IN THE SUPREME COURT OF SAMOA
HELD AT APIA

IN THE MATTER:
of a claim for Certiorari and Declaratory Orders and relief under the Constitution of the Independent State of Samoa, the Judicature Ordinance 1960 and the Declaratory Judgments Act 1988.

BETWEEN:

VAASILIFITI MOELAGI JACKSON, High Chief of Savaii, and
AMARAMO SIALAOA, Economist,
Members of the Committee of People Against Switching Sides for and on behalf of the Committee of People Against Switching Sides of the Road.
First Applicants

AND:

THE ATTORNEY GENERAL, sued for and on behalf of
THE MINISTRY OF WORKS TRANSPORT AND INFRASTRUCTURE and
THE SAMOA LAND TRANSPORT AUTHORITY
an authority constituted by the Land Transport Authority Act 2007.

Respondent

Counsels: TRS Toailoa, LR Schuster and D Clarke for the applicants
Aumua M. Leung Wai, P. Bednall and M. Lui for the respondent

Hearing: 17,18,19,20,21 & 24 August 2009
Decision: 28 August 2009

DECISION OF NELSON J.

Of the 18,789 vehicles in Samoa as at 31 July 2009, 14,541 are left hand drive and 4,248 are right hand drive. Clearly the majority of vehicles come road switch day in 10 days time will be left hand drives. At 6.00am on that day they will be required to immediately and without further ado switch from driving on the right side of the road to for want of a better word driving on the "wrong" side of the road namely the left side. This change is inter alia mandated by sections 4 to 7 of the Road Transport Reform Act 2008. That 7th September 2009 is a date that will go down in Samoan history is without doubt, whether it will go down as famous or an infamous date is a matter history will judge. But as a result of the proposed change the applicants have come to this court seeking declarations striking down the said sections 4 to 7 of the Road Transport Reform Act as being contrary to articles 5(1) and 15(1) and (2) of the Constitution.

Article 5(1) of the Constitution provides:

> "No person shall be deprived of his life intentionally, except in execution of a sentence of a court following his conviction of an offence for which this penalty is provided by the Act."

This is commonly referred to as the right to life provision of the Constitution. It was referred to by the Working Committee on the Constitution as of paramount importance and for which adequate provision had to be made in the Constitution: see generally ***'Samoa: The making of the Constitution'*** by Lauofo Meti 1st edition (2002) at pages 75 and 76.

The importance of the article was not lost on the framers of our Constitution. An extract from the 1960 Constitutional Convention Debates which led to the establishment of the Constitution found at Volume 1 page 114 says as follows, in the words of one Leiataua Poai of Aiga-ile-Tai:

> "The question we have before us is human life. Since civilization first arrived on these islands of ours there is no doubt that we are all aware of the most appropriate way in which to deal with this subject. I would like to say there are many issues which may lead up to this and therefore I personally would like to say we should not be afraid of dealing with this. I would like to say let us resume the responsibility of considering this and whatever we say, goes."

Article 15 of the Constitution is the freedom from discriminatory legislation provision and provides:

> **"15. Freedom from discriminatory legislation –**
>
> (1) All persons are equal before the law and entitled to equal protection under the law.
>
> (2) Except as expressly authorized under the provisions of this Constitution, no law and no executive or administrative action of the State shall, either expressly or in its practical application, subject any person or persons to any disability or restriction or confer on any person or persons any privilege or advantage on grounds only of descent, sex, language, religion, political or other opinion, social origin, place of birth, family status, or any of them.
>
> (3) Nothing in this Article shall:
>
> (a) Prevent the prescription of qualifications for the service of Samoa or the service of a body corporate directly established under the law; or

(b) Prevent the making of any provision for the protection or advancement of women or children or of any socially or educationally retarded class of persons.

(4) Nothing in this Article shall affect the operation of any existing law or the maintenance by the State of any executive or administrative practice being observed on Independence Day:

PROVIDED THAT the State shall direct its policy towards the progressive removal of any disability or restriction which has been imposed on any of the grounds referred to in clause (2) and of any privilege or advantage which has been conferred on any of those grounds."

The applicants rely on articles 15(1) and 15(2).

Because road switch day is looming the applicants challenge was set down on an urgent basis by this court and hearing was completed last Monday with counsels submissions. I indicated then to the parties that as an urgent decision was sought the matter will be adjourned till today for an oral ruling. I propose to address the main points of the debate but given the time constraints operative it will not be as detailed as it otherwise would be. Copies of the ruling however will be made available to all concerned in due course.

Preliminary issues:

Two preliminary issues have arisen involving the identification of the parties to these proceedings. Firstly, the applicants. Originally these proceedings were brought by two applicants, the present applicant as first applicant and CCK Trading Limited as second applicant. Before the hearing commenced, applicants counsel sought leave for the second applicant to withdraw from further participation in the proceedings. This was objected to by the respondent on the basis that if the application is unsuccessful costs may lie against the second applicant who has been a party to this challenge from its inception. The issue was reserved for a ruling from the court but I note the applicants current motion dated 6 July 2009 being its Third Amended Motion for declaratory relief pre-supposes that leave has been granted as it cites the original first applicant as the only applicant.

The matter would appear to be governed by rule 109 of the Supreme Court Civil Procedure Rules 1980 which allows a plaintiff at any time before trial to discontinue his action either wholly or in part by filing with the court a Notice of Discontinuance. Although no formal notice has been filed I will treat counsels application as an application for discontinuance sanctioned by Rule 206 prescribing procedure for matters not specifically provided for. And I will allow the application subject however to the provisions of Rule 109(3) which permits the court on any discontinuance to award to the respondent such costs of the action as it thinks fit.

The second preliminary point requiring addressing is the identification of the respondent. I touched upon this issue in my ruling dated 26 June 2009 on the respondents Strike Out Motion at pages 2 and 3 thereof, in response to which the applicants by their Third Amended Notice of Motion have cited the Parliament of Samoa as a respondent and the Transport Control Board as a respondent. As noted in the strike out ruling I had reservations about Parliament being made a respondent and quoted Lord Cooke who said in ***Ah Chong v Legislative Assembly of Samoa*** [1996] WSCA 2:

> "We have reservations about the somewhat novel course of naming a House of the Legislature as a defendant. It is not a body corporate and we doubt whether it can sue or be sued. The orthodox procedure would be to sue Ministers or the Speaker or other officer who might seek to enforce decisions of the House alleged to be invalid".

Justice Kellam in the ***SDUP v Leiataua*** (unreported) 06 May 2009 said:

> "The above statement is dicta, but to my mind it is dicta of a most persuasive nature. In my view, the naming of a House of legislature as a defendant is indeed novel. Indeed, in the limited time available to me for research, I was unable to find a case other than ***Ah Chong*** in the jurisprudence of the UK, Australia, New Zealand and Samoa. It appears to me to be clear that, as Lord Cooke stated, the appropriate procedure is to sue Ministers or the Speaker or other officer who might seek to enforce decisions of the House alleged to be invalid".

The appropriate procedure therefore is to sue the relevant government agency or the minister responsible. And as the Transport Control Board has ceased to exist and has now been replaced as a matter of law by the Land Transport Authority (‘the LTA/the Authority") pursuant to the Land Transport Act 2007 it would seem the Authority is the proper respondent, it being the entity responsible under the direction and control of its Minister for: planning, developing, operating and maintaining a safe efficient and effective national road system for Samoa": see sections 5,6,33 and 34 of the Land Transport Authority Act 2007. The proper respondent is accordingly the Attorney General sued for and on behalf of the Land Transport Authority and the Ministry. Pursuant to rule 32 of the Supreme Court Rules I order that substitution to be made and the entitulements will be amended to reflect the true situation.

The facts:

The first part of this decision relates to the facts. The court heard from a number of witnesses over the course of last week. For the applicants, Mr Graham John Williams a self employed crash investigator with 37 years experience in traffic management, enforcement crash investigation and analysis including work undertaken for the New Zealand Ministry of Transport and the New Zealand Police. We also heard from Leiataua Tom Tinai a civil engineer with 27 years experience in designing and overseeing the construction of roads in this country and his brother title holder, Leiataua Isikuki

Punivalu a self employed civil engineer and former Director of Works for the Government of Samoa with extensive experience in construction and design of Samoan roads. The court heard from Professor Thomas J. Triggs, a Fellow of the Monash University Accident Research Centre in Melbourne Australia, a highly qualified expert on road behaviour, accident data and research and other relevant matters. As well as from Lutuiloa Vaiula Solomona of Apia Insurance Company Limited concerning certain accident statistics in the insurance industry and Mr Vavatau Taufao a senior lecturer at the National University of Samoa on the protest march by the applicants to Parliament against the respondents decision and governments adoption and implementation of that decision and on the applicant group PASS generally. Also Lelaulu Tiatia Mapusone the president of the Savaii Bus Owners Association concerning the cost of cutting new doors for Savaii buses. A further witness was proposed to be called on this issue but due to serious illness he was unable to attend. Finally for the applicants were Messrs Lorenzo Hagedorn and Sose Annandale on the lack of information as to the switch given to drivers renewing their licenses at the Authority offices.

In reply the respondent called seven witnesses: an expert of their own a Mr Paul Hillier, a civil engineer specializing in road safety and management who had been commissioned to report on the road safety implications of the switch and other related matters; Mr Leasi Galuvao the Chief Executive Officer of the Land Transport Authority and Tusa Misi Tupuola the manager of the Road Use Section of the Authority on pertinent aspects surrounding the road switch and the various measures undertaken by the respondent to minimize the hazards a switch would entail; one Aiono Afaese, a member of the LTA Board on the question of costs and cutting of new doors on buses and related issues; Fonoti Perelini, a mechanical engineer and the current president of the Samoa International Institute of Professional Engineers on their position on the road switch and his opinion on certain matters. As well the court heard from Mapuilesua Mulifusi Togafau, Manager of Safety and Rehabilitation for the Accident Compensation Commission ("ACC") who produced certain ACC statistics for road accidents and fatalities over the 2003-2008 period. Finally we heard from Commissioner of Police Papalii Neru on the enforcement measures and ancillary actions to be taken by the Police in preparation for, during and after the road switch occurs.

The evidence of all witnesses consisted of a mixture of affidavits and oral testimony and they produced a large number of reports, commentaries and such like in the course of their evidence. Ordinarily the court in a decision would review all that evidence but as time does not permit that to be done I will focus instead on the main parts of the evidence of the witnesses.

Firstly, the expert evidence. As has been noted in closing submissions the road safety experts Messrs Williams, Triggs and Hillier all agree on one very important fact: this road switch carried with it certain inherent road safety risks. Driving habits ingrained over many years will take time to change, pedestrian instincts need to be re-adjusted, and so forth as related in their evidence. Many of these matters are common to both left hand and right hand drive drivers who are accustomed to driving on the right side of the road.

But there are also risks peculiar to left hand drive vehicles. One does not need to be an expert to realize that the field of vision or line of sight of the driver of a left hand drive vehicle is different to that of the driver of a right hand drive vehicle. In some instances this operates as an advantage, for example the driver of a left hand drive vehicle driving on the left side of the road is in a better position to see pedestrians walking on his side of the road compared to the driver of a right hand drive vehicle driving on the same side of the road. But in some cases it operates as a disadvantage. For example when the driver of a left hand drive vehicle wishes to overtake a vehicle in front of him, his line of sight is significantly impaired by the vehicle in his path necessitating what can be a risky maneuver of his having to partially or wholly cross the centre line into the lane of oncoming traffic in order to have a clear view of the oncoming traffic. Such a maneuver can result in a side swipe collision or in extreme cases a head on impact with oncoming traffic. This probably accounted for the increase in head-on collisions without an increase to the overall accident rate experienced in Sweden, the last country to effect a road switch in the year 1967. These risks are what the respondents own expert Mr Hillier acknowledges in paragraph 9 of his affidavit dated 11 August 2009 as the "obvious road safety risks associated with implementing the switch in Samoa." There is accordingly no question in the minds of the experts that there are inherent road safety risks associated with the switch.

The applicants engineers Messrs Tinai and Punivalu arrived at the same conclusion but by a slightly different route. They based their view more on road design construction than on road behaviour. Mr Williams also referred to aspects of road engineering and design as contributing factors. The respondents engineer Mr Perelini did not really venture into the fray probably quite wisely as he is a mechanical engineer by trade and experience. He was more there to advise the position of the Samoan Society of Engineers which seems to change depending on who is president.

Where the experts differed is whether these risks will lead to an increase in the number of accidents and in particular fatal accidents. The applicants expert said they will. Mr Williams view was based on his experience and observation on two trips to Samoa plus the lack of remedial engineering works such as for example widening of bends and road shoulders. He said this taken together with the literature on the matter which seems to be a reference to the British Columbia, United Kingdom and Canadian studies referred to in his evidence, led to his opinion that come 7 September 2009 there will be a dramatic increase in the number of road crashes and by logical extension, an increase in the number of road fatalities. He did not accept that the preventive measures taken by the respondent such as road marking, road signage, reduction in speed limits, installation of speed humps etc. would be effective in preventing this. But he did accept they would have an effect. He said "they must have an effect" but how much effect he was unable to say. He also stated that even in a perfect road network there will always be crashes including fatal crashes.

In cross examination this witness agreed that he did not hold any civil engineering qualifications and that he had only spent a limited amount of time in Samoa inspecting

the roads. Further that he did not visit Savaii at all, Savaii containing some 34% of Samoas roads and that he did not visit all of the remaining 66% of our road network. Neither did he meet with the Chief Executive of the Land Transport Authority to discuss the measures to be introduced by them in an effort to mitigate the road switch risks nor had he conferred with the Commissioner of Police concerning their plans. Neither had he been given access to all relevant government documents, studies and data on the matter. His opinion therefore while useful must be read subject to these limitations. He also agreed with the suggestion that crashes can be described as "rare, random and multifactored." He said that was a good way of describing them.

The evidence of the other expert of the applicant Professor Triggs was also that in traffic accidents there are in most cases more than one cause. Sometimes it is a combination of speed and alcohol, sometimes a combination of speed and fatigue or defective brakes. Come the switch day it may be a combination of alcohol, the switch and behavioral tendency which causes a driver to inadvertently drive on the wrong side of the road. But the point made strongly by the Professor in his evidence was that in many cases the switch is only but one factor in what the Professor referred to as "a family of factors" which causes an accident: see generally paragraphs 25 and 26 of his affidavit.

Of the government measures being actioned to mitigate the effect of the switch the Professor described them as largely ineffective. For example a road hump is only a localized speed reduction device as they have the effect of reducing speed only in the vicinity of and at the hump itself. He said it was not generally a device regarded as useful for reducing speed throughout a road transport system. As for road signs he questioned their usefulness saying that studies developed over many years of research overseas showed that pictorial signs are far more effective than the verbal signs he has seen being put up on our roads. Signs which he said were too small and should not be placed before corners where they would only serve to distract a driver. He agreed that some of the engineering measures being taken such as road side clearing of vegetation and use of directional arrows were helpful but more needed to be done. He was critical of the value of the respondents educational programs based on world experience but he accepted that a well publicized information campaign had much merit. He also opined that enforcement initiatives which were well targeted, well designed and consistently applied such as for example Australia’s Anti Drunk Driving Campaign had proved to be most effective but only if properly strategized, policed and enforced.

The Professor was clearly a fan of the preparation measures that were undertaken in Sweden prior to their switch. He spoke of an intensive and extensive four year pre-switch campaign to bring the road switch and its implications into every household and to the notice of every man, woman and child in that country. He also praised the many engineering measures taken including re-colouring of all roads in a new proposed switch colour, the replacing of all headlamps to facilitate safe night driving, as well as the regular media and press releases, TV programs and such like that occurred prior to the Sweden road switch. The Samoan preparations did not impress the Professor either in their quality or magnitude and he predicted an increase in fatalities especially night

fatalities. He termed the Samoan preparations "marginal" rather than "reasonable".

When evaluating the evidence of expert witnesses great care must be exercised by the court to ensure that the tribunal reaches its own decision and does not merely adopt the conclusion of an expert. The proper approach was laid down by Lord Cooper in ***Davie v Edinburgh Magistrate*** (1953) SC 34, 40 where he said:

> "Expert witness however skilled or eminent can give no more than evidence. They cannot usurp the functions of the jury or judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the court. Their duty is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence".

That approach was approved by this court in ***Police v Alosio Nauer*** [2009] WSSC 25 when evaluating the testimony of an expert in relation to narcotics. As noted by Binnie J. in the Canadian case of ***R v J-LJ*** [2000] SCC 51, 56 the expert witnessess role is:

> "to assist the trier of fact by providing special knowledge that the ordinary person would not know. Its purpose is not to substitute the expert for the trier of fact. What is asked of the trier of fact is an informed judgment, not an act of faith."

While I do not doubt the integrity of the two road safety experts called by the applicants or the honesty by which they hold their opinions, there is a significant qualification to be made to their view that the result of the switch would be more accidents in particular more fatal accidents. And the qualification arises because it is clear from the evidence of the two men that they suffered from a lack of information as to the preventive measures said to have been implemented by the respondent and by government. Mr Williams had not met with any officials in order to be briefed on the respondents road switch implementation plans and what has already been done and proposals regarding what remains to be done in preparation for the switch. Neither did he have any knowledge of the proposed police enforcement measures testified to by the Commissioner in his evidence. His source of information on the respondents plans appeared to be the affidavit of Mr Hillier in respect of which he conceded that the measures proposed "must have an effect". It does not assist Mr Williams evidence that he only spent a limited amount of time in this country and did not extensively inspect our roading network or any of the roads in Savaii unlike the respondents expert. While I accept there are legitimate reasons for that such as time constraints and costs, it nonetheless affects the value of his views.

The same can be said of the learned Professor Triggs. He said in examination in chief that in order to make a fully informed judgment about the measures that government is putting into place in regard to the switch, he would need more information on "the details, the intensity of the campaigns, how many workshops were held in rural villages, the campaigns in the schools, what their exact form and content was and so on….". And

in cross examination he conceded he had never spoken to any government officials about what was proposed or to any visitors to the 150 schools about what had occurred there or been given any information as to the 'look right look left' school programme and its frequency on TV, or information as to the many pamphlets and posters distributed to schools or in relation to the 'train the trainer' teachers programme or information on a host of other measures being undertaken by the respondent. This is no criticism of the Professor whose evidence I found to be impressive, illuminating and forthright. But it is a great pity someone of that calibre was not provided all the necessary information so that he could make an independent and fully informed assessment of the efficacy of the measures being undertaken and yet to be undertaken by the respondent. Expert evidence is a valuable tool for any tribunal or court but experience shows that the best expert evidence is usually impartial and the more information an expert is given the better the quality of the opinion rendered. In the final analysis the Professor's evidence must be measured as against these informational shortcomings.

Where then does that leave the evidence of the applicants traffic experts? As noted they are there to assist the court in formulating and reaching conclusions. I accept their evidence that the road switch with its acknowledged safety risks would more probably than not lead to an increase in the number of road accidents. But this case is not about road accidents. The applicants article 5(1) argument which is their primary argument is not premised on an increase in the number of accidents, it is founded on the road switch causing an increase in the number of road fatalities.

The opinion of both the applicants expert witnesses was that the increase in the number of road accidents inevitably means an increase in the number of road fatalities. This opinion they based on various factors such as the overseas studies and research, limited driver visibility, night blindness because of the non adjustment of headlights of left hand drive vehicles, inadequate road engineering, ingrained habit and such like. But these are the same factors that they rely on in coming to the conclusion that there would be an increase in the number of road accidents. No additional factors are put forward to justify their determination that with more road accidents comes more road fatalities. Their view seems to be that by necessity or by a process of extrapolation, if you have more accidents you will therefore have more fatalities. If this is correct the statistics should bear this out. However the statistics produced to the court do not bear this out. Police statistics were requested of the Commissioner but those produced were unsatisfactory and have not been relied on by any counsel in their submissions. It also must be remembered police statistics are more concerned with the total number of accidents reported to them and its probable causes.

The more reliable statistics were those submitted by the Accident Compensation Commission which deals with traffic deaths and injury claims for compensation and benefits. These show a different picture. For example for the year ending 30 June 2005 the number of reported traffic accidents and persons injured decreased slightly yet the number of road fatalities increased by 50%. For the period ending 30 June 2006 the number of accidents slightly increased yet the number of fatalities decreased, they went

the other way. For the period ending 30 June 2007 the number of accidents again increased but the number of fatalities this time stayed the same. For the period ending 30 June 2008 the number of accidents significantly decreased and the number of fatalities significantly decreased.

This means for the 5 years from 2003 – 2008, only for one year which was the 2007/2008 period was there a direct correlation between the number of accidents and the number of fatalities in that they both went down by roughly the same margin. In no year during this 5 year period did the number of fatalities increase as the number of accidents increased as was the opinion given by the two experts. It is also notable that these statistics show that over the 5 year period in question, about one in five fatal accidents involved pedestrians crossing the road and approximately one in three, drunken drivers. Factors which on the face of it are independent of the side of the road a vehicle is driving upon. Unfortunately no break down as to whether right hand drives were involved in these accidents is to found in these statistics.

I have no doubt as was touched upon by Professor Triggs that a detailed analysis may uncover the true relationship and the reasons for such differing statistics from year to year. But no such analysis is available to the court and I hesitate to blindly embrace the results of overseas studies and research because road and traffic conditions in those jurisdictions are markedly different as is driver behaviour. It would be plainly in my view wrong for the court to prefer such analysis and overseas results over trends identifiable from our own road statistics. The opinion therefore of the applicants experts in this fundamental regard is therefore open to serious question. But these were not the applicants only experts. They also called two local civil engineers.

As on other issues, the engineers evidence on the likely increase in the number of road fatalities was based on road design considerations. But their opinions in this regard were also far from convincing. For example Mr Tinai relied heavily on the issue of line of sight of the driver of a left hand drive vehicle as the essential component of any road design as provided for according to the road engineers bible, the Australian Roads publication ‘Guide to the Geometric Design of Rural Roads’. That publication was accepted by the respondents witness as authoritative and a copy of it was produced as Exhibit "A-7" for the applicants.

But a perusal of that work reveals that whilst ‘sight distance’ is a principal aim of road design, it is not one of the factors influencing the choice of a design. Those factors as contained on pages 2 and 3 include financial considerations, terrain considerations, traffic volume, traffic composition and safety factors et al. And under financial it makes this interesting observation:

> "The appropriate design standard for a particular road depends on both the overall availability of finance and the state of development of the road network. When the overall network is substantially adequate and finance is available, improvement projects will be directed at operational safety and efficiency and higher geometric

> standards are appropriate. (And then comes the point that probably applies to this country). When the network is inadequate in terms of traffic demand and funds are limited, geometric standards may be lowered selectively on parts of the road system."

It must also be remembered that this text is an Australian text, where they drive on the left side of the road. How therefore a text for such a situation can be used to design roads intended exclusively for driving on the right side is a little beyond my comprehension. More likely the reality of the situation is this text applies with minor modifications to all road design irrespective of which side of the road you drive on. It seems to me the importance of line of sight may have been over-emphasized.

Not being discriminatory Mr Punivalus evidence fares no better. He also underscored line of sight as an important consideration in construction of Samoan roads but when asked in cross examination whether he would change the design of the road curve shown in a particular diagrammatical exhibit, being "A-5" case scenario # 2, his answer was:

> "looking at this probably not too much to change"

This a puzzling answer because if in fact Samoan roads are specifically designed for vehicles driving on the right, presumably they would need substantial modification in order to cater for vehicles driving on the opposite side of the road and yet the witnesses in relation to a bend where line of sight is most critical suggested otherwise. I also note that apart from line of sight, both engineers did not provide further bases for their opinion about the unsuitability of the existing roads to a switch. Their views do not greatly assist and I note the evidence that they no longer represent the views of the Institute of the Engineers of this country.

The respondents expert witness Mr Hillier had a different approach and view. He accepted the switch carried with it inherent risks but argued that the measures being undertaken by the respondent and the government to a large extent mitigated and managed these risks. He accepted though that even with endless resources the risks could never be completely eliminated. His opinion as summarized in paragraph 495 of his report was that the reduction in speed limits was the key factor and that was likely to reduce the severity of crashes that may result and by logical consequence an increase in the chances of survival of such a crash. As a rationale for his view he used in his report fatal risk curves and a power model to justify his conclusions.

I have not overlooked that the respondent has objected to the court considering opinions based on strictly inadmissible evidence or facts not directly proven in the proceedings before it. If I were to apply that approach strictly there would be two end results. A lot of the expert evidence on both sides would have to be ignored and the court would be left with very little to assist in its task of determining risk probabilities and likely eventualities. I prefer instead to take a more flexible approach as was done by Mr Justice Blackburn in ***Milirrpum v Nabalco Pty Ltd*** (1971) 17 FLR 141, 162 where he said:

> "It seems to me that the question is one of weight rather than the admissibility of the evidence, and that the court must be astute to inquire how far any conclusion proffered to an expert is indeed based on facts and to weigh it accordingly."

This is consistent with the approach of the learned Lord Denning in ***Garton v Hunter*** [1969] 1 All ER 451 as discussed and applied by this court in ***Police v Chankay*** [2009] WSSC 72.

Mr Hilliers oral testimony was essentially that while acknowledging the switch would lead to an increases in the number of crashes, he isolated speed as a key contributing factor and the remedy in his opinion was that the many measures being undertaken such as speed humps, reduced speed limits and road signage and yet to be undertaken by way of police enforcement would significantly reduce crash severity. In other words he suggested that the increased number of road accidents would not necessarily result in increased road fatalities because of the measures being undertaken by the respondent and that the two would offset one another.

Much has been said of the measures being undertaken and I need therefore to deal with that issue. These were testified to by the Chief Executive Officer of the Land Transport Authority as well as its Manager Road Safety and the Commissioner of Police. In a very detailed affidavit the CEO LTA outlined a 248 day road switch implementation plan which is said to have been commenced in November last year. The plan refers to community awareness programs in various villages in Upolu and Savaii, awareness sessions with organizations such as pulenuu and mafutaga o tina, sessions in major schools and with driver groups, radio and television ads and panel discussions and numerous other matters. His affidavit expands on these matters and he refers to the visits to over 150 primary schools, distribution of 5,000 pamphlets to school children, vehicle bumper stickers, dashboard stickers, road safety programs for government school teachers, programs for many church communities, further school visits in early 2009 and song drama and speech competitions, the finale of which will conclude on 3 September 2009 with National Road Awareness Day: see paragraphs 21pp. Under the heading of driver training he refers to 5,013 drivers having attended the Defensive Driving Course ("DDC"), although there is no evidence that all 5000 odd drivers did it in preparation for the road switch and it may well be that is the total number who have undertaken this course. There are two matters in his affidavit which he testified about but these were subsequently withdrawn because of the evidence given by the final two witnesses for the applicant. He also refers to two rounds of training which have been conducted for government drivers, as well as training workshops for employees of various companies and organizations including British Tobacco Company, the LDS Church, ANZ Bank and Electric Power Corporation. He refers to the road switch trial complex at Faleata which is probably the loneliest piece of road in this country as well as the extensive road directional arrow markings on all major roads. A lot of these are now plainly visible and that is probably one of the most useful reminders to drivers of where to drive. As well there are extensive plans for physical works and road marking, signage, modification of

traffic islands and traffic signals, those ones that work anyway, and he refers to the installation of a large number of speed humps. While there are different opinions on the usefulness of a speed hump it must be remembered that those opinions are based on the overseas experience. This country is different. We only have one thousand kilometers of road and the presence of humps although greatly inconvenient to users of the road will probably have more of an impact in this country than overseas.

His affidavit also refers to modification of public transport vehicles namely buses which has been the subject of a lot of recent publicity and there was some evidence as to this. There was a severe conflict in the evidence as to this and it is not clear to the court how much of this measure will be implemented come road switch day. With the prevalence of omnibus transport in this country and the heavy reliance on it by the rural community in particular, this could be a serious last minute problem but no doubt some enterprising bus owners will show up at the last minute with a fully converted fleet ready to be applied to this need.

There is also reference in the affidavit to speed limits and reduction of speed limits, although there is some confusion about this given the address made recently by the Honourable Prime Minister which refers to different limits. He further referred to traffic enforcement activities which was also the subject of the Commissioner of Polices evidence to the effect that in addition to the normal duties of the police, some 380 of the 440 member police force would be involved in special road switch duties code named "Operation Order". His affidavit also refers to a road switch action plan divided into three phases being phase 1 in August involving vehicle and licence checks and roadblocks, during August/September of Police briefing and familiarization with what is required of them, phase 2 in September being deployment and implementation of Operation Order including assessing its successes and failures and finally phase 3 in September/October of the Operation: see paragraphs 6-11 of his affidavit dated 11 August 2009. Also planned are measures to be undertaken on road switch day itself such as live TV broadcasts and commentaries, locating LTA, Ministry of Works and Police personnel at all major intersections and roving mobile broadcasts for the benefit of the public. All of these factors are touted as representing the respondents measures being undertaken and to be undertaken to manage and mitigate the risks the road switch will entail.

The evidence of Mr Tupuola supplied the details as to the matters covered by his CEO as Tupuola was a direct part of the various public and educational programs and campaigns. He produced as part of his evidence some of the brochures, posters and pamphlets, not all of which necessarily related to the switch but which were related to road safety issues addressed by those campaigns..

Conclusions of fact:

After giving these matters due consideration, I have come to a conclusion somewhere between the evidence of the two sets of experts. Viewed on a balance of probabilities, the respondents measures must go some way if not a long way towards mitigating and

managing the risks that are inherent in the road switch. How far they go cannot be calculated with any degree of certainty. Because of the very nature of the beast it is probably not possible to truly assess how far such measures can go. Do they alleviate all the risks? Of course not, that much is clear. But as the applicants experts have conceded they must have some effect. Even the respondents expert accepts that with all the resources in the world, residual risks would still remain. And if these experts had been given the totality of the picture my strong impression was that their opinions would probably have been revised.

Some conclusions then on the evidence but before I do I interpose here that I have not dealt with the evidence of all witnesses which is not to say that their evidence was not important. But their evidence was largely subsidiary in nature and I have tried to cover the main aspects of the case.

The applicants argument is the evidence shows that the switch "poses a known and real risk of direct and immediate threat to life" as stated in their application. I accept the evidence establishes the switch will in all probability result in more accidents but the evidence also establishes that accidents are "rare, random and multi-factored". They are not the product of any one single cause, they are in the words of Professor Triggs "the result of a family of factors" which in any given situation does not necessarily include the road switch. If a man goes to a bar and drinks himself into an alcoholic stupor and then gets behind the wheel of a car, he is literally an accident waiting to happen. He is waiting for the right combination of circumstances, the family of factors to come together at a given point and time and thereby produce an accident. That is true whether he drives on the left side of the road or the right side of the road. Which kind of car he is driving is of course material because if he is in a left hand drive vehicle his chances of an accident when for example overtaking, are higher than if he were driving a right hand drive. The fact that the alcohol he has consumed may cause him to forget which side of the road he is supposed to drive on is also material. But one cannot say that the primary cause of his accident is the road switch. The primary cause is alcohol. The road switch is but one of a number of contributing factors, is one of the family of factors that Professor Triggs was talking about.

It is very difficult therefore to say that the switch by itself poses the sort of threat argued by the applicants. Even taking the simple situation adverted to by Professor Triggs in paragraph 27 of his affidavit where a person pulls out of a drive-way and forgets which side of the road he must drive on and causes a head on impact with an on-coming vehicle on its proper side of the road killing the driver. Is that a fatal accident caused by the road switch as the professor suggests? Or is it more caused by the persons momentary inattention and forgetfulness, or is it in reality and truth caused by a combination of both, caused by the family of factors principle that all the experts referred to in one way or another in their evidence?

There is a further difficulty with the applicants arguments. The experts all agree the switch carries risks and further that it will probably result in more accidents. But not

every accident nets a fatality. The Accident Compensation Corporation statistics show that out of the 351 accidents reported over the 5 years from 2003 to 2008, only 97 fatalities were recorded. And it must not be overlooked that some accidents can produce more than one fatality. Those statistics significantly show that more accidents do not necessarily mean more fatalities. That may seem illogical and strange but that is what the statistics suggest.

Granted the evidence of Mr Williams and Professor Triggs was different and was to the effect that more accidents would produce more fatalities but they failed to explain why they thought that. Their argument seems to be that the court should extrapolate or by necessity conclude that more accidents equals more fatalities and then increase that probability because of the inherent risks. I cannot say based on the evidence that the switch will necessarily produce more fatalities than would normally be expected on our road traffic network. The evidence lacks that clarity and it is insufficient in my respectful view to draw that conclusion. I am reminded of what was said in the Canadian case cited earlier - what is asked of the trier of fact is to make an informed judgment not a leap of faith.

If I am wrong in these conclusions there remains the issue of the impact of the so-called remedial measures taken by the respondent, the education programs and such like and the proposed enforcement plan testified to by the Commissioner of Police. I am bound to observe that like the applicant much of this evidence took me by surprise. There has been a distinct paucity of information placed in the public domain about these measures and one cannot help the overwhelming impression that the public are being spoon-fed tidbits as and when the respondent sees fit. Only now probably as a result of the national and international publicity these proceedings are receiving plus the fact that switch day is fast approaching has there been saturation coverage in the media of the respondents proposed plans. Very unlike Sweden which had four years of extensive publicity of the proposed change.

The lack of transparency over the past 10 months has been obvious. Those who preach it should practice it. To do otherwise breeds distrust and notions of secret plans in dark places and erodes confidence in public institutions which are there to serve not to rule and which are funded not by some amorphous bureaucracy but by the taxpayer. Had this been done these proceedings could well have been avoided.

Having reviewed the measures disclosed by the testimony of the Land Transport Authority and the Commissioner of Police I have come to a conclusion similar to Mr Hillier. These measures will not remove the inherent risks completely for that is an unachievable ideal. But they will go a long way towards minimizing them and how far they will go in reality will also depend on the respondents capacity to maintain them as ongoing and viable risk management strategies. The suggestion was made that these plans and strategies are paper plans only and do not correspond with the actuality. I have seen nothing in the evidence to support that and some degree of trust must be placed in appointed public servants that they will carry out to the best of their ability their

designated tasks, functions and plans.

The legal arguments:

Extensive and detailed submissions have been made by both parties as to the applicable law and proper interpretation of the article 5(1) right and it is only fitting that I also deal with these though not to the depth they deserve in view of the time constraint we are operating under.

Part II of the Constitution prescribes the fundamental rights that every citizen of Samoa enjoys. Article 4 provides that any citizen may apply by appropriate proceedings to the Supreme Court to enforce those rights and pursuant to Article 4(2) the Supreme Court is empowered to make all such orders as necessary and appropriate to secure the enjoyment of such rights.

The applicants have brought this application under article 4 for orders declaring the relevant provisions of the road switch legislation unconstitutional. They say it is unconstitutional because the switch poses a known and real risk of direct and immediate threat to life when implemented and further the respondent has failed and will fail to take appropriate measures to protect the lives of its citizenry. Secondly that the relevant statutory provisions would expressly or in their practical application subject the owners of all left hand drive vehicles to a disability and/or restriction in that they would be forced to drive on a side of the road their vehicles were not designed for thereby violating the freedom from discriminatory legislation provisions of article 15(1) and 15(2) of the Constitution.

Although the applicants have made an issue of it, as I understand the respondents submission, the respondents are not questioning this court has jurisdiction to issue the orders being sought provided such orders are "necessary and appropriate". The question is more whether the relevant articles have been breached making such orders necessary and appropriate. The dispute centers around the issue of breach. This necessarily involves a consideration of the proper interpretation of the articles in question. As stated in the earlier decision of the court, article 5(1) is arguably the well spring from which all other protective rights emanate, its pre-eminent position as the first of the fundamental rights guaranteed by Part II of the Constitution underscoring its importance.

The applicants arguments are many and varied but in summary they are firstly: that article 5(1) covers both intentional and unintentional killings. Secondly, that the respondents interpretation that it covers intentional killings only is unduly narrow and restrictive. In this regard they rely on decisions of the European Court of Human Rights on article 2(1) of the European Convention on Human Rights which is similar in wording to our article 5(1). Thirdly, the applicants argue that there should be implied into article 5(1) a duty on the part of the State acting through the respondent to refrain from conduct the effect of which will present a serious risk to the lives of its citizens. Fourthly there is a positive duty on the State to protect life and fifthly in construing article 5(1) the court

should have regard to its international treaty obligations under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights to which this country is a party.

In response the respondent argues: firstly that article 5(1) is clear enough. It extends only to intentional deprivation of life and does not cover unintentional killings. Any other interpretation they say ignores the realities of the modern state and if we were to accept the applicants argument, then every action and inaction by the State could be construed as infringing the right to life protection. The respondent seeks to distinguish the European Courts decision because of the different wording of article 2(1) of the European Convention.

As to the implied term argument, the examples used by the applicants have no application because they relate to freedom of political communication which is a necessary implication into the Australian Constitution in order to render workable other provisions of that constitution. They say that what the applicants are asking the court to do is not to imply a term into article 5(1) but to enlarge it beyond its clear provisions. But in any event even if there is a positive duty to be implied the evidence shows the respondent has taken appropriate measures to safeguard the lives of its citizens.

Constitutional interpretation:

The approach to constitutional interpretation was averted to in the strike out decision being the generous interpretation doctrine of Lord Wilberforce as adopted by our Court of Appeal in the landmark case of ***Attorney General v Saipaia Olomalu*** [1980] WSCA 1. The Court of Appeal talked about "giving primary attention to the words used" and "the undoubted truth that the function of the court, if the relevant part of the Constitution is clearly expressed, is to give effect to those clear words". This was reaffirmed by the Court of Appeal in ***Mulitalo v Attorney General*** [2001] WSCA 8 where it said:

> "The courts do not have the power or ability to go beyond the clear and unequivocal words used. General words in the preamble are not a mechanism whereby the courts can extend beyond the clear boundaries contained in the Constitution. The Preamble sets the scene within which the powers and responsibilities established by the Constitution are to be exercised but they are not a general licence to avoid the clear words which have been employed."

The last part of this passage has added significance here because the applicants also rely on parts of the preamble to the Constitution and the Christian principles enshrined therein.

Conclusions on the law:

I have considered the arguments of the applicants and the respondents and the very full and thoughtful submissions they have made. I am in respectful agreement with the

respondent. The words of article 5(1) are clear enough. The article was designed to cover an intentional deprivation of life hence its use of the word "intentionally". The importance of what was under discussion was not lost on the framers, the passage cited at the beginning of this judgment from the Constitutional Convention Debates indicates they well understood its significance. The choice of the word "intentionally" was deliberate. Had they intended that unintended killings would also be covered there would undoubtedly have been a debate as to its implications for cases such as manslaughter, reckless killing or the like, much like the intensity of debate on the issue of capital punishment that is contained in the Constitutional Convention Debates of 25 August 1960 at page 107 onwards.

Such an interpretation is I believe in keeping with the proper approach to constitutional interpretation laid down by the authorities. It gives primary attention to the words used because the court does not have the power or ability to go beyond them where they are unequivocal and clear. It is not doubted that our constitutional state is founded on Christian principles historical process which led to the document is clear but these matters are subservient and must be subject to proper principles of constitutional interpretation as laid down by our courts.

It is also to be noted that a contrary interpretation would as suggested by the Attorney impugn into the realm of those aspects of modern life which are many, governed by legislation. If such be the intention that is a matter properly left for the legislature not the courts for they involve matters of policy which are rightly the province of that house, not this. There is no evidence the framers of the Constitution had this mind when formulating article 5(1) or intended it to be the test that if a government reasonably foresees a serious risk to its citizens that it must refrain from an activity that it perceives rightly or wrongly to be for the greater good. Thus governments are permitted to send its sons and daughters to war asking of them the ultimate deprivation of life and the highest sacrifice. The remedy against such actions if such be required is change through established democratic processes.

True enough the European Courts decisions in relation to construction of article 2(1) of the European Convention a provision similar to our article 5(1) took a different view. And ***Osman v UK*** Case 23452/94 (28 October 1998) and ***Makaratzis v Greece*** Case 50385/99 (20 December 2004) concluded that article 2(1) includes protection from unintended death. But article 2(1) of the Convention is significantly different from our article 5(1) because it starts off with the sentence: "Everyones right to life will be protected by law." These words import a positive duty to protect human life and are conspicuously absent from our article 5(1).

The court in ***Osman*** was specifically concerned with the first sentence of article 2(1) and the court in ***Makaratzis*** said it was dealing with article 2 as a whole the text of which reads:

> "1. Everyones right to life shall be protected by law. No one shall be deprived of

his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b in order to effect a lawful arrest or to prevent escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a not or insurrection."

Those decisions must therefore be read with that in mind. Further, the court in ***Osman*** said:

"that it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge"

and that article 2(1) was to be applied in a manner that did not impose an impossible or disproportionate burden on the State. I note also that ***Osman*** has not been followed in a number of other jurisdictions: see for example ***Sacramento v Lewis*** 523 US 833 and ***Hosford v John Murphy and Sons Ltd***. [1987] IR 64 where it was held that accidental, negligent and even recklessly indifferent conduct of the State resulting in loss of life does not trigger the right to life or bodily integrity guarantees.

In ***Lawson v Housing NZ and Minister of Housing and Minister of Finance*** (unreported) 29 October 1996 it was contended that section 8 of the New Zealand Bill of Rights Act which though worded slightly differently to our article 5(1) is that countrys equivalent provision, it was argued the provision includes not only the right not to be deprived of life but also the right not to be deprived of the things necessary to support that life, such as in that case adequate and affordable housing. The court held and I quote from page 82 of the judgment:

"Whilst this court should have regard to international human rights norms in interpreting and applying the New Zealand Bill of Rights Act and whilst a liberal interpretation approach is warranted, the court is ultimately constrained by the wording of the section itself. It requires an unduly strained interpretation of s.8 to conclude that the right not to be deprived of life encompasses (the right sought by the applicant/plaintiff.)."

And further on:

> "The suggested role also involves a massive expansion of judicial review, since it would bring under judicial scrutiny all of the elements of the modern welfare state. As Oliver Wendell Holmes would have pointed out, those are issues upon which elections have been won and lost. The judges need a clear mandate to enter that arena and (the relevant section) does not provide that clear mandate."

Similarly in Canada the court in ***Clark v Peterborough Utilities Commission*** (1995) 24 OR (3rd) 7, in respect of a similar claim said:

> "It goes beyond (the relevant provisions of the Canadian Rights Charter) right to life and security of the person to seek a certain level of means and services as a guaranteed right. This type of claim requires the kind of value and policy judgments and degree of social obligation which should properly be addressed by legislatures and responsible organs of government in a democratic society not by courts."
> [**The words in parenthesis in these quotes are mine**]

I could not have put it better myself. Other authorities in the same vein have been cited in the respondents submissions. In this regard the applicants argument cannot succeed.

The applicants have also argued for a term to be implied into article 5(1) that the State must refrain from conduct which poses a serious risk to the lives of its citizens. They base this on the Australian case of ***Australian Capital TV Limited v The Commonwealth*** (1992) 177 CLR a decision of the High Court of Australia. But as pointed out in the respondents submissions, that implication was drawn by the High Court in order to make workable other parts of the Australian Constitution, in that case provisions as to representative government which are an important and necessary part of any constitution document and any system of government. As noted by Brennan J. in the subsequent decision of ***Lange v Australian Broadcasting Corporation*** (1997) 145 ALR 96, the implied freedom confers no rights on an individual, it is negative in nature, it invalidates laws and consequently creates an area of immunity from legal control, particularly from legislative control.

In the present situation, the applicants have not identified any express term or parts of the Samoan Constitution that can only be rendered workable by granting the application that they seek. That is because as far as I can determine there are no such terms or parts requiring this implication be drawn. The body of Australian case law relied on has no application to the present situation. The decisions on article 2(1) of the European Convention likewise do not assist the applicants here bearing in mind the observations previously made.

It must also never be forgotten the implying of terms into a written Constitution is not an exercise to be lightly undertaken. There must be clear and persuasive reasons and a basis

for doing so. The Constitution of this country is the product of a long and often painful struggle beginning with the *mau o pule* when Germany ruled colonial Samoa. It had its origins in the Fono of all of Samoa held at Lepea in 1946 where representatives of all the traditional districts met to discuss self government. Ours is a history of orderly but a step by step development towards the inevitable goal of independence. In the words of a New Zealand administrator of the time:

> "It is no way our desire nor that of the New Zealand Government or the Trusteeship Council of the United Nations to give you a palagi plan to govern your country. This is your country and you should make the plan. When you have produced this plan it is for us as good friends to discuss it and to see any weaknesses that may make trouble in the future. We wish to help you fit into the world."

As acknowledged by New Zealand High Commissioner JB Wright in his opening speech at the 1960 Constitutional Convention:

> "The path leading to self-government and independence has been a long one and some of Samoas greatest patriots and leaders have not been spared to see ahead the end of the road. May they rest in peace in the knowledge that those who succeeded them have seen to it that their labours were not in vain and Samoa when it becomes independent will be a house built on rock".

The Samoa Constitution was the end-result of two constitutional conventions, one in 1954 and one in 1960. Its drafting and consideration was guided by a working committee of distinguished figures of Samoan history: Luamanuvae Eti Alesana later to become Prime Minister under his title Tofilau, Mata'afa Faumuina Mulinuu II our first post-independence Prime Minister, Tupua Tamasese Meaole and Malietoa Tanumafili II our first Heads of State, Professors JW Davidson and Colin Aikman two reputable legal scholars of the time from New Zealand, not to mention the many matai who played a part in the formulation of the Constitution document. A document noted by Lauofo Meti Secretary of the working committee in his work "as one designed to lay firm foundations on which the nation could build, a document born with high hopes to make this country something more admirable than a dictator ridden republic". The slogan '*good government is no substitute for self government*' became '*self government must become good government*'. Tinker with such a Constitution at your peril.

That is the document the applicants now seek to imply a term into. If such a course of action be necessary in order to give it working effect, the court will not hesitate to do so but the case for that must be clear, obvious and without question. As the Court of Appeal said in ***Olomalu***, "momentous constitutional changes are not held to be brought about by a side wind or loose and ambiguous general words." The applicants have not in my view demonstrated the necessity to make the constitutional implication they seek.

The applicants have also argued that notwithstanding what is in article 5(1), the State has

a positive duty under the Constitution to generally protect life. Here they also seek to rely on article 15(1) and article 2(1) of the European Convention and the ***Osman*** decision. The court has already dealt with the latter matters.

In relation to article 15(1), I do not agree that it imposes a positive duty on the State to protect life, neither is that the combined effect of articles 5, 15 and the Constitution as a whole. But even if there were such a duty, such a duty cannot be absolute. A good example is a domestic violence situation. If the applicants are correct it would mean that a state organ having the statutory power to intervene in a domestic violence dispute in order to protect the life for example of a child would be in breach of article 5(1) if it failed to do so. Likewise the Department of Labour would be in breach of article 5(1) if it failed to ensure safe building codes and practices and a fatality results. Likewise doctors who failed their statutory obligations to patients absent of negligence might become liable. The implications are endless and it is conceivable the country would become bankrupted in trying to comply with all such duties imposed on the State. There is no evidence our framers intended it to work that way and it would be tantamount to opening a pandoras box. The court would be very hesitant to take that path without compelling reason. Furthermore, such a duty if it exists must have limits and economic reality is legitimately one such limit. Article 5 itself has limits imposed on it by virtue of article 5(2) where deprivation of life is permitted in certain situations. The article 5(1) right is therefore not an unlimited or unfettered one.

The final argument of the applicants is the international treaty obligations argument. This was touched upon in the strike out judgment and I have considered the further submissions made by counsels. I see no reason in those to change my position which is reinforced by what the court said in ***Lawson*** namely that while this is a relevant consideration the court is ultimately constrained by the wording of the provision in question.

Decision:

The applicants challenge must fail. It fails on the facts and it fails on the interpretation of article 5(1). Article 15(1) does not assist the applicants because as pointed out in the respondents submissions, there is no inequality between the driver of a left hand drive vehicle and the driver of a right hand drive vehicle. Both are subject to the same set of rules, the same set of laws. The difference is the degree of risk of accident carried by the left hand drive driver, but that is not to be confused with a legal inequality which is what article 15 is all about. Article 15(2) does not assist either. The applicants cannot bring themselves within the categories therein stated and are unable to show that the disability or restriction of a left hand drive driver is based on "descent, sex, language, religion, political or other opinion, social origin, place of birth or family status".

All this is not to say that this application should not have been brought and heard. There is no doubt the applicants as a voluntary community group have brought it in the interests of the public as a whole on a matter of national significance for as observed in the strike

out judgment, the consequences of this road switch will endure long after all our bones have turned to dust. To characterize the applicants as a vocal minority is perhaps unduly harsh. But they can take comfort in the fact that so were the Christians a vocal minority in the land of the Romans. The fundamental rights of any Constitution are designed to protect not only the rights of the majority but the minority in particular.

Before I close I wish to say something to the lawyers involved. They are to be commended for their selfless service in these proceedings. I was concerned at the strike out phase by the somewhat let us say intemperate language that was being used in the written materials submitted and I would be failing in my duty as a judge to point that out to them as officers of the court. But I am very glad to observe that counsel have risen above the pressures of the occasion and the politics and emotions of a difficult and challenging case, and for that counsels are to be commended. All young lawyers should aspire to this standard.

That a government would embark on an undertaking such as this that even its own experts acknowledge places its citizens at risk can be disconcerting. For organizations such as the applicants it was alarming and in their view unwarranted and irresponsible. But if a government does so it is not thereby in my respectful opinion acting in breach of any of the fundamental rights provisions of the Constitution. That it would do so however without first fully consulting the citizens thereby affected does give one pause for thought, for one would expect that if you are going to risk my life at least you should first seek my views.

I have no quarrel with the respondents argument that the government does not have to seek the permission of its citizens before it allows a dangerous activity to be carried on in the country or allows a dangerous situation to continue. That is necessary in order to allow for a functioning government. But where the activity or situation endangering the majority of a citizenry in this case the 14,000 out of 18,000 who will be driving on the "wrong" side of the road is deliberately embarked upon, it must surely behoove an administration if not as a legal obligation then as a moral one to seek the views of those likely to be affected by such a momentous change. Irrespective of however noble the purpose or good the aspiration may be for its actions. The respondents own legislation recognizes this: see section 5(1)(e) of the Land Transport Authority Act 2007.

It is written in Gallations that ye shall reap what ye sow. Let us make a fervent prayer that the switch is not a harvest of mayhem and destruction. And the inevitable question that no one has asked in this whole exercise does arise, what if New Zealand and Australia change the side of the road that they drive on? Some may say that is inconceivable, but it was inconceivable a few years ago that we would be where we are now.

Costs:

To save further time, expense and the parties having to come back and address this issue I will deal with it now. Bearing in mind all factors that have been canvassed in this

judgment in particular that the expert testimony of the applicant was also beneficial to the respondents and vice versa, there will be no order as to costs. Each party will bear their own.

JUSTICE NELSON