expect favours in return. In this regard, as in so many others, the judge should bear in mind

that the conduct of one judge may reflect adversely on the whole court to which he or she belongs.

Religious affiliations

What about a judge's religious beliefs and practices? A judge is entitled to the same religious freedom as any one else, although in discharging judicial functions the judge must apply the law impartially, and not with a view to the particular interests of his or her own religion.[20]

Not every assertion of apprehended bias passes the fair minded lay observer test. In another Scottish case, *Helow v Secretary of State for the Home Department*,[21] the Immigration Appeal Tribunal had upheld a decision of an immigration adjudicator to refuse a claim for asylum. A judge dismissed a petition to review the decision of the tribunal. The petitioner sought to have the judge's decision set aside on appeal, on the basis that it was vitiated for "apparent bias and want of objective impartiality".[22] The petitioner was a Palestinian with connections with the Palestine Liberation Organisation ('PLO') and the judge was Jewish. Her Ladyship was also a member of the International Association of Jewish Lawyers and Jurists, whose quarterly publication included some articles that were fervently pro-Israeli and antipathetic to the PLO. It was not suggested that the judge could not be impartial merely because she was Jewish. The argument was that, by virtue of her membership of the association, she gave the appearance of being the kind of supporter of Israel who could not be expected to take an impartial view of the petition. The argument was that, as a member of the association, she must have received the publication and read the articles. However, there was no evidence that she had even read the articles, let alone of her reaction to them. Members of the association held widely differing views, as was acknowledged publicly by its president and by the publishers of the journal. In the circumstances the House of Lords held that a fair minded and informed observer would not have considered there was a real possibility the judge would not be impartial. In a subsequent speech, Lord Hope (who sat on the appeal) said –

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20 See the discussion of the abstract right to religion in Jonathan Soeharno, *The Integrity of the Judge – A Philosophical Inquiry* (Ashgate Publishing Limited, 2009) 80 – 81.

21 [2008] 1 WLR 2416.

22 Ibid, 2420.

> "…the complete absence of anything that [the judge] said or did to associate herself with the published material was crucial. Had she dropped even the slightest hint on any occasion, however informal, that she was in sympathy with what was published the result might well have been different. As it was, since she had said and done nothing at all, the conclusion had to be the test of apparent bias was not satisfied in her case. That case offers some reassurance to judges who like to be well informed and are observed reading the *Sun* or some other such tabloid which has taken sides on an issue which comes before them judicially. They can read what they like, so long as they do not say or do anything to associate themselves with what has been written."[23]

Conclusion

Let me return to what I said at the outset: the application of ethical principles and guidelines must be informed by context.

In small communities, judicial officers may be expected to assume leadership or advisory roles which they might be well advised to decline in larger communities, where there are more likely to be other people able to do so.

Take the hypothetical example of a small island community which is anxious to attract some of the lucrative tourist trade. The island is one of about 30 small islands which together form a nation state. A group of off-shore investors is seriously considering acquiring a parcel of land from the local people and developing it as a resort. There is only one magistrate on the island. Although magistrates from other islands have jurisdiction on this island, they seldom sit here because they are fully occupied on their own islands and the nation simply does not have the financial resources to allow them to do so. The magistrate is also a community leader, and in that capacity he gives behind the scenes advice and assistance to those members of the community who negotiate a deal with the investors. The inevitable occurs, and a dispute arises between the investors and the community. A proceeding is commenced in the Magistrates Court, and an urgent interlocutory application comes before the magistrate. To recuse himself may leave the aggrieved party without any avenue of potential redress, because he is the only magistrate on the island. He must make full and frank disclosure

[23] Lord of Hope of Craighead KT, 'What happens when the Judge speaks out?' (Address delivered at the Holdsworth Club, Birmingham, 19 February 2010) 8.

of his role in the negotiations, hear the parties on how urgent the application really is, hear them on the issue of bias or apparent bias if it is raised, and in the light of those submissions decide whether to hear the application. He is in an unenviable position.

The fair minded lay observer knows that sometimes idealism has to be tempered by pragmatism. He or she knows that judges are human, and that they must have lives outside the courtroom.

When a judge recognises that his or her prior conduct or relationship with a litigant or a witness may give rise to an issue of apparent bias, or when such an issue is raised by a party, he or she can be expected to do no more than conscientiously strive to be candid with the litigants about the nature and extent of his or her involvement or interest, and diligently and dispassionately apply the fair minded lay observer test.