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Justice for "criminals"

The guest editorial for this issue consists of four extracts from a very lengthy statement (28 typed A4 pages) dated 31 October 1994, by the Public Issues Committee of the Auckland District Law Society. The statement is entitled "Coddling the Crims? Judges, Human Rights and the Adversary System". The Committee is an autonomous one and expresses its own views. Although the 10 members are appointed by the Council of the Auckland District Law Society the statement does not represent the views of the Council, much less of all Auckland practitioners. Copies of the full statement can be obtained through the Auckland District Law Society.

Synopsis

In this paper we:

- Examine the role of the judges in relation to human rights.
- Show how our human rights legislation has an international and historical context
- Explain why it is that judges often have less choice when making decisions than may be commonly understood.
- Examine some fundamental changes which appear to be taking place in our underlying model of criminal dispute resolution — the adversary system.
- Show that a modified and more flexible model is evolving, with hopefully advantageous results for the community.

We pose the question: are the judges really just coddling the crims? We answer in the negative, in summary because:

- In accordance with their oaths of office, the judges generally act in obedience to the will of Parliament as expressed in various human rights statutes which in turn have been enacted in fulfilment of international obligations which we, as a country, have freely and voluntarily undertaken.
- When sentencing offenders, judges almost always have access to much more information than is revealed to the public through the media.
- A sentencing judge is obliged to have regard to sentencing tariffs set in previous cases in higher courts.
- The development of a more flexible model for our criminal justice system is creating a situation in which the rights of all persons affected by a decision should be taken into account when a decision is made, particularly at the dispositional stage of the process.

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Human Rights and Criminal Justice

The human rights movement thus has roots that reach back into history for hundreds, even thousands of years and it is a truly international movement too, having been born from the worst experiences of many races and nations.

Numerous significant events — some long ago, some more recent — have contributed to the recognition of human rights, both internationally and in our own country. Many of these events involved acts of the grossest inhumanity imaginable, on a scale which is difficult to conceive. It is easy to forget, for example, that in the twentieth century there have been several genocides in which millions upon millions of people have been murdered by *their own governments.*

It is legitimate to ask, however, what the prevention of tyrannical and murderous dictatorships has to do with our system of criminal justice. The answer lies in understanding the distinction between authoritarian or dictatorial governments and systems of limited government. In an authoritarian or dictatorial government, all power resides ultimately with a small group or even a single individual. By contrast, in a system of limited government there should be a separation of powers between the legislative, executive and judicial branches. No one branch has ultimate power. Each acts as a check on the other.

In a system of limited government there should also be a system of checks and balances in relation to *agents*

of the state, eg the police. Parliament prescribes the limits of police power, the police administer the power conferred by Parliament and the courts act as a check on the administration of the power.

So, for example, in an authoritarian system, there will often be nothing to prevent the use of police power for political purposes. Indeed, it may be accepted that it is part of the role of the police to uphold the existing political order. By contrast, in our kind of political system, the police are, in theory at least, politically neutral.

The Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the New Zealand Bill of Rights Act 1990 all recognise the right of citizens to be free from the invasion of their privacy by unlawful searches. In New Zealand the police cannot generally search people's homes without a warrant. Warrants are issued only when sufficient evidence has been placed before a judicial or quasi-judicial officer. If the police carry out an unlawful search a court may, in a subsequent criminal trial, exclude evidence wrongfully obtained. As a consequence of the exclusion of evidence a guilty person may walk free. Search warrant cases are therefore an example of police powers being subjected to checks and balances and of human rights being given effect at the point where state power clashes with individual freedom. These checks are imposed for the benefit of all citizens, not just the accused.

As a result of the ever-increasing recognition of the need to ensure the observance of human rights, governments in many nations have come to adopt a rights-based approach to the protection of individual freedoms. Since the enactment of the New Zealand Bill of Rights Act 1990 our own courts have inevitably given human rights an increased emphasis. In a recent landmark case a Court of Appeal judge (Hardie Boys J in *Baigent v Attorney-General* (unreported, CA 207/93)) said:

> The New Zealand Bill of Rights Act, unless it is to be no more than an empty statement, is a commitment by the Crown that those who in the three branches of the Government exercise its functions, powers and duties will observe the rights that the Bill affirms. It is I consider implicit in that commitment, indeed essential to its worth, that the Courts are not only to observe the Bill in their discharge of their own duties but are able to grant appropriate and effective remedies where rights have been infringed. I see no reason to think that this should depend on the terms of a written constitution. Enjoyment of the basic human rights are the entitlement of every citizen, and their protection the obligation of every civilised state. They are inherent and in and essential to the structure of society. They do not depend on the legal or constitutional form in which they are declared . . .
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> In the limited range of cases that have thus far come before it, this Court has been consistent in the view that the terms of the Covenant and the terms of the Bill of Rights Act itself require a rights-centred response to infringements. That is not to exclude other objectives: to ensure compliance in the future, and to secure the wider public interest. But the primary focus has been on providing an appropriate remedy to a person whose rights have been infringed . . . Thus the courts have responded to breaches of sections 21, 22 and 23 by adopting a rule of prima facie exclusion of evidence obtained in consequence of the breach. This has certainly had the effect of securing general recognition by law enforcement authorities of the rights affirmed by those sections. And while there are doubtless those who believe that this has favoured criminals to the detriment of the public interest, it may also have advanced that interest in other ways of emphasising the importance of what is often taken for granted and by demonstrating that the Courts will not be party to breaches, but will insist on preserving the integrity of the administration of justice.

The point is that if rights are to be more than mere words they have to be enforced and they must be given equally to everyone: the just as well as the unjust — the guilty as much as the innocent.

Common sense

Most people would probably agree that the rights and freedoms affirmed in the Bill of Rights Act are, on their face, perfectly reasonable. But as has been observed, a primary function of a bill of rights is to limit the powers of the state in order to preserve the freedom of the individual. One of the results of that is to place restrictions upon agents of the state.

A person who shares the human rights perspective outlined above will find it relatively easy to accept that there have to be restrictions and that an acquittal may be the necessary price of ensuring that an innocent person is not convicted. But those who do not share the human rights perspective tend to focus on results. If the result of a trial appears to be wrong, the whole system will appear to be wrong. The law will appear to be an ass and the Bill of Rights Act will appear to be nothing more than a rogue's charter. To those people, no matter how much justification for a decision there may be in legal theory or constitutional principle, if the result is "bad" the judge's decision must be "bad" or else the whole process which led to the decision must be "bad".

Understandably, this kind of attitude is most likely to be expressed when an accused person has been "let off" or sentenced leniently, particularly if the case has sensational features and has had more than usual publicity.

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The suspicion that judges are engaging in coddling is apt to arise at each of the two stages of the criminal justice process: at the fact finding stage because the judge may be perceived as "letting someone off on a technicality" and at the dispositional stage because the sentence may be perceived as too lenient. What the public often fails to understand is that the judge is operating within an established legal framework at both stages of the process. At the fact finding stage the judge is duty bound to give effect to the provisions of our human rights legislation. That legislation has been put in place as the fulfilment of international obligations which we as a country have voluntarily undertaken. At the dispositional stage, while having a certain amount of discretion, the judge is certainly not free to do as he or she likes. The public rarely is made aware of all the facts which are known to the judge or sees the anxious consideration which the judges invariably give when deciding what is to be the appropriate penalty.

Coddling the Crims?

To return, then, to our opening theme: is it right to criticise our judges for placing too much emphasis on human rights?

Is it true that the judges are really just coddling the crims?

Our answer is an emphatic "No!", in summary because:

- In accordance with their oaths of office, the judges generally act in obedience to the will of Parliament as expressed in the various human rights statutes which have been discussed. Our human rights legislation has been enacted in fulfilment of international obligations which we, as a country, have freely and voluntarily undertaken. Those international obligations have arisen from the combined human rights experiences of virtually all of the nations of the world stretching back for hundreds, even thousands, of years.
- When sentencing offenders, judges almost always have access to much more information than is revealed to the public through the media.
- A sentencing judge is obliged to have regard to sentencing tariffs set in previous cases in higher courts.
- While there has been a much greater emphasis on human rights since the introduction of the Bill of Rights Act, and while it is true that we are going through a period of adjustment to the new regime under that Act, the development of a more flexible model for our criminal justice system is creating a situation in which the rights of all persons affected by a decision should be taken into account when a decision is made, particularly at the dispositional stage of the process.

As Abraham Lincoln allegedly said, you can please some of the people all of the time and you can please all of the people some of the time but you can't please all of the people all of the time. Nevertheless, it is always possible to make improvements. In our view the criminal justice system is at present undergoing a healthy phase of self-examination, the result of which is likely to be a better deal for those involved in or affected by its processes.

In short, we do not believe it is necessary to throw out the human rights baby with the politically-stirred bathwater. □

Appointment of Justice Rabone

On 20 October 1994 the Attorney-General announced the appointment of District Court Judge John David Rabone to be a Judge of the High Court. In accordance with common practice the new Judge is being appointed a temporary Judge in the first instance, but the Attorney-General stated that the appointment would be made permanent in due course.

The Judge has been a District Court Judge since 1983. He has sat as a temporary Judge of the High Court for two short periods. These periods were in 1991 and 1993. Following his swearing-in the new Judge will transfer to Christchurch where he will be one of the resident Judges.

Justice Rabone was born in Wanganui on 4 December 1937. He had his schooling in Hamilton and then attended Victoria University of Wellington from which he graduated LLB in 1962 and LLM in 1963. In 1967-1968 he was a partner in the Wellington firm of Sladden Stuart Joseph and Lawrence. From 1968 to 1977 he was Crown Counsel in the Crown Law Office, and from 1970 to 1977 held the office of Crown Solicitor, Nelson. He returned to private practice in 1977 and was a partner in the firm then known as Watts and Patterson until his appointment to the District Court bench in 1983.

Since its inception Justice Rabone has been a member of the Criminal Practice Committee of the Justice Department; and he was on the Institute of Criminology Advisory Committee for Victoria University of Wellington in the years 1987 to 1991. He has also been on advisory committees for the Law Commission in respect of the Evidence reference, and the Police Questioning Discussion Paper.

The new Judge and his wife married in 1969. They have a son and a daughter. Mrs Frances Rabone is the daughter of Sir Richard and Lady Denby. Sir Richard was President of The Law Society, in England, 1977-78. The Judge's recreations are listed as gardening, golf and reading. □

Case and Comment

The doctrine of part performance

Fleming v Beevers [1994] NZFLR 109; [1994] 1 NZLR 385

At [1993] NZLJ 239 the need for the Contracts Enforcement Act 1956 was questioned. Mr Dugdale concluded that the statute should be repealed and he advanced six arguments in favour of change. He concluded that there is no need for such legislation in New Zealand. Later in 1993, in *Fleming v Beevers* Tipping J again considered the doctrine of part performance and the above legislation.

The case

In *Fleming v Beevers* Miss Fleming brough an action against the personal representatives of her late defacto husband. She claimed on conventional constructive principles an interest in the home she and Mr Beevers had occupied. In the High Court she was awarded a third interest and from that decision neither side appealed. Miss Fleming also claimed that Mr Beevers had promised to leave her in his will his half interest in a property that they owned together in Queenstown plus a grand piano. The High Court dismissed this claim, Fraser J held that whilst each party intended leaving the other their share of the Queenstown property by will this did not amount to a legally binding contract of which specific performance could be awarded. Nor was the Judge satisfied that there was an enforceable contract in relation to the piano. As a valid will was in existence leaving the Queenstown property to Mr Beevers' children, that stood, and Miss Fleming received no part of Mr Beevers' half of the property in Queenstown.

In the Court of Appeal Tipping J agreed with Fraser J about the grand piano but with regard to the Queenstown property it was held that there had been an intention to create legal relations and that each party had provided consideration. The vital issue concerned the doctrine of part performance. It was argued that even if there was a contract, otherwise enforceable, there was no note or memorandum for the purposes of the Contracts Enforcement Act 1956 and therefore the purely oral contract to leave each other their half share in the property was unenforceable.

Prior to *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88 the law relating to part performance was far from clear. The leading decision had been that of *Steadman v Steadman* [1976] AC 536 where their Lordships had spoken with divergent tongues. In the *Dellaca* case Tipping J reviewed not only the textbooks which considered the doctrine of part performance but also the decisions in England, Australia and New Zealand and had concluded that a Court must consider three points when considering the doctrine:

1 Was there a sufficient oral agreement such as would have been enforceable but for the Act?
2 Has there been part performance of that oral agreement by the doing of something which:
   (a) clearly amounts to a step in the performance of a contractual obligation or the exercise of a contractual right under the oral contract; and
   (b) when viewed independently of the oral contract was, on probabilities, done on the footing that a contract relating to the land and such as that alleged was in existence.
3 Do the circumstances in which that part performance took place make it unconscionable (fraudulent in equity) for the defendant to rely on the Act?

His Honour emphasised that what was required was an act which was in furtherance of the contract not merely in reliance on it. In the present case Tipping J altered 2(b) above to read "consistent with that" rather than "such as that alleged", but otherwise used these points as his reference point.

In *Fleming v Beevers* the Court was not dealing with a single term contract as had been the situation in most of the reported cases. This was a composite transaction evident from the fact that the parties had agreed:

(a) to buy the land together;
(b) how the purchase was to be financed;
(c) how title was to be taken between them;
(d) how Mr Beevers would guarantee Miss Fleming's mortgage;
(e) that she would indemnify him; and
(f) that each would leave to the other his or her interest by will.

The Court found that by signing the agreement to buy the Queenstown property and carrying it into effect and raising the money which constituted her half share of the purchase price Miss Fleming had performed acts of part performance of her composite oral contract. The key question then became, whether that concluded the matter or whether point 2(b) above had to be satisfied.

It was noted that the land was the same land throughout as both the acts of part performance and the oral agreement concerned the Queenstown property. This made the case similar to that of *Brough v Nettleton* [1921] 2 Ch 25 where it was held that the taking of possession under an oral agreement was a sufficient act of part performance in relation to the agreement as a whole. The total agreement in *Brough v Nettleton* had involved both a lease and an option to purchase. Viscount Dilhorne in *Steadman v Steadman* [1976] AC 536 whilst discussing *Brough's* case, had said that if equity had power to prevent the Statute of Frauds from operating to facilitate fraud, then he could see no

justification for concluding that its power to do so was restricted to a case when the part performance was of the provision relating to land.

Tipping J concluded that in the present case the acts of part performance clearly identified the land and were consistent with the oral contract which was alleged to be part of the transaction as a whole. They were also acts of part performance of several terms of the composite oral contract. His conclusion was therefore that there were sufficient acts of part performance to make the composite oral transaction enforceable as a whole. The Court could enforce the oral obligation which rested on Mr Beevers to transfer his half of the Queenstown property to Miss Fleming.

The facts of *Fleming v Beevers* and the decision must surely add support to the view that the Contracts Enforcement Act 1956 is not necessary, and that the decision to transfer Mr Beevers' share of the Queenstown property to Miss Fleming could have been arrived at by a far less difficult route had the Act not existed. A constructive trust argument succeeded for the property the couple lived in when not on holiday. Indeed Miss Fleming sought to argue that the personal representatives of Mr Beevers should hold the Queenstown property on a constructive trust. Tipping J held that it was too late to raise this submission in the Court of Appeal. His Honour stated that he was unattracted to the proposition on the basis that if there is no obligation in contract, it seemed to be unsound on principle to impose the same obligation by way of constructive trust thereby defeating the Contracts Enforcement Act. If the Act was not in existence and if a constructive trust argument had been argued initially there is nothing to indicate that it could not have succeeded. The facts of the case might have been such that Miss Fleming could have succeeded under the Testamentary Promises Act 1949.

Difficult questions

The case illustrates a number of interesting and difficult questions that remain with the doctrine of part performance. If one is following the three points set out in the *Dellaca* test, and one is faced with a composite oral transaction, then it is by no means clear how wide one can go in defining the total transaction. There may be great difficulties in determining whether an act claimed to be done in part performance is an act which will be considered by the Court to be part of the total composite oral transaction. Without being able to determine the first point of the test it is difficult to go on to the second consideration. Furthermore it could be very difficult to decider whether the acts relied upon as part performance were carried out in performance of the composite oral contract or on reliance of it.

Finally the case is interesting in the way it treated the third point of the *Dellaca* decision. Did the circumstances in which the part performance took place make it unconscionable (fraudulent in equity) for Mr Beevers to rely on the Act? Tipping J stated that if there has been part performance, equity takes the view that the defendant is not charged upon the contract alone but also upon the equities arising from part performance. Therefore it is not the contract alone which is being enforced contrary to the statute but also the collateral equities which arise out of the contract. It is not clear whether his Honour was simply answering his point 3 above or further refining the questions to be considered when considering part performance. Unfortunately the case offers no guidelines for answering this third point, and in a composite transaction it might be very difficult, without more, to decide whether the circumstances in which part performance took place do make it unconscionable for a defendant to rely on the Act. The relationship between part performance, estoppel and other equitable doctrines is not an easy one. Estoppel and constructive trusts could be used if the Contracts Enforcement Act ceased to exist.

In the *Dellaca* case Tipping J referred to a statement that he had made previously to the effect that it might not be a bad thing if a cart and horse were driven through the Contracts Enforcement Act. His Honour thought that this was not a matter for the judiciary.

Fleming v Beevers achieved a just and equitable result on the facts. It may, however, be seen as regrettable that the Court had to arrive at its decision in the manner it did rather than by considering purely equitable remedies.

Nicky Richardson
University of Canterbury

Fixed charges on book debts: A bankers' charter

Re New Bullas Trading Ltd [1994] BCC 36

The floating charge has been without doubt the most important form of security since the late nineteenth century. Yet while a more than adequate security in most cases, the floating charge was always susceptible to having its priority postponed to fixed charge holders and, most importantly in recent years, statutory postponement to preferential creditors. The solution in the mid-1980s to this increasingly pronounced weakness was to extend the ambit of the fixed charge to include the company's book debts and stock-in-trade. The difficulty these early charges could not overcome, however, was how to allow the company sufficient access to the proceeds of the book debts to allow it to trade without turning the fixed charge back into a floating one.

In the recent decision of *Re New Bullas Trading Ltd* [1994] BCC 36 the English Court of Appeal was called upon to consider the second generation of such charges: one that began life as fixed but subsequently floated. The Court's unqualified approval of the charge and its efficacy in evading the English equivalent of s 30 of the Receiverships Act 1993 is thus of particular interest and concern.

The principal activities of New Bullas Trading Ltd were to act as agents for, and to supply personnel to, engineers of major oil companies. The company's major assets were its book debts and these were the subject of a debenture granted in favour of its bankers, 3i plc. The debenture contained the usual fixed charge over the company's book debts and floating charge over the remainder of the company's assets. The fixed charge on book debts, contained in clause 12 of the debenture, was however somewhat unique. It provided that the company would

collect the debts and pay them into a designated bank account and would deal with them only in accordance with directions that might, from time to time, be given by the bank. In default of a direction the book debts were to be released from the fixed charge and were to become subject to a floating charge.

The company subsequently defaulted under the debenture and receivers were appointed. In addition to the debt to its bankers, the company owed substantial amounts to preferential creditors, principally the Inland Revenue, Customs and Excise and the Department of Social Welfare. Such was the company's plight that its assets would realise only enough to satisfy the preferential creditors or the bank but not both.

In England, as in New Zealand, preferential creditors are given priority in some circumstances. Section 40 of the English Insolvency Act 1986, which in its material provisions is equivalent to s 30 of the Receiverships Act 1993, obliges the receiver to pay the company's preferential creditors, in priority to the debenture holder, out of assets coming into his hands under the floating charge. For the purposes of both the English and New Zealand provisions, a floating charge is defined to include one created as such even if it has subsequently crystallised. It does not, however, extend to a charge which as created was fixed. The question on which the receivers sought direction was whether the charge on the book debts was fixed or whether it was in substance a floating one to which s 40 applied.

In the High Court ([1993] BCC 251) Knox J approached the construction of the charge on the basis that, notwithstanding the labels used by the parties in the debenture, it could only be fixed if the debtor was deprived of a sufficient degree of beneficial control. Cases such as *Re Brightlife* [1987] Ch 200 had, in his Lordship's opinion, established that the essential difference between fixed and floating charges was that under a fixed charge the debtor could not deal with the charged property nor remove it from the ambit of the charge. If this was possible the charge was necessarily a floating one. In his Lordship's view the present charge over the book debts, and for this purpose no distinction was made between the debts and proceeds thereof, was necessarily floating. Viewed at the date of creation where no directions had been given, the debtor retained a degree of beneficial control that was inconsistent with a fixed charge.

In the Court of Appeal the matter was approached on a different footing. Nourse LJ, speaking for their Lordships, accepted the bank's primary contention that the effect of clause 12 of the debenture was to create a fixed charge over the book debts while uncollected and a floating charge over their proceeds. The creditors' submission, that the release of the debts was inconsistent with the essential nature of a fixed charge, was rejected:

> The short answer is that here the asset does not cease to be subject to the fixed charge at the will of the company. It ceases to be such because both parties, not the company alone, have determined that if the proceeds of a book debt are paid into the specified account at a time when no directions have been given it shall thereupon be released. The matter is governed by a clear agreement of the parties. Unless there is some authority or principle of law which prevented them from agreeing what they have agreed, their agreement must prevail. ([1994] BCC 36, 41.)

The creditors' contentions also failed as a matter of principle. Implicit in these, and indeed in the judgment of Knox J in the High Court, was the assumption that the concepts of fixed and floating charges have certain essential characteristics that the parties may not contract around. Thus irrespective of the parties' agreement, the effect of releasing the debts from the charge was as a matter of law to make the charge a floating one. In their Lordship's opinion, however, the equitable charge is "a creature of exceptional versatility, malleable to the intention of its creators, adaptable to the subject-matter assigned" (ibid). It was thus open to the parties to provide that the book debts shall be "subject to a fixed charge while they are uncollected and a floating charge on realisation" (ibid) p 42). Having reached this conclusion as to the nature of the charge, their Lordships answered the receivers' question in the negative. As the charge created by clause 12 of the debenture was at its creation fixed, it followed that s 40 did not apply and the receiver was entitled to pay the proceeds of the debts to the debenture holder.

The decision in *New Bullas* will come, given the unfavourable trend in recent years of first instances decisions, as a pleasant surprise for banks and other secured creditors. The decision, however, raises a number of important issues and is not without its difficulties. In particular, the Court of Appeal's judgment warrants comment on three fronts.

A Preferential claims

The Court of Appeal's conclusion that both in principle and on the present facts it is possible to create a charge that at its inception was fixed but later becomes floating has startling consequences. While historically the floating charge has been the most important type of security, the decision in *New Bullas* means that in most situations the secured lender will now be better off with the fixed/floating charge. It also means that the preferential creditor provisions are rendered effectively useless. It is only lenders who have not updated their charges that will be caught.

There are, however, a number of difficulties with this conclusion. First, on the particular facts the Court's decision on the application of s 40 is quite simply wrong. The Court assumes throughout that the charge over the debts and proceeds is the same one, albeit changing in nature. However, it is clear from clause 12 that when released from the fixed charge the proceeds became subject to the general floating charge created over the remainder of the company's assets. The *proceeds* held by the receiver were thus held pursuant a charge that as created was floating. Section 40 ought therefore to have applied.

Secondly, the Court's decision affirms in this area the primacy of the law of contract and the apparent willingness of the law to disregard third party rights. While this is in line with the general trend (see *Fire Nymph Products v Heating Centre* (1992) 10 ACLC 629, such an approach is, nevertheless, subject to the objection that the creation of charges have proprietary consequences that affect third parties. Thus, while as between debtor and creditor it is a matter of contract,

those rights ought not necessarily to be allowed to diminish the rights of other creditors.

Thirdly, in policy terms it is at least questionable whether the parties ought to be allowed to evade the clear legislative direction to grant priority to preferential claims.

This is a point that will be elaborated upon below.

B Objections of principle and policy

Central to the Court's reasoning was the conclusion that there was no principle of law or consideration of public policy that prevented the parties from making whatever contract they chose. Objection may also be taken to this conclusion.

First, the proposition that a charge does not cease to be fixed where the assets subject to the charge may be released from it is controversial and the weight of authority is against it. In Australia, in decisions such as *Hart v Barnes* [1983] VR 517, *Waters v Widdows* [1984] VR 503 and *Norgard v DFCT* (1987) 5 ACLC 527 the contrary proposition has led the Courts largely to reject the possibility of such charges. As it is almost always intended that the company will continue to trade, the debts must necessarily be released from the charge and thus it can only be floating. There are also suggestions in Hammond J's decision in *Commercial Factors v Maxwell Printing Ltd* [1994] 1 NZLR 724 that he too would share this view. In Britain, in decisions such as *Siebe Gorman v Barclays Bank* [1979] 2 Lloyd's Rep 142, *Re Brightlife Ltd* and *Re Wogan's (Drogheda) Ltd* [1993] 1 IR 157, while not rejecting the possibility of such charges the Courts have affirmed that if the assets can too readily be released from the charge it cannot in law be fixed.

As a matter of principle also, the notion that there are no objective criteria which distinguish a fixed and a floating charge is difficult to accept. While the parties are free to utilise one or the other, so long as the law recognises two forms of equitable charge and attaches different consequences to them (for example in respect of priority, registration and preferential creditors) the characterisation of the charge as fixed or floating is a matter of law, not agreement. The point the authorities referred to above agree upon is that in law it is the debtor's beneficial control of the charged assets that is the point of distinction.

Secondly, although it was conceded by counsel that there were no considerations of public policy that prevented the creation of such a charge, it is questionable whether the Court ought to have been content with that concession in the present case. At issue here are not just the contractual rights created between debtor and creditor, but also the order of distribution of the assets of an insolvent company. In both England and New Zealand the distribution of the company's assets in receivership is subject to a legislative direction which reflects the same policy concerns as do the equivalent provisions in winding up (this is especially clear in England where receivership is deemed an insolvency procedure). Whether these considerations are sufficient to deny the parties' contractual freedom may be debatable, but it is surely impossible to dismiss these concerns out of hand.

C Characterising the parties' transaction

The decision also raises a more general question about the proper role of the Courts in characterising the parties' creation. It is perhaps trite law that the Courts look to the substance of what is done, not to the mere form. In broad terms however, the approach of Commonwealth Courts is to derive the substance from the documents rather than looking at extrinsic evidence of the overall effect of the transaction. As the recent decision of *Re Cut Bend & Supply Ltd* (1993) 6 NZCLC 260,228 illustrates, the Court typically begins its enquiry with the labels attached by the parties and seeks inconsistencies that point to the agreement in law being something else. Thus in *Cut Bend & Supply Ltd* the agreement purported to create an absolute assignment of progress payments but the use of "secured" and provisions requiring the assignee to account for sums received pointed to the assignments being by way of security only.

In recent years the English Court of Appeal, in cases such as *Welsh Development Agency v Exfinco* [1992] BCC 270 and *New Bullas,* has shown a marked reluctance to deny effect to the parties' wishes on the basis that what they had created was not in law what they had clearly wanted. In some cases this has been justified by the inadequacy of the legal criteria, but conceptually it seems driven by what is perceived to be the demands of contractual freedom.

A substance based approach, however, is meaningful only if one accepts the existence of objective criteria for characterising the parties' creation. Without such criteria we have little choice but to admit that in our search for features inconsistent with the labels adopted by the parties we have no way in which to refute the parties' assertions. The existence of objectively defined legal institutions are not, furthermore, incompatible with contractual freedom. The parties are free to choose whichever institution they please, but what they cannot do, and what they ought not to be allowed to do, is buy a cat and enjoy the benefits of owning a dog.

Conclusion

While banks in particular will no doubt latch onto the decision with some glee, too great a reliance would be unwise. Those who seek to rely upon the decision would do well to recall that it was the very success of the floating charge that brought the legislative intervention that made the kind of device in *New Bullas* necessary. The "success" in *New Bullas* may well provoke a similar response.

Ross Grantham
University of Auckland

Fees and expertise

The problem is that many lawyers are unwilling to become specialists if the fees they can charge do not reflect their level of expertise. Given the profession's tendency to shoot itself in the foot in the matter of fees over the last 15 years, I have no hope that the public will ever learn that if you pay peanuts for your legal work your lawyer is likely to be a monkey.

Christopher Wallworth
"Will Drafting"
Solicitors Journal
14 October 1994

The International Court of Arbitration for Sport

By Mr Tim Castle, Barrister, of Wellington

In this article Mr Tim Castle highlights the work and jurisdiction of the Court of Arbitration for Sport, established by the International Olympic Committee in 1983. Mr Castle was appointed to the Court in 1991. He has a continuing involvement in sport and its administration, particularly in cricket and rowing. He is honorary legal counsel for the Wellington Cricket Association and the New Zealand Rowing Association. In this article he describes the structure and the work of the Court with accounts of particular cases by way of example.

In compiling this paper the author has referred to a number of separate papers produced for the Sports Law Conference hosted by the Court of Arbitration for Sport in Lausanne, Switzerland, September 1993; and acknowledges his reference to, and use of, material contained in the article by Jan Paulsson (Freshfields, Paris) "Arbitration of International Sports Disputes" 1994.

In 1991 I was honoured to be appointed a member of the international Court of Arbitration for Sport. This was an appointment initiated by the late Sir Lance Cross, former President of the New Zealand Olympic and Commonwealth Games Association. I was then, and still am, the only member of the Court for Oceania.

The Court sits in Lausanne, Switzerland. It is undertaking an increasing responsibility for sports related dispute resolution throughout the world. The history of the Court is interesting, as is its jurisdiction, recourse to which has recently increased in frequency.

The Court derives its being from a proposal to establish an internationl arbitration institution which could deal with disputes directly or indirectly linked with sport. Launched by H E Juan Antonio Samaranch, it was put into practice by the International Olympic Committee in 1983. By it, the International Olympic Committee set out to put at the disposal of any individual or corporate body, private or public, involved with sports activities or their development, an arbitration institution whose members – all appointed for a four year term – are accepted as jurists of quality and with a good knowledge of sports related issues and dispute resolution practices.

Although the Court of Arbitration for Sport was created by the International Olympic Committee which covers its running costs, the members of the Court are completely independent from the Committee in the exercise of their duties and jurisdiction. Quite significant amendments were made to the statute establishing the Court at the International Olympic Committee meeting of September 1990 in Tokyo. Apart from the usual three person panel there is now provision for a one person panel, it having become apparent that in some cases of lesser importance there has been no need for three judges.

The jurisdiction of the Court of Arbitration for Sport is three-fold – contentious proceedings, requests for opinions, and conciliation. Recent examples of contentious proceedings include a claim for damages following breach of a sponsorship contract (see paragraph 6(i) hereof). Numerous legal opinions have been issued including opinions requested by International Federations and National Federations. In addition, the Court is frequently consulted on the wording of arbitration agreements for inclusion in athletes' contracts. It has been called upon to advise International Federations and National Federations wishing to include in their statutes a clause naming the Court of Arbitration for Sport as the sole instance of appeal in respect of disputes. Several international sports federations, have introduced into their statutes clauses providing for recognition of the Court as the sole judicial authority competent to hear an appeal against the decisions of their internal bodies (appeal juries, commissions of appeal, appeals tribunals of federations etc) thereby having a last instance referral to the Court of Arbitration for Sport for any disputes arising from the application of their statutes and regulations. Consistency in treatment of national federations by international federations has featured in the deliberations of the Court.

On the occasion of its 10th anniversary the Court of Arbitration for Sport, under the International Olympic Committee auspices, organised an international conference on the theme "Law and Sport" in Lausanne, 13-14 September 1993.

During the Conference attention was drawn to the necessity of decentralising the Court of Arbitration for Sport in all the continents to ensure the strengthening of international sport arbitration in the world of sport. I support the establishment of regional divisions of the Court and have been liaising with the President of the Australian Olympic Committee over this proposal.

The 1993 conference also endorsed the following statements of principle:

(i) The need to aggressively continue to fight against doping in sport;
(ii) The need to ensure respect for the rights of the parties concerned in a disciplinary sports procedure including the desirability of submitting cases to the Court of Arbitration for Sport; and
(iii) The need to implement measures to support the fight against violence and corruption in sport.

As at 30 June 1993 the Court had dealt with approximately 100 cases. These cases demonstrate the three specific jurisdictions being exercised by the Court:

(i) **The Court of Arbitration for Sport acting as an arbitration court of first (and sole) instance.** This jurisdiction is conferred either under an agreed submission of a dispute to arbitration, or because the relevant contract, rules or constitution of or affecting a national or international sports federation, provide accordingly.

Example: In an award *G v S* 31 March 1992, an athlete who under a sponsorship contract was required to wear clothing bearing the mark of a sports equipment manufacturer, had appeared in public wearing clothing with a different brand name whilst participating in a different sporting activity. This resulted in the immediate termination of the contract by the sponsor. The dispute was heard by the Court of Arbitration for Sport exercising jurisdiction as a Court of Arbitration of first and sole instance. The parties had expressly stipulated two years as the length of time during which the contract for the supply of clothing would apply. The athlete, during the contractual term, began to train and compete in a sport complementary to the sport in which he previously participated and for which he wore the clothing bearing the mark of the sports equipment manufacturer. What he did not do is inform the first supplier that he intended to participate in another competition sport; that as the result he would have to reduce slightly his activity in terms of his principal sport; and that he would have to wear clothing by another manufacturer supplier to the national team of the new sport.

The Court held that the athlete appearing in public wearing clothing with a different brand name in the context of a different sporting activity was not such as to justify immediate termination of the contract by the original supplier of sports clothing. It also ruled that the contractual relations with the original supplier had characteristics of an agreement by the athlete to transfer his name and image to the sponsor for advertising purposes associated with a particular sport. Subject to the duty to inform his sponsor (which was not done by the athlete in this case) the Court held that an athlete practising a particular sport was free to practise a complementary sport: that the sponsor had no reason to hinder that freedom, particularly where the practice of it had no prejudicial effect on the original supplier. Although the Court did not consider that there were grounds for immediate termination of the sponsorship contract, it reduced damages payable to the athlete by 25% for his "concomitant fault in not informing the sponsor".

Another example: A dispute between an international sports federation and a broadcasting company concerned the termination of a five-year contract providing exclusive rights to broadcast world championship matches. The issue was whether the contract had been validly terminated. The Court held that it had not been validly terminated by the international sports federation and although considering that the Broadcasting Corporation was at fault in terms of the contract, justifying a reduction in damages award, the Court ruled that there had been no valid termination of the contract in accordance with its terms and:

> partial compensation (was) awarded to the claimant Broadcasting Company and fixed equitably by the Court of Arbitration in accordance with the rules of applicable Swiss law.

(ii) **The Court of Arbitration for Sport acting as an appellant body.** In this jurisdiction the Court is one of last instance: it responds to an appeal against the decision of an internal decision-making body of a national or international sports federation. The case load of the Court as an appellant body has developed since the second half of 1991, principally following the inclusion of an arbitration clause in favour of the Court of Arbitration for Sport into the regulations of the International Equestrian Federation. This Federation was the first to provide for access to an appellate jurisdiction outside that of its own executive bodies: it has since been followed in this by several international and national federations – as at June 1993, 15 in number. The cases before the Court as an appellant court reflect the recourse available under the regulations of the International Equestrian Federation: most if not all of them involve decisions over doping of horses. Some of the more recent cases have focused on implications of what is under the International Equestrian Federation regulations a reversal of the burden of proof, where it is enough for a penalty to be imposed that analyses performed have allowed the presence of a prohibited substance to be detected. Others have considered the fate, under the International Equestrian Federation regulations, of the presumption of innocence and benefit of the doubt as well as the right (ie the meaningful right) to be heard.

(iii) **The Court of Arbitration for Sport, providing advisory opinions.** Usually outside a contentious environment and often relating to questions of principle, the advisory opinions are not binding, but obviously can be very persuasive. One of the more interesting advisory opinions, given by the Court in June 1991, involved consideration of who can properly come within the term "professional sports journalist" and who is qualified to decide on accreditation of journalists at major international sporting events.

The key to the current and continuing success of the Court of Arbitration for Sport is a continuing guarantee of independence. As it happens, under Swiss arbitration law, an arbitrale tribunal is capable of making an award comparable to the judgment of a State court if, and only if, it provides adequate guarantees of independence. This is the quality which distinguishes the Court of Arbitration for Sport from

internal tribunals or disciplinary committees of sports associations which so frequently are seen as not providing a sufficient guarantee of independence. The independence and indeed, precise legal nature of the awards made by the Court was recently the subject of consideration by Switzerland's highest court, the Swiss Federal Tribunal. In *Gundell v International Equestrian Federation* a 1992 Court of Arbitration for Sport award was challenged and upheld. Gudnell was a professional equestrian and a member of the German Equestrian team. He held a licence granted by the German Equestrian Federation, which entitled him to compete in national and international events. At every renewal of that licence, he submitted himself to the rules of the German Federation, which referred, in the context of international competitions, to the rules of the International Equestrian Federation. The Federation is an association in Lausanne, comprised entirely of national equestrian federations. Gudnell had been disqualified, suspended and fined by the International Equestrian Federation legal commission following a drug test on his horse, performed in connection with a competition in June 1991. He appealed to the Court of Arbitration for Sport.

The arbitrators confirmed the disqualification but reduced the period of suspension and the amount of fine. Gundell challenged the independence of the Court and in particular its independence from the International Equestrian Federation. The close connections between the International Olympic Committee of which the International Equestrian Federation is a member federation and the Court of Arbitration for Sport caused the Swiss Federal Tribunal to hesitate in accepting the independence of the Court. Under the procedure of the Court of Arbitration for Sport, where the Court sits as a court of three, the parties to the dispute may each appoint one arbitrator, who then may appoint a third: in default the President of the Court appoints the panel. Any arbitrator may be challenged by a party if he is connected (or too connected) with the other party, or if he/she has already been involved in the dispute in another capacity. The Swiss Federal Tribunal recognised some "organic and economic" connections between the Court of Arbitration for Sport and the International Olympic Committee because:

(a) The Court of Arbitration for Sport was not an organ of the International Equestrian Federation;

(b) The Court of Arbitration for Sport was not subject to directions from the International Equestrian Federation;

(c) 15 of the body of 60 members of the Court of Arbitration for Sport were unconnected with International Olympic Committee or any federation or national olympic committee;

(d) it was possible to challenge any arbitrator connected or seen to be connected with the International Equestrian Federation

> the CAS . . . retains sufficient personal autonomy . . . in conditions (which) . . . allow that the CAS offers the guarantees of independence upon which Swiss law makes conditional the valid exclusion of ordinary judicial recourse.

Sensitivity to the issue of independence has lead to new initiatives by the International Olympic Committee following, in particular, the September 1993 Conference of the Court. Confirmation of these new initiatives was expected at the Centenary Congress of the International Olympic Committee in Paris in August 1994. The Committee has created a (new) supreme International Council of Arbitration for Sport as one of two bodies created to settle, through arbitration, sports related disputes. The other body is (the existing) Court of Arbitration for Sport. The seat of the International Council of Arbitration for Sport and the Court of Arbitration for Sport will remain in Lausanne, Switzerland. The task of the International Council is to facilitate the settlement of sports related disputes through arbitration and to safeguard the independence of the Court along with the rights of the parties. The International Council of Arbitration for Sport is composed of 20 members, four of whom are appointed by the International Sports Federations; four appointed by the association of National Olympic Committees, four by the International Olympics Committee from within or outside its membership; four by the twelve members of the International Council listed above after appropriate consultation with a view to safeguard the interests of athletes; and a further four co-opted and chosen from among personalities independent of the bodies designating the other members of the International Council of Arbitration for Sport. So the independent personalities and those appointed to safeguard the interests of athletes are co-opted to the International Council, progressively, by members appointed by the International Federations, National Olympic Committees and International Olympic Committee. The International Council then appoints the arbitrators of the Court of Arbitration for Sport who shall number 100. The International Council members are not able to act as arbitrators of the Court, nor as counsel for one of the parties in proceedings before the Court. The International Council of Arbitration for Sport looks after the financing of the Court of Arbitration for Sport; has jurisdiction to set up regional or local, permanent or adhoc arbitration structures; and may take any action which it deems likely to protect the rights of the parties, and in particular to better guarantee the total independence of the arbitrators and to promote the settlement of sports related disputes through arbitration.

A new code of sports related arbitration has been produced in draft form for consideration by the International Council for Arbitration of Sports and members of the Court. It develops a series of procedures and procedural rules in conformity with international arbitration mechanisms and establishes the Court in two divisions – the Ordinary Arbitration Division and an Appeals Arbitration Division. The Ordinary Arbitration Division constitutes panels, the mission of which is to resolve disputes submitted to the ordinary procedure. It will function in the same manner as other private law arbitration bodies; the Appeals Arbitration Division will

> deal with challenges against disciplinary decisions of sports bodies wherever the statutes of that

body – accepted by the competitor – refer to the CAS as having an appellant jurisdiction. (See the informative article "Arbitration of International Sports Disputes" by Jan Paulsson, partner with Freshfields, Paris, and member of the Court.)

Costs of proceedings in the Ordinary Arbitration Division must be met by the parties; those in the Appeals Arbitration Division by the Court of Arbitration for Sport. The Appeals Arbitration Division will be given jurisdiction by the statutes, constitutions or regulations of federations, associations and other sports bodies with particular regard to disciplinary matters, perhaps especially doping-related disputes.

I would expect the prospect of appeal to the Appeals Division of the Court to be of particular value. The appellant jurisdiction of the Court of Arbitration for Sport can be exercised in a manner which will not only be, but will be seen to be, entirely independent of the disciplinary bodies of the sporting federations themselves. For the athlete who is disciplined by a sports federation or a international federation disciplinary body, that is to say an internal body, it may be only of cold comfort that he or she will have right of appeal to yet another internal body. So much greater comfort should be a right of appeal to the independent Court of Arbitration for Sport.

Evidence of the jurisdiction and influence of the Court in New Zealand will be very apparent in November 1994 with the staging in Wellington of the Metropolitan Life ITU Triathlon World Championships. This will be an exciting event: the "Tri Worlds 1994" will again put New Zealand on the world sporting stage. New Zealand's Erin Baker won the women's event in the inaugural World Championships in France in 1989 and Rick Wells placed third in the men's event: these were truly outstanding performances. (As I write, Erin's sister Philippa and Brenda Lawson have successfully defended their world double sculls title at the World Rowing Championships in Indianapolis – another outstanding performance.)

The World Triathlon Championships are being conducted in accordance with International Triathlon Union competition rules and International Triathlon Union Operations Procedures. Competitors are required to complete a declaration in the following terms:

"ITU Athletes Waiver

I, the undersigned, accept that any dispute arising from regulations of the International Triathlon Union (ITU), which cannot be settled by its existing appeal procedure, shall be settled finally by the Court of Arbitration for Sport (CAS), Lausanne, Switzerland, to the exclusion of recourse to ordinary courts."

The challenge for the Court and its members will be to continue to provide a means for sports organisations and athletes to settle differences in simple, just, rapid and relatively less expensive ways. Sport is big business: it knows no international barriers. Regional divisions of the Court are, I believe, a likely future development. The Court now has the support of a large number of international sporting codes which provide for access to it as the final arbitrator of disputes. It might even be a better avenue for resolving the dispute between New Zealand and Canberra Raiders Rugby League star, Ruben Wiki, the Raiders and the Auckland Warriors, apparently "almost certainly" designed for hearing in the ordinary Courts ". . . with solicitors now involved . . and legal documents exchanged . . .". The future will tell. □

"Making the Angels Weep" — corrigendum

There was a publishing error in the concluding paragraph of the article by The Rt Hon Sir Robin Cooke at [1994] NZLJ 364 which is very much regretted. The word "not" was omitted from the penultimate sentence which unfortunately nullified the point of the article on the world-wide significance of the decision of the Supreme Court of India *Supreme Court Advocates-on-Record Association v Union of India.* The last paragraph of the article should have read:

Yet I do not end on a note of criticism. As held by the majority of the Supreme Court of Canada in *Reference re Amendment of the Constitution of Canada* (1981) 125 DLR (3d) 1, recognising and giving precision to constitutional conventions is a legitimate function of the Courts. Despite the proffered evidence that of 547 appointments to the higher Indian judiciary in the decade ending in 1993 only seven were not in accord with the opinion of the Chief Justice of India, it may be assumed that some genuine apprehension underlay the deliberations of the Judges and the arguments of counsel in *SCAORA v UOI.* The majority of the Court may have gone too far, if their conclusions be viewed as an interpretation of the Constitution intended to be binding in law. But the judicial arm of the state has a part to play not merely in expounding conventions, but in helping to create them. The decision of the majority will no doubt have at least that tendency in India itself. And the overall impact of their decision is a blow struck for the principle of judicial independence that will not be felt in India only. However vulnerable in detail, it will surely always be seen as a dramatic event in the international history of jurisprudence. □

Proceedings under the Mental Health Act 1992:
The legalisation of psychiatry

By Carmel Rogers, of Wellington

Psychiatric disorders are a form of illness that is distinct from any other because it directly affects the distinguishing mark of being human — the rational mind directing (at least to some extent) the active will. Psychiatric patients therefore constitute a particularly difficult class to assess, particularly given the inherent possibility of risk to themselves and to others. This article discusses legal aspects of the relatively new system of patient rights and assessment under the Mental Health (Compulsory Assessment and Treatment) Act 1992. The writer emphasises that for lawyers in this field it is the patient who is the client, and like all clients their legal rights are to be protected and if necessary enforced through the legal system.

Introduction

The Mental Health (Compulsory Assessment and Treatment) Act 1992 established a regime that is still relatively new – the Act came into force only in November 1992. The Act affords psychiatric patients far more extensive rights than were available to them under the 1969 Mental Act. The long title of the Act is instructive –

> AN ACT to redefine the circumstances in which and the conditions under which persons may be subjected to compulsory psychiatric assessment and treatment, to define the rights of such persons and to provide better protection for those rights . . .

Proposed patients and patients now have the capacity to refuse treatment (other than during the first month of compulsory treatment (see ss 59 and 63) and challenge compulsory assessment and applications for Compulsory Treatment Orders, of which there are two types – inpatient and Community Treatment Orders (see s 28).

Patient rights

Even before an application for a Compulsory Treatment Order is made by the patient's Responsible Clinician, a patient can apply under s 16 of the Act to have his or her condition reviewed by a Judge in order to terminate compulsory assessment and treatment before an application for a Compulsory Treatment Order has been made[1] Sections 57, 59 and 63 enable a patient to refuse treatment in certain circumstances. Section 79 allows a patient to have his or her condition reviewed by the Review Tribunal (and under s 83 there is provision for appeal against decisions of the Review Tribunal) and s 84 provides for a Judicial Inquiry – a very broad remedial provision which allows a Judge of the High Court to direct an inquiry in relation to any person "the Judge has reason to believe is being detained in a hospital as a patient and to inquire into and report on such matters relating to that person as the Judge thinks fit". Section 76 directs that a Responsible Clinician must conduct 3-monthly formal reviews of patients subject to a Compulsory Treatment Order (however, s 34(4) provides for a compulsory order to have effect indefinitely upon its third extension although the patient could still apply to the Review Tribunal). Section 70 provides patients the right to legal advice and assistance and Part VI of the Act provides broad patient rights. Part X of the Act sets out the Act's enforcement procedures.

Mental health patients/consumers have via the 1992 Act, gone from being one of the most disempowered sectors of the New Zealand legal system to a population that now has at its disposal an extensive and potent range of legal rights. The relative ease of having a person committed under the 1969 Mental Health Act, frequently against the will of the patient or without the patient comprehending what exactly was going on, has been consigned to the undignified history that such an unjust system deserved. The 1992 Act requires specific procedures to be satisfied during the initial period of assessment and treatment (which is broken up into the first 5 days, the next 14 days and a final period of 14 days) and in all cases, where any Compulsory Order is being sought, the condition of the proposed patient must satisfy the definition of "mental disorder" in s 2 of the Act.[2] This involves the satisfaction of three criteria:

(1) an abnormal state of mind (continuous or intermittent) characterised by delusions, or disorders of mood, perception, volition or cognition of such degree that it –
(2) poses a serious danger to the health or safety of the proposed patient or others; or
(3) seriously diminishes the capacity for self-care.

(NB the qualifying word "serious" will be removed if the current Amendment Bill is passed and enacted).

The definition of mental disorder is absolutely pivotal. Section 27 provides that on any application for a Compulsory Treatment Order, "the Court shall determine whether or not the patient is mentally disordered".

The critical importance of the existence or not of "mental disorder". takes the practitioner acting for a proposed patient into the quagmire of psychiatric diagnosis. The psychiatrist concerned (the "Responsible Clinician") must be able to justify his or her diagnostic conclusion that the person has a "mental disorder". If the practitioner succeeds in either satisfactorily contradicting this, for example, the symptoms arise only by reason inter alia of substance or alcohol abuse or intellectual handicap (and therefore, s 4 applies) and not from "mental disorder" or raises sufficient doubt about the psychiatrist's diagnostic conclusion that there is "mental disorder", for example where there has been a history of conflicting diagnoses) then a Compulsory Treatment Order may well not be granted.

Consideration of the parameters of patients' rights involves not just the 1992 Mental Health Act but other statutes, principally the New Zealand Bill of Rights Act. Sections 11 (the right to refuse medical treatment) and 22 (the right not to be arbitrarily detained) are clearly of direct relevance to compulsory assessment and treatment. However, the relationship between the two statutes is not entirely unproblematic. While Keane DCJ accepted in *Re GHC* that as a general proposition, the Bill of Rights Act 1990 does apply to the Mental Health Act 1992, it was stated *In Re M* [1993] 3 DCR at 172 that s 11 would apply only if the person concerned is competent to consent and Gallen J decided in *Re M* [1992] 1 NZLR 29 that s 22 would not apply where detention was justified under the (then) 1969 Mental Health Act. The Southern Mental Health Review Tribunal has also, very recently, expressed the view that the New Zealand Bill of Rights Act applies only in a very conditional way, secondary to the 1992 Mental Health Act (SRT, 146/93, 27 September 1993). Despite, however, the resultant unclarity of the relationship between these two statutes in the case law, it cannot be said that the New Zealand Bill of Rights Act simply does not apply because a person is being detained or treated under the 1992 Mental Health Act. A strong lead on both the issue of consent (s 11) and detention (s 22) is available in the American and Canadian cases in these contexts. For example, *Rennie v Klein* (New Jersey) and *Rogers v Okin* (Massachusetts) state that detention per se does not give an automatic permission or right to treat.[3] Interestingly, in *Rennie v Klein*, the Court indicated that neuroleptic drugs should not be used automatically in the case of psychosis and that using these medications might well deprive the patient of the ability to learn the social skills required to recover fully from psychosis. The Court also expressed very strong concern about the side-effects of medications typically used in these circumstances.

As to detention, O'Sullivan JA stated in the Manitoba Court of Appeal in *Kohn v Globerman* (1986) 27 DLR (4th) 583, 590:

> I should be sorry for my part, without argument to rule that the protections in the Mental Health Act are sufficient to safeguard the liberty of those who are subject to the Act. I think the concept of mental illness is an elastic one . . . I think the test for determining whether restriction is necessary must be much more narrow that the test constituted by the good faith perception of government-authorized psychiatrists that the "welfare" of a patient requires compulsory detention or treatment.

McCullough J in *R v Hallstrom, ex parte W* [1986] 1 QB 1090 took a similar approach.

> It goes without saying that, unless clear statutory authority to the contrary exists, no one is to be detained in hospital or even to submit himself to a medical examination without his consent. This is as true of a mentally disordered person as of anyone else.

As indicated, the parametrical relationship between the 1992 Mental Health Act and the New Zealand Bill of Rights Act, is still a matter that lacks certainty. However, it is safe to say that the Bill of Rights Act is a repository of patient rights which should always be considered by the patient's lawyer, alongside the provisions of the Mental Health Act. While the 1992 Act certainly does qualify patient rights in certain significant respects (for example in s 114 where ill-treatment or negligence has to be *intentional* or in s 59(2)(b) which removes the patient's right to refuse treatment if such treatment is considered by a second psychiatrist to be "in the best interests of the patient"), it is nonetheless a huge advance for patient rights when placed beside the 1969 Mental Health Act. It should be noted however that the current Mental Health (Compulsory Assessment and Treatment) Amendment Bill 1994 expands the definition of "mentally disordered" significantly by removing the word "serious" as it presently prefaces the word "danger" in the present Act's definition of "mental disorder" in s 2 and by extending the coverage of the legislation to intellectual handicap and personality disorder. If a person is considered "likely" to reoffend then his or her detention in hospital may be extended. Clearly a significant measure of the 1992 Act's protectiveness is dismantled by the breadth of coverage anticipated by the Amendment Bill.

Life at the Patient/Lawyer/Psychiatrist interface

As indicated, as a consequence of the statutory centrality of "mental disorder", the active interface between diagnosis/clinical treatment and legal action has become significant. Since the 1992 Mental Health Act, it is no longer possible to draw a box around clinical/diagnostic decisions and draw a separate box around legal action. Clinical decisions, which include both diagnosis and drug treatment, are now directly vulnerable to legal challenge under the 1992 Act. Indeed, a practitioner working in mental health law especially when representing a patient or a proposed patient would simply not be doing his or her job properly if the patient's clinical notes were not perused very carefully in relation to diagnosis and treatment (see New Zealand Law Society seminar booklet, "Mental Health (Compulsory Assessment and Treatment) Act 1992, p 21, para 5.15)). That diagnosis is the legitimate concern of the legal process relating to compulsory treatment was in fact established well before the 1992 Mental Health Act.[4] The presence of the term *abnormal state of mind* in the s 2 definition of "mental disorder" immediately raises the question of diagnosis – determining whether a state of mind is abnormal as opposed to normal surely means that there must be a systematic basis for this

distinction to be established and that can only be psychiatric diagnosis. Whereas some earlier decisions such as *In Re Jane* [1989] DCR 16 stated that the term "mental illness" should be given the meaning it had in the mind of "the ordinary user of English language" (*R v T* [1993] DCR 600 took the same approach), Keane DCJ's decision in *Re GHC*, cited above, the 1992 Act's "more precise and exacting definition of mental disorder" and to the Judge having to (at 4) reconcile psychiatrists' diagnoses with "the statutory definition of mental disorder". Section 27 of the Act states very clearly that if the patient is not mentally disordered, a Compulsory Treatment Order cannot be made.

The relevance of diagnosis to the task of the patient's lawyer raises an amalgam of interesting questions and difficult problems. Predictably, one of the main problems is human nature. Psychiatrists are less than ecstatic that their clinical decisions are now exposed to legal scrutiny. It is fair to say that of any branch of medicine, psychiatry has been clothed in a particular mystique (I suspect not because it is so complex but because it is so inexact) and psychiatrists perhaps more than any other group of medical practitioners have been consequently less vulnerable to scrutiny and accountability. However, perhaps more than any other group of medical practitioners or medical specialists, psychiatrists should be held to strict account. As Kennedy has commented, "if illness is a judgment, the practice of medicine can be understood in terms of power. He who makes the judgment wields the power". The consequences of this are extreme – as Dr D Laing put it, "I am still more frightened by the fearless power in the eyes of my fellow psychiatrists than by the powerless fear in the eyes of their patients".[5]

The prevailing inexactitude of psychiatry is directly related to and seems to arise from the elasticity of its diagnostic criteria. New disorders seem to spring into diagnostic life with remarkable ease – such as post-traumatic stress disorder (recognised in DSM III) and premenstrual dysphoric disorder (recognised in DSM IV). Then there is the osmotic relationship between one diagnosis and another. For example, Borderline Personality Disorder and Post-Traumatic Stress Disorder and the aetiologically heterogeneous "Personality Disorder".[6] Much more legendary is the "catch-all" category of "schizo-affective" disorder which becomes the psychiatrist's means of diagnostic escape when he or she cannot say with sufficient certainty that the patient has schizophrenia or bipolar affective disorder.

Another inherent problem for psychiatry is that it is not pure medicine. As Whiteford and Westmore commented:[7]

> Modern psychiatry to a greater or lesser extent incorporates biological, psychological and social factors in arriving at a diagnosis and when formulating a management plan.

The very term "abnormal" prompts comparison with "the normal" and while "mental disorder" is not as was suggested in *In Re Jane* and *R v T* (cited above) determined, fortunately, by the thoughts of the ordinary person, there is a great deal of "the ordinary" or the "norm" or prevailing social values that informs the fluid diagnostic criteria of psychiatry. There is an alarming propensity for social fads or passing preoccupations to be translated into psychiatric disorders – for example, "post-traumatic stress disorder". Did the disorder exist before psychiatry deemed it to be a disorder and what about "recovered memory syndrome"? The question that arises here is did psychiatry invent these disorders or did it just provide the nomenclature for conditions that have played a perennial part in human existence – how much is psychiatry psychiatry and how much of it is simply an inauthentic mirror of human existence? This question is surely not unimportant in that with "recovered memory syndrome" people, mainly men, who committed sexual abuse decades ago are now being convicted for criminal offences which have stiff custodial sentences as well as stiff social stigma as a consequence of the recognition of this "syndrome".

The renowned elasticity of psychiatric diagnostic criteria becomes very pronounced in Compulsory Treatment Order hearings under the 1992 Act. While on the one and, this elasticity is acknowledged by some psychiatrists with considerable self-consciousness and embarrassment, on the other hand, it is the liberty of the proposed patient or patient which is in issue. The professional vanity and vulnerability of the applicant psychiatrist, both of which can be disclosed quite graphically during cross-examination are far less important considerations than the liberty of the patient but it is fair to say that few psychiatrists acknowledge or address this fundamental liberty of the person which does not magically abate simply because the person is alleged to have a mental disorder.

The attitude of psychiatrists towards legal accountability or regulation is instructive. Professor Elaine Murphy for example, wrote (in the context of the UK Mental Health Commission guidelines):[8]

> The main point to take issue with is that these "safeguards" or rules are imposed on a profession that has not evolved and agreed them from within its own ranks . . . it is possible that a "responsible body of skilled and experienced doctors" might not agree that *slavish attention* to the Commission's safeguards was necessary for the proper discharge of one's duty of care. Rules of good practice must evolve from *within* the profession, in consultation with others, and should *not be imposed by some external body.* (emphasis is the writer's)

Perhaps this is "Murphy's" law. Professor Murphy's comments are clearly an expression of considerable pain and offence occasioned by a perceived invasion of the law into the "ex cathedra" judgments of psychiatrists. Her evident sensitivity is by no means unique. Dr James Durham is afflicted by a similarly painful sense of assault. In his discussion of the definition of "mentally ill person" in the 1983 New South Wales Mental Health Act, he argues that this definition "will have unwelcome consequences".[9] The tenor of Dr Durham's article is not at all dissimilar from the lament of psychiatrists that the s 2 definition of "mental disorder" does not correspond with their operating diagnostic criteria. This tenor of discontent rings loudly and clearly through psychiatrists' perception of their especial vulnerability to civil legal action as well. Judd et al, for example, state in an article dealing

with psychiatrists and the law of negligence that:

> Psychiatrists often deal with paranoid and "difficult" patients. These patients are among those most likely to pursue negligence claims. ("Psychiatrists and Negligence" *Australian and New Zealand Journal of Psychiatry* (1986) 20: 233-236, 233.)

Psychiatrists also fear the law even in the context of peer review. As Craddick ("Looking at quality hospital care" *Australian Doctor Weekly* 1987; July 7: 14) noted, it has been argued by them that "meaningful peer review activities" can only take place if they are "totally protected from even the slightest chance of use against the hospital or staff in negligence actions". Is this thin skin or is this thin skin?

McGarry and Chodoff capture the friction at the legal/psychiatry interface graphically. In their discussion of the ethics of involuntary hospitalisation they write:[10]

> at an ethical level, psychiatrists need to be careful to avoid acting on the irritation and sense of injury they may feel as they see their well intentioned efforts slighted and sneered at, and themselves blamed by eager legal reformers . . . In 1958, Dr Harry Solomon, then President of the American Psychiatric Association stated, "I do not see how any reasonably objective view of our mental hospitals today can fail to conclude that they are bankrupt beyond remedy" . . . (at p 214)

Of the relationship between lawyers and psychiatrists, McGarry and Chodoff offer salutary advice.

> It can be taken that both groups intend good for those disturbed human beings who come into the psychiatric orbit without asking to do so . . . Perhaps it would be well to remind both parties that when being free from external constraint comes into conflict with being free from dehumanising disease, the conflict should not be seen in terms of drama (right against wrong or black against white) but rather as tragedy (one right against another right) (at p 218).

Adjusting to direct scrutiny and legal challenge has then, without doubt, occasioned some psychiatrists considerable discomfort. It comes as no surprise that this discomfort is articulated by accusations from these psychiatrists that the lawyer is "interfering" in clinical treatment. Of course, this accusation carries with it a striking irony. Unsurprisingly, when a psychiatrist has applied for a Compulsory Treatment Order and the patient vehemently opposes compulsory treatment, the quality of the patient-psychiatrist relationship is already unsurprisingly less than warm and positive.

For the psychiatrist then to blame the patient's lawyer for souring an already caustic relationship leaves one wondering if there is a mutual exclusivity between logic and psychiatry. The patient invariably has formed his or her own view of the psychiatrist before the lawyer arrives on the scene. For example, Nicholas et al quote comments made by patients in their article on "Attitudes Towards Involuntary Treatment" *Australian and New Zealand Journal of Psychiatry* 1991; 25:231-237.

> "I think we are in a police state when doctors can send police out to pick up a person."
>
> "Having the injection forced on you, its like an assault."
>
> "All the medication does is bomb me out."
>
> "I don't want to be a guinea-pig."

The "interference in clinical treatment" argument which is often described as the result of the lawyer "contaminating" the patient/psychiatrist relationship, is but one bullet in the "best interests of the patient" arsenal. By the time the patient's lawyer arrives, given that the patient is already being detained involuntarily by his or her psychiatrist, the so-called "therapeutic relationship" is generally already terminal. It is, frankly, utterly insulting to the patient for the psychiatrist to blame the lawyer rather than acknowledge that the patient can in fact think and feel outrage as the individual who is being held captive by the psychiatrist.

The next item then on the agenda of psychiatrist self-defensiveness is that this alleged "interference" is undermining the clinical treatment of the patient. If this self-defensiveness is subscribed to, the ultimate outcome is that psychiatric patients cannot exercise their legal rights because in doing so, their clinical treatment will be disrupted. This takes us back to the dark ages of the 1969 Mental Health Act regime under which the patient had very limited statutory facility to challenge involuntary treatment. In the deep shadows of that regime, psychiatric patients were regarded in not too dissimilar a manner to the way in which some would have children regarded – to be seen and not heard, to be "treated" and not to complain or question. It was even possible to limit patients even having to be seen in that in the past they have been conveniently thrust away from all us sane people into the recesses of the likes of Porirua, Cherry Farm and Kingseat hospitals.

Silove et al in their article on the relationship between lawyers and psychiatrists under the New South Wales mental health legislation describe a situation that is consistent with the writer's experience of hearings under the 1992 Act. They comment:[11]

> In New South Wales, solicitors are playing a central role in challenging the legitimacy of detention orders at magisterial hearings. As a result, the procedures at these open hearings increasingly mimic those of a routine Court case where an adversarial atmosphere is accepted as the norm.

Hearings under our 1992 Act are not conducted in open Court but it is fair to say that the tenor is adversarial rather than inquisitorial. Silove et al refer to the psychiatrist having to assume the "unfamiliar and unpleasant role of 'prosecutor' " (at p 295) and to psychiatrists being encouraged to emphasise the worst aspects of their patient's recent behaviours in order to justify and obtain detention orders. They also note that lawyers confronted clinicians not only with questions about their diagnoses but also with questions about the validity of psychiatric diagnosis in general. This has been the approach taken by the writer and is, in the writer's view, a proper approach. The approach has frequently been mistaken as "an anti-psychiatry" campaign but is in fact related directly to the representation of the patient's instructions where the patient is opposed, and often very

vehemently, to the granting of a Compulsory Treatment Order.

In the writer's view, to call proceedings under the Act "inquisitorial" is a tad precious. An adversarial approach typifies almost every other aspect of the legal system and it enables the lawyer for the patient to argue as strenuously as possible for the patient. If the approach were inquisitorial, the patient's instructions to the lawyer would become secondary to a "team" endeavour on the part of the lawyer, the Judge and the psychiatrist to determine the patient's "best interests" (it is of more than passing irony that typically the patient is not considered a part of "the team" but is the person who ends up copping the Compulsory Treatment Order.) Of course, where a patient is opposed to the granting of a compulsory order, the patient for whom the lawyer is acting, invariably does *not* regard an order as being in his or her "best interests" and for the patient's lawyer, it must be the patient's regard that must be determinative.

Proceedings under the 1992 Act will inevitably be adversarial unless it is accepted that the patient is not entitled, or somehow less entitled than other clients, to issue and have followed, his or her instructions. To negate this entitlement by saying that it is the patient's "best interests" that must prevail is to exercise an insulting paternalism – who knows the patient's view of his or her "best interests" better than the patient?

The price of psychiatry's exemption from the law

The price of psychiatry's protection from scrutiny and the mandate of its mystique has already been demonstrably costly for New Zealand society. This invisibility was of course often secretly rejoiced in and actively supported by the families of psychiatric patients who felt embarrassed by the perceived strangeness of the behaviour of their mentally ill sons and daughters or brothers and sisters.

The 1988 Mason Report was a testimony to the pervasiveness of psychiatry. The report argued that even where a person did not have a treatable mental illness, they should still be placed in mental hospitals because such people may have social deficits. The report subscribed to the concept of the mental hospital as an "asylum" (see Appendix 4, "Treatment and Treatability", p 223). However, what to the writers might seem humanitarian "asylum", to the subjects of this "asylum" may well have been involuntary annihilation and agony. The almost palpable paternalism of the Report is a robust reminder of a place in mental health to which we should not return and where we have come to from the pock-marked path of mental health in the past is a history that we need to put beside the 1992 Act. The patients' mandate delivered by the 1992 Mental Health Act is for us as lawyers acting for patients, an ethical direction that such myopia never manifests again.

In a society that so often seems dedicated to the destruction of those who are different, where the tall poppies are chopped back as viciously as our native forests were once plundered, the tall poppies are punished and pruned by attaching to them the label "mentally ill". While our geography is of a land of extraordinary contrasts, our social mentality is often a statement of extraordinary control and is often a catechism of uniformity. As Alastair Campbell et al comment:

> Literature is replete with examples of books written about discriminatory and dehumanising attitudes masquerading as care of the insane (*Faces in the Water, One Flew Over the Cuckoo's Nest, Skallagriig*). In each story, the same processes tend to occur: the patient is diagnosed as mentally disordered, he is admitted to an institution, he is treated as less than a person, he objects to that treatment, his objection is regarded as futher evidence that he is unable to see what is for his own good, harsher measures are instituted . . . he is truly dehumanised. (Alastair Campbell, Grant Gillett and Gareth Jones *Practical Medical Ethics* (Oxford University Press: 1992), 131.)

We need only remind ourselves how close New Zealand psychiatry came to the dehumanising of Janet Frame – arguably New Zealand's most acknowledged writer. As lawyers acting for psychiatric patients, we ought never to shrug off the mantle cast by the words uttered by John Locke over 300 years ago – "wherever law ends, tyranny begins".

We have had report after report on the mentally ill (remember the Hutchinson, Gallen and Mason reports, for example). It is almost as if New Zealand society stumbled across another way of hiding the mentally ill away – this time in an infinity of Commissions of Inquiry, Working Parties and investigations. For psychiatry itself the integrity of its mystique and the safety of its diagnostic inaccessibility has not been massaged in any meaningful way by the stream of reports on the treatment of the mentally ill. It has been accorded the sanctity of presumption – the presumption that it knows what it is doing. Even though it has been criticised as being too liberal and therefore responsible for the fatal freedom of for example John Papalii (who in 1987 with a carving knife killed two people and severely wounded two others), the way in which psychiatry actually works, its diagnostic irresoluteness and its frequently colloquial treatment methodologies have essentially escaped determined scrutiny. Criticism of psychiatry has not sustained any corresponding scrutiny – we have mentioned its mistakes but simply accepted the mandate of its methodology.

Unfortunately, while we have blamed psychiatry for its sometimes graphic mistakes, our horror of "the mad" and "the loonies"has left the haven of psychiatry unhindered. Because the preserve of psychiatry is populated by "the mad" and "the loonies", we do not really want to look at it too closely – it is too frightening and maybe contaminating. If psychiatry goes unchallenged and its diagnostic criteria continue to command the constituency and credibility of diarrhoea those criteria are still permitted to justify the incarceration of people in mental hospitals or in psychotropic drug regimes. Our reluctance to demand of psychiatry a standard of medicine that we would not hesitate to insist upon for cardiology, oncology or general surgery allows psychiatry to persist in its isolation, introspectivity and exemption from the law.

Diagnosis and treatment — A lawyer's business

The 1992 Mental Health Act has opened the door of psychiatry's closeting introspection. Diagnostic conclusions and clinical treatment are now matters for which psychiatrists

are accountable, whether they like it or not. Mental disorder must now be established (ss 2 and 27) and neglect or ill-treatment of the mentally disordered is an offence (s 114). The legitimacy, indeed the necessity of the lawyer's concern with diagnosis is also underlined by the approach of Keane DCJ in *Re GHC* and much earlier, by Finnigan DCJ in *In the Matter of an Inquiry under the Mental Health Act 1969* (cited above) when he found insufficient evidence of mental disorder or of necessity for the patient to be subjected to continued compulsory medication.

Practitioners working in mental health law have a mandatory opportunity to learn something strangely new — psychiatric diagnostic concepts and psychiatric pharmacology. It is impossible to argue persuasively that your client is not, contrary to the opinion of his or her Responsible Clinician, mentally disordered if your cupboard is bereft of a sound comprehension of diagnostic categories and the typical pharmacological responses to those categories. In some cases, this is reassuringly straightforward but in other cases it is a matter of real complexity. Purely schizophreniform behaviour can be strongly characteristic but what about schizoaffective disorder where there are symptoms of schizophrenia on the one hand but on the other hand there are mood swing patterns that are typically featuristic of bipolar affective disorder? Worse still, how do you know when hallucinations and relapsing psychoses are the result of documented cannabis abuse or self-occurring psychoses? Here we are overtaken by chickens, eggs, carts and horses — what came first — the substance abuse or the mental disorder? Then, what about the fact that some antipsychotic medications (for example, Haldol) can actually produce the very psychoses that we all thought the antipsychotic medication is supposed to control? Is the patient mentally disordered or wrongly medicated? If there is an insufficiently settled diagnosis then how can it be properly established that there is a mental disorder and if the nature of the mental disorder is unknown or unsettled, what is the basis upon which medication is being prescribed? — a "pig in a poke"? a clinician's whim or a costly process of trial and error?

Where a patient objects to his or her drug treatment and, as enabled by s 70 of the 1992 Act, asks for a lawyer to act in relation to their right to object, the practitioner needs to have an at least sufficient grasp of what cocktail of drugs are typically dispensed for the category of mental disorder concerned. As well, the practitioner will need to know average dose levels, the nature of side-effects (for example many psychotropic drugs cause hand tremors, extreme dryness of the mouth and a restless legs syndrome type of physical discomfort), relevant anticholinergic medications to control these side-effects and the means by which the efficacy of the principal medications can be assessed. The patient's lawyer cannot properly assist the patient in enforcing the patient's right to refuse treatment (ss 59, 63 and 76) if the lawyer has an inadequate comprehension of the reasons why the patient refuses to consent to treatment.

It is fair to say that some psychiatrists have a particular resentment about lawyers acting for patients in relation to drug treatments. This issue goes to the heart of the psychiatric/legal interface in that it challenges in a direct way the acceptability or efficacy of the psychiatrist's quality of clinical judgment. Where psychiatrists attempt to argue that questioning drug therapy is an interference with their patient's treatment and welfare, it is apparent that they reject the notion that a patient has any right to refuse his or her consent. This right however is not just an unhelpful, dismissible notion but a statutory right pursuant to ss 57, 59, 60 and 63 of the Mental Health Act 1992 and s 11 of the New Zealand Bill of Rights Act 1990.

It is quite clear that lawyers must involve themselves in matters of diagnosis and treatment. Barker J in *Re S* [1992] 1 NZLR 371 cited with approval the words of O'Sullivan JHA in *Kohn v Globerman* cited earlier. Barker J went on to state in the context of these remarks, (at 372)

> While these observations must be read in the knowledge that Canadian Courts have the power to strike down legislation under the charter, they are a timely reminder of the danger of making assumptions as to the lack of competence of mentally ill people.

"Dangerousness" — A high hurdle

Dangerousness is indeed a dangerous thing. While DSM—III, perhaps the most important international diagnostic system, does not include dangerousness as a necessary symptom for mental disorder, dangerousness nonetheless remains strongly featuristic in the public perception of mental disorder and is to Judges still a disproportionally persuasive element in the psychiatrist's diagnosis. Yet, time and time again, the overstatement and overestimation of dangerousness as a characteristic of mental illness has been made starkly clear. The 1988 Mason Report dealt with the issue of dangerousness at some length in appendix 2 of the Report where it stated, (at 209):

> The stark fact is that it is impossible to make certain predictions of future human behaviour. Notwithstanding the greatest care and judgment there can be no certainty in the prediction of human affairs. Subjective judgment, even when based on experience, professional knowledge and available information, is extremely unreliable. That applies as much to psychiatrists as to any other occupational group. Not even a long history of clinical involvement with a patient gives a reliable basis for assessing an individual's future performance with any assurance of accuracy.

The Mason Report also points out that while criminals regain their freedom at the end of their prison sentence, those who are mentally ill can be detained on an indefinite basis if they are regarded by psychiatrists as "dangerous". It is salutary to note in this context John Monahan's observation that

> No-one thinks that the prediction of violence is on the verge of attaining a validity comparable to that of the prediction of the weather. (John Monahan "Psychiatry: second generation of theory and policy" (1984) 141 Am *Journal of Psychiatry* 10, at 11.)

Dangerousness to self, often articulated by psychiatrists as suicidality risk, is another forceful phantom. That a person intimates that he or she wants to commit

suicide is an entirely different matter from actual suicide intention. Psychiatrists are about as successful in predicting suicide as the average New Zealander is in winning Lotto. As Pokorny noted, in one comprehensive predictive study, only 2% of a group nominated as high risk actually committed suicide. (AD Pokorny "Prediction of suicide in psychiatric patients" *Archives of General Psychiatry* 40, 249-257.)

Arguably, the 1992 Mental Health Act in itself has not provided patients compelling protection against the phantom of dangerousness. Qualifying the word "danger" by the word "serious" (as in s 62 and in the very definition of mental disorder itself in s 2) is insufficiently robust. After all, surely the word "danger" implies seriousness in any event.

In a sense, the 1992 Act's emphasis on "serious danger" has simply subscribed to a self-sustaining social prejudice – that the mentally disordered are inevitably dangerous. This prejudice subscribes to simple ignorance. As a Wellington psychiatrist, Dr Joanna MacDonald commented in 1991 in defence of a community house for mental health consumers in Lower Hutt, people's fear of the mentally disordered is largely caused by ignorance and distorted media images of the mentally ill who are in reality usually withdrawn, lacking in motivation and confidence and vulnerable to victimisation by others (*The Evening Post*, June 22, 1991).

That dangerousness is such a strong criterion in the 1992 Act is not only confirmation that gross prejudice and ignorance has been elevated into statute but leaves the practitioner with a major barrier to overcome. As the Mason Report noted (at 208) fear might well be understandable but fear is an "emotion-driven context rather than one arising out of rational diagnostic criteria".

At present, the issue of dangerousness is a most significant problem in the enforcement of patient rights. The 1992 Act gives with one hand but takes away with the other. The enormous emotional persuasiveness of the description of a patient as dangerous must be confronted head-on. If it is not then what is too frequently an un-or under-challenged constituent of the definition of "mental disorder" will continue to be an unfairly disproportionate and insufficiently justified consideration in deciding whether a person is mentally disordered or not. The real dangerousness of "dangerousness" is its too ready judicial acceptance which is materially compounded by the fact that after the Papalii and Donaldson debacles (Donaldson was discharged from hospital under the 1969 Act and then committed murder and suicide) Judges are perhaps none too ready to decide that someone is not dangerous then that person proceeds to commit an act of dangerousness.

At the end of the day, dangerousness is a question of balance. At present, we have an imbalance and disproportion that is actively depriving psychiatric patients/consumers of their liberty and their rights. Dangerousness is little more than a title for psychiatrists' autocracy and for as long as that autocracy goes unchallenged, patient rights will be rendered meaninglessly unenforceable. Practitioners should become far more demanding of real justification for the psychiatrist's conclusion that a person is dangerous. There must be a balance wrought by an insistence upon the nomination by the psychiatrist of the degree of risk and justification as to how that degree of risk has been calculated and if that is a tall order, then too bad – the price of anything less is the removal of a person's liberty. As Greig J said in *Re M* (unreported, High Court, Wellington 21 April 1986, 716/85), "special regard will be given to that restriction of liberty of the person and the general desirability that all persons should be free" (at 16).

Factors that are relevant here include (see the New Zealand Law Society seminar booklet on the Act) –

(1) the person's previously demonstrated degree of dangerousness;
(2) the degree of danger typical of the particular mental disorder involved;
(3) any evidence that there is an imminent risk of dangerousness;
(4) evidence that the risk is a serious one;
(5) whether there are particular stressors that precipitate dangerousness and whether those stressors can be controlled;
(6) whether community mental health supports can reduce or eliminate the risk of dangerousness;
(7) does a second psychiatric opinion confirm or contradict the Responsible Clinician's estimation of the risk of dangerousness;
(8) whether the drug treatment involved is contributing to any risk factor and if the drug treatment can be adjusted in any way to reduce this factor.

Diminished capacity for self-care is another elastic criterion. Some people, whether we like it or not, actually elect to live their life at a level of quality that we might find personally objectionable. The capacity for self-care and the elected type or quality of self-care are two entirely different issues. If these two separate considerations are not kept separate then discrimination will be the inevitable consequence. Many ex-patients live in chronic impoverishment. Their fridges and kitchens are not always filled with food and often their general living conditions are very basic simply because they cannot afford anything better. It is very easy to mistake this for an insufficient capacity for self-care. If this mistake is made, poverty is permitted to dictate who is mentally disordered and who is not.

Problematically, danger to oneself tends to be merged into diminished capacity for self-care. In a recent Review Tribunal decision *GC* SRT (39/93) it was stated, "In this case these issues are very much interrelated and it is most appropriate to deal with them together". This poses a real problem. The s 2 definition of "mental disorder" has apart from an abnormal state of mind, two other conditions that are required in the alternative – *either* a serious danger to oneself or others OR seriously diminished capacity for self-care. These conditions are clear alternatives in the Act and cannot have been intended to be regarded as "interrelated". A serious danger to oneself suggests a feature such as a high suicide risk whereas seriously diminished capacity for self-care raises issues such as non or poor compliance with medication or an inability to feed oneself properly. If these two alternatives are rolled into one, subsumed under a supposed "interrelatedness" then not only is the

Act misinterpreted but the threshold is arguably lowered by the generalised category of self-danger/diminished capacity that results.

The patient's "best interests"

Often the patient's lawyer, when acting upon instructions from his or her client to, for example, oppose a Compulsory Treatment Order application, is accused by the psychiatrists and hospital (and often very vehemently by the patient's family/caregivers) of not acting in the patient's "best interests". Of course, the psychiatrist sees the patient's "best interests" as being making the patient take medication or remain an in-patient compulsorily so the patient can be made "well".

In the writer's view the "best interests of the patient" mentality is simply a mandate for the psychiatrist to do what he or she thinks is the correct action to take. This means that the psychiatrist's diagnosis is unquestionable and must be accepted prima facie – this flies directly in the face of the 1992 Act and the requirement for "mental disorder" as defined in the Act, to be estabished.

In the *Re: GHC* decision, cited above, Keane DCJ expressly rejected the argument put by Counsel for Porirua hospital that the psychiatrist's written certification that he considered the patient to be mentally disordered was, of itself, sufficient for "mental disorder" to be established. This reminder that it is the Judge who ultimately decides that there is "mental disorder" was by no means unique, in fact, it was a well established principle even before the 1992 Act came into force (see, for example *In the Matter of an Inquiry Under the Mental Health Act 1969* [1984] 2 DCR 348, 351, 352).

The patient's lawyer is ethically obliged (and in the context of s 70 of the 1992 Mental Health Act, statutorily obliged) to act in accordance with the patient's instructions. To act otherwise, in concert perhaps with the psychiatrist's version of the patient's "best interests", is a refusal to act in accordance with the patient's instructions where those instructions do not accord with the "best interests" views of the psychiatrist.

The "best interests of the patient" syndrome is predicated on a perception of the mental health patient as being incapable of giving instructions or not entitled to give instructions. However, as William May noted: "Some psychiatric patients who are involuntarily hospitalised . . . at the same time are deemed competent to refuse treatment for their illness". (*The Patient's Ordeal*, Oxford University Press 1991, p 311.) This view is surely sustained in ss 59 and 63 in the 1992 Act. In *In the Matter of an Inquiry Under the Mental Health Act 1969* cited above, Judge Finnigan held that while the patient was clearly experiencing delusions, she should not be forced to take the medication that four psychiatrists who gave evidence insisted that she needed.

Finnigan DCJ's decision rewards the closest possible study. It is an astonishing beacon of judicial robustness in an area too frequently darkened by the shadows cast by Judges who merely reflect the wishes of the psychiatrist. Its sensitivity and "sensibleness" are salient impeachments of the surrender to psychiatrists that characterise so many decisions in this difficult area.

Can psychiatrists and lawyers live together under the 1992 Act?

Well, they have to but there is little danger that they will become intimate. The architecture of the Act is still being developed as hitherto untested issues of law disclosed by proceedings under the Act await resolution. However, that lawyers and psychiatrists must co-exist in the same statutory structure is quite clear.

Psychiatrists must learn to accept that psychiatry is no longer an inaccessible, sacrosanct temple constructed only by their views. Diagnosis and treatment are no longer matters for the incontrovertible disposition of psychiatrists. The 1992 Act and the patient rights it compellingly confers has swung open the door of the sacred temple that has hitherto housed the introspectivity and unaccountability of psychiatry.

The 1992 Mental Health Act has, as suggested at the outset, delivered a potent collection of patient rights – rights that were long overdue. It is crucial that lawyers for mental health patients do not forget that it is the patient who is their client – a "best interests" conspiracy with the psychiatrist is not an option.

It is the client patient who must be represented. If that means that we end up stepping on the toes of psychiatrists then psychiatrists will most assuredly have sore feet. When they learn to move in step with the tune of the Act, their toes will feel infinitely better.

As far as the interface between the lawyer and the psychiatrist is concerned, an adaptation of the words of Janet Frame describes the legislative reality of the Act well – "We are now entering the map of the human mind". What she actually wrote is an even more compelling message as to the environment within which the Act is located – "We are now entering the map of the human heart". As lawyers and psychiatrists, we are making that journey together, across the landscape of a person's mind and heart – what greater responsibility could we possibly have? The nature of our respective responsibilities may be different but the gravity of our common concern is such that upon our shoulders sits human catastrophe or compassion. □

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1 Note however that Keane DCJ in *Re C [mental health]* (1993) 10 FRNZ 454, decided that where a s 16 application is made but a Compulsory Treatment Order application is also made before the s 16 application is heard, both applications may be heard together. In the writer's respectful view, this is incorrect in that the patient's "forum" created by s 16 is then collapsed into and overtaken by the Responsible Clinician's "forum" which is the Compulsory Treatment order application.

2 Willy DCJ in *In Re M* [1993] DCR 658 dismissed an application for a Compulsory Treatment Order where the procedural time limits imposed by the Act were not complied with by the applicant Responsible Clinician stating (at 664), "I am satisfied that it is central to the scheme of this Act that the procedural time limits within which the various steps might be taken should be strictly observed". However, Keane DCJ in *Re GHC*, cited above, referred to Willy J's decision and stated that while the issue central to the *In Re M* decision did not apply in *Re GHC*, "if the Court does have implied power to review compliance with the earlier procedures", he would have concluded that the procedures "were adhered to essentially". Keane J went on to say that the question of possible non-compliance with the Act's procedures would be affected by any prejudice caused the patient as a consequence. Arguably, Keane J's approach in *Re GHC* implies a degree of flexibility at odds with Willy J's strict approach in *In Re M*.

3 *Rennie v Klein* 462 F Supp 1131 (D NJ) 1978; *Rogers v Okin* 634 F 2nd (1979); 478 F Supp 1342 (D Mass) 1979.

4 See *Re M* [1992] 1 NZLR 29, at 42, *In the Matter of an Inquiry Under the Mental Health Act 1969* [1984] 2 DCR 348, at 351 and *In the Matter of an Inquiry Under the Mental Health Act 1969* [1984] 2 DCR 303, at 305.

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Conflicts of interest in criminal cases; The case for a Model Code of Conduct

By Lyn L Stevens, Barrister of Auckland

Conflicts of interest are an endemic risk in the practice of the law. The resolution of such possibilities, before a trial say, is very important for the integrity of the legal system itself, for the protection of clients and of their legal advisers and finally for the public perception and confidence in justice having been done in particular cases. In this article Mr Lyn Stevens looks at the issues and the case law in criminal cases. He concludes that consideration needs to be given to the issue by the Ethics Committee of the New Zealand Law Society or by the Law Commission.

Introduction

The right to be represented by the solicitor or counsel of a litigant's own choosing, is an important aspect of the public interest in how litigation is conducted. (*Black v Taylor* [1993] 3 NZLR 403, at 408-409 (CA).) But various recent decisions involving civil cases (*Black v Taylor, Equiticorp Holdings Ltd v Hawkins* [1993] 2 NZLR 737 and *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587) have demonstrated that this right is not an absolute one. The risks associated with disclosure of confidential client information may lead to the litigant's choice being overridden in appropriate cases. Such risks require the avoidance of actual or potential conflicts of interest on the part of the solicitor or counsel. Thus a range of competing interests may need to be balanced when Courts are called upon to resolve disputed questions of representation.

High on the list of relevant interests is the protection of the integrity of the judicial process. Justice must be seen to be done. (*Black v Taylor*, supra, at 409, per Richardson J.) The Court has a right to receive assistance in litigation from counsel who are independent and who are entirely free from burdens of actual or potential conflicts of interest. Thus, the Courts assert an inherent supervisory jurisdiction over the conduct of counsel where their conduct, both inside and outside the Courtroom, may have a bearing on the course of particular litigation. Such jurisdiction can be traced through in a line of cases dating back over 150 years! While conflicts of interest in civil cases have recently been the subject of both judicial and academic comment (see, for example, Dean and Finlayson "Conflicts of Interest: When May a Lawyer Act Against a Former Client" [1990] NZLJ 43) there appears to have been little consideration given in New Zealand to conflicts of interest in the context of criminal cases.

It is the purpose of this article to examine the relevant legal principles as they apply to issues of representation in criminal cases. It is instructive to consider the approach of the US Courts which have, in recent years, been required to consider conflicts of interest in the context of prosecution applications for disqualification of defence counsel. For example, there is the celebrated case of the removal of the well-known defence counsel Bruce Cutler in the criminal trial of the "Teflon Don" in New York. (*United States v Locascio and Gotti* 6 F 3d 924 (2nd Cir 1993).) Some suggestions will be offered as to how the New Zealand law might be developed by adopting a Model Code of Professional Responsibility, similar to US examples which have facilitated judicial intervention. It is convenient first to consider the applicability to criminal cases of certain of the principles commonly applied in civil cases.

Jurisdiction of the Court to control the conduct of counsel in criminal cases

It has been accepted by the Courts in civil cases that, if they are to function properly as Courts of Justice, there must be an ability to prevent a barrister acting as counsel in a matter in which the barrister has a conflict of interest, or the appearance of a conflict of interest. The mere fact that counsel might be subject to the disciplinary powers set out in Part VII of the Law Practitioners Act 1982 does not remove or limit the powers of the Court to control the conduct of counsel in proceedings before the Court. Hence, in appropriate cases, a declaration or injunction has been sought against counsel in civil litigation. (*Black v Taylor*, supra, at 419.)

Similar procedural measures should also be available to resolve conflicts of interest arising in relation to criminal prosecutions. In Australia, interlocutory injunction proceedings have been used to restrain a law firm from representing the Commissioner of Corporate Affairs in connection with criminal charges against a former client. (*Mallesons Stephen Jacques v KPMG Peat Marwick & Ors* (1990) 4 WAR 357.) After the injunction was obtained, the law firm sought a declaration that it was entitled to act for the Commissioner in relation to the charges, while the former client sought a permanent injunction restraining the plaintiff from so acting. The Court held that

there was a "real and sensible possibility" of a conflict of interest which precluded the law firm acting for the Commissioner.

If the relevant criminal proceedings are before the High Court, issues relating to an alleged conflict of interest could be raised by way of an interlocutory application as part of the criminal proceedings. Such a course was followed in the context of the civil proceedings in *Black v Taylor* (at 419). If, on the other hand, the substantive criminal proceedings are before the District Court, the appropriate procedural vehicle for seeking a declaration or injunction (be it quia timet or prohibitory) would be to file an originating application to obtain the leave of the Court under Rule 458D(1)(c), a course commented upon favourably by McGechan J in the High Court decision in *Taylor v Black* (unreported decision, CP 157/92; Wellington Registry).

The Court's power to restrain a barrister from acting in a conflict of interest situation arises from the Court's inherent jurisdiction and may be exercised where the interests of justice so require. The scope of the Court's inherent jurisdiction was recognised by Lord Morris in *R v Connolly* [1964] AC 1254 (HL). It was seen as imperative that the Court

> must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process. (at 1301.)

The Court of Appeal in New Zealand has endorsed this approach. (*Black v Taylor*, supra.)

In the civil cases involving conflicts of interest, the Courts have held that the supervisory jurisdiction extends to determining the propriety of counsel appearing in a particular case. It is not just a question of determining the right of counsel to practise generally. The Court may be required to determine whether representation by particular counsel is appropriate to ensure that there is, as Cooke P stated in *Black v Taylor*, "both justice and an appearance of justice". In a recent case involving the propriety of counsel acting in a civil proceeding (a representative of a law firm appearing for clients where there is an actual or potential conflict of interest), the Court was also concerned about the integrity of the judicial system. (*Kooky Garments Limited v Charlton*, supra.) Thomas J there referred to the "principle of protecting the integrity of the judicial process". His Honour added that:

> Integrity is undermined if solicitors or counsel do not possess the objectivity and independence which their professional responsibilities and obligations to the Court require of them. (at 590.)[2]

The willingness of the Courts to determine conflict issues is of course related to the historical approach of the common law that legal disputes be settled fairly, openly and free from prejudice. The maintenance of this objective has led to the Courts being prepared to examine the conduct of barristers to ensure that such conduct does not prejudice either particular litigants or the judicial process itself. As was stated in an Australian case:

> It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a Court of Justice from having his case tried free from all matters of prejudice. (*Ex Parte Bread Manufacturers: re Truth and Sportsman Limited* (1937) 37 SR (NSW) 242 at 249, per Jordan CJ; this dictum was applied by Ipp J in *Mallesons Stephen Jacques v KPMG Peat Marwick & Ors*, supra, at 368).

Limitation on the ability to act — formulating the test

It now seems clear, following the decision of the Court of Appeal in *Black v Taylor*, (at 417, per McKay J), that a barrister does not have an absolute and independent right to determine whether he or she may act in any proceedings, subject only to breach of confidence obligations. An obvious application of the principle arises in connection with criminal legal aid. Legislation provides for the appointment of counsel to act on legal aid (see Legal Services Act 1991, s 17), but a defendant does not have a right to choose the particular counsel.

A further limitation on representation arises through the exercise, in appropriate cases, of the Court's powers to deny the right of audience to counsel when, by reason of conflict or otherwise, the interests of justice so require. As to the appropriate test for determining the circumstances in which counsel's right to appear may be circumscribed, the Courts have yet to settle on a single all-encompassing test (See the discussion in the various judgments in the Court of Appeal in *Black v Taylor*, supra.)

An attempted formulation of a suitable test was propounded by the Court of Appeal in England in *Rakusen v Ellis Munday & Clarke* [1912] 1 Ch 831. The Court held that it would only interfere with a party's choice of solicitor if it were "satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act" (per Cozens-Hardy MR at 835), or where there was "such a probability of mischief that the Court feels . . . it ought to interfere" (per Fletcher Moulton LJ at 841.) The "probability of mischief" approach applied in *Rakusen* was recently considered again in England by the Court of Appeal. (*Re a Firm of Solicitors* [1992] 1 All ER 353). Various formulations of the appropriate test were examined, leading the Court to reject the "probability of mischief" test in favour of a test of "reasonable anticipation of danger" which was aimed at giving the Court wider powers of control over representation issues.[3]

The *Rakusen* test has also been held in Canada to be inadequate because of difficulties of proof of use of confidential information.[4] The Canadian Courts seem to be moving towards a test based on an unqualified perception of fairness and the requirements of the interests of justice. (See *Everingham v Ontario* (1992) 88 DLR (4th) 755.) The Full Court of the Ontario Divisional Court upheld a lower Court's removal as counsel of the Crown Solicitor who had spoken to a litigant (a mental patient) before cross-examining the litigant on his affidavit. The Court stated that:

> The public interest in justice requires an unqualified perception of its fairness in the eyes of the general public . . . The goal is not just to protect the interests of the individual litigant but even more importantly to protect public confidence in the administration of justice. (at 762.)

In New Zealand, the Court of Appeal in *Black v Taylor* (supra) has embraced this approach. The

President and McKay J did so implicitly, by adopting a test based on an appearance of a conflict of interest such that justice will not be seen to be done (per Cooke P at 406 and per McKay J at 418). Richardson J did so explicitly and stated:

> Disqualification will ordinarily be the appropriate remedy where the integrity of the judicial process would be impaired by counsel's adversarial representation of one party against the other. The decision to disqualify is not dependent on any finding of culpable conduct on the lawyer's part. Disqualification is not imposed as a punishment for misconduct. Rather it is a protection for the parties and for the wider interests of justice. The legitimacy of judicial decisions depends in large part on the observance of the standards of procedural justice. Where the integrity of the judicial process is perceived to be at risk from the proposed or continuing representation by counsel on behalf of one party, disqualification is the obvious and in some cases the only effective remedy although considerations of delay, inconvenience and expense arising from a change in representation may be important in determining in particular cases whether the interests of justice truly demand disqualification. (at 412.)

The Australian Courts have also struggled with the *Rakusen* test. (See *Australian Commercial Research and Development Limited v Hampson* [1991] N[1] Qd R 508 and *Wan v McDonald* (1992) 105 ALR 473.) In the *Mallesons Stephen Jacques* case, Ipp J adopted the test of "a real and sensible possibility that the solicitor's duty and interest might conflict". He then drew attention to the obligation of the Court to ensure "not only that justice is done, but also that it is apparent that it is done". (at 362, citing *D&J Construction Pty Ltd v Head (trading as Clayton Utz)* (1987) 9 NSWLR 118.) The Australian Courts seem determined to ensure that they have the ability to control representation issues where conflicts of issue arise. Such powers have been applied to conflicts involving both solicitors and barristers.

Applicability of the Rules of Professional Conduct

The New Zealand Law Society has, pursuant to statutory powers, (see s 17, Law Practitioners Act 1982), published rules of conduct which provide guidance for practitioners in their practice of law. (See Rules of Professional Conduct for Barristers and Solicitors, 2nd edition, published January 1993). Such rules (and related commentaries) have been approved and adopted by the Council of the New Zealand Law Society, not as an exhaustive code, but rather as a definition of the bounds within which practitioners may practise the profession. The introduction to the rules acknowledges that the provision of guidelines is more complex in New Zealand than in a number of other countries, because of the structure of the profession. It is also suggested that any attempt to compile an exhaustive code purporting to define exclusively the rules would be "self-defeating".

In the context of any consideration of conflicts of interest and representation, a number of the rules may be noted:

> **Rule 1.02** A practitioner as a professional person must be available to the public and must not, without good cause, refuse to accept instructions for services within the practitioner's fields of practice from any particular client or prospective client.
>
> **Rule 1.03** A practitioner must not act or continue to act for any person where there is a conflict of interest between the practitioner on the one hand, and an existing or prospective client on the other hand.
>
> **Rule 1.06** A practitioner must not act for a client against a former client of the practitioner when through prior knowledge of the former client, or of his or her affairs which may be relevant to the matter, to so act would have the potential to be to the detriment of the former client or could reasonably be expected to be objectionable to the former client.
>
> **Rule 1.08** Information communicated to a practitioner by a client or otherwise received by a practitioner on behalf of a client, is confidential and, with certain statutory exceptions, privileged from disclosure.

There are other rules, such as Rule 1.05, which deal with conflicts of interest, but which need not be examined in detail here. It is also unnecessary for present purposes to discuss the commentaries to the rules just mentioned. It may be observed, however, that the rules regarding conflicts of interest make no attempt to distinguish between civil and criminal cases. It seems that the New Zealand Law Society rules are broad enough to encompass actual and potential conflicts of interest in both criminal and civil cases. But the commentaries are, in the main, directed at conflicts of interest in the case of transactions generally or civil litigation.

When the Courts are called upon to determine representation issues arising out of conflicts of interest, they will undoubtedly have regard to the content of the applicable rule. In *Black v Taylor*,[5] McKay referred, for example, to rule 1.06 as being relevant to the issue before the Court. The learned Judge stated:

> that rule is of relevance to the exercise of the Court's inherent jurisdiction as being a statement, by the responsible body of the profession invested with the statutory power to make rules regulating the conduct of practitioners, as to what is an appropriate standard of conduct in a conflict situation. (at 418-419.)

His Honour added:

> The standard of conduct which [rule 1.06] imposes on barristers appears to me to accord with the standard which is necessary to enable the Courts to discharge their functions in the administration of justice. I would adopt it, subject to the de minimis principle, as an appropriate guide for the exercise of the inherent jurisdiction on an application such as in the present case. (at 419.)

Accordingly, where the Court is called upon to determine conflict of interest disputes in relation to criminal cases, the content of the relevant rules of professional practice are likely to be a factor which the Court will consider. It should be noted, however, that the rules as presently formulated

do not provide any detailed guidance on the relevant factors which are likely to apply to actual or potential conflicts in criminal cases. In this regard, our rules are to be compared with the Model Code of Professional Responsibility which have been developed by the American Bar Association, and which provides more detailed guidance as to what is acceptable conduct.

Application of disqualification principles to criminal cases

There appear to be no reported cases in New Zealand of the application of the conflict of interest principles to criminal cases. A recent application to the High Court for a prohibitory injunction and declaration against a barrister in the context of a Serious Fraud Office prosecution (*Sturt v Judd & Anor*, M No: 543/94 Auckland High Court) was resolved without the need for a hearing. The only known Australasian precedent is the case of *Mallesons Stephen Jacques v KPMG Peat Marwick* (supra). It was there observed that:

> litigation involving the prosecution of serious criminal charges calls for the most careful measures to secure not only that justice is done, but that also it is apparent that it is done.

Ipp J also drew attention to the fact that the law firm concerned would, if it acted for the prosecution against a former client, "receive a very great psychological benefit". (at 368.) He added:

> The adversary system of criminal justice brings about an atmosphere of subtle tension in the court room which is an important part of the trial process. It is often the dynamics of that atmosphere that determines a jury's decision to believe or disbelieve a witness. In a trial involving serious charges, lasting many months, covering many complex issues, there could be an incalculable and prejudicial effect upon the state of mind, and therefore the demeanour of a defendant who knows that prosecuting counsel has been briefed by the very firm of solicitors whom he previously consulted to advise him on several of the very issues which form the subject matter of the prosecution. Such prejudice would be intangible, but, nevertheless, very real.

Finally, Ipp J referred back to the public interest factor which had strongly influenced the Judge who granted the interlocutory injunction. That Judge had stated that:

> It is in everybody's interests that the procedures of the criminal law be made as safe as is reasonably possible. That is because people's liberty and reputations are involved.

It is in the context of actual or potential conflicts in criminal cases, that the tests developed by the Court of Appeal in *Black v Taylor* are likely to prove most apposite. Given the premise that disqualification is appropriate where a barrister "appeared to have a conflict of interest such that justice would not be seen to be done", the test is apt to permit disqualification in a wide range of circumstances. The amplification of the test for disqualification, expounded by Richardson J (at 412), and rooted in "the integrity of the judicial process" is also highly relevant to representation disputes in the criminal context. At the end of the day, it will be an issue of determining whether, on the facts of any particular case, the interests of justice and fairness require disqualification.

But what these tests, and the New Zealand Law Society's Rules of Professional Conduct, do not do, is spell out for counsel operating in the criminal law field, where the precise boundaries of representational propriety may lie. In this regard, it is pertinent to consider some of the recent US authorities where disqualification of defence counsel at the behest of State prosecutors, has been granted in a range of interesting circumstances.

US cases on disqualification in criminal cases

A consideration of the US cases must start by noting that the Sixth Amendment to the constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence": (US Const Amend VI.) However, this Constitutional provision does not give an accused person the absolute right to counsel of choice. It has been held that:

> while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. (*Wheat v United States*, 486 US 153 at 159 (1988).)

The US Supreme Court made it clear in *Wheat* that the Sixth Amendment right to choose one's own counsel is circumscribed in several important respects. It was pointed out that, regardless of the advocate's persuasive powers, the advocate who is not a member of the Bar may not represent clients (other than himself) in Court. Moreover, a defendant may not insist on representation by an attorney he cannot afford or who, for other reasons, declines to represent the defendant. Chief Justice Rehnquist stated:

> Nor may a defendant insist on the counsel of an attorney who has a previous or on-going relationship with an opposing party, even when the opposing party is the government. The question raised in this case is the extent to which a criminal defendant's right under the Sixth Amendment to his chosen attorney is qualified by the fact that the attorney has represented other defendants charged in the same criminal conspiracy.

The Supreme Court was asked to rule on a successful prosecution application for disqualification of the chosen defence attorney, in circumstances where that attorney had at an earlier trial, represented two of the co-defendants, one of whom was to testify at the accused's trial. The United States Court of Appeals had upheld the disqualification on the basis that there had been a proper balancing of two rights under the Sixth Amendment, namely, the right to counsel of one's choice and the right to a defence conducted by an attorney who is free from conflicts of interest. This decision was affirmed by the Supreme Court.

One of the issues which arose in the case was what weight should be given to an accused's waiver of the

Sixth Amendment right to a conflict-free representation, not only where an actual conflict might be demonstrated prior to the trial, but also where there was a potential for conflict of interest which might develop into an actual conflict as the trial developed. It was argued on behalf of the appellant that a waiver would have cured any problems created by the multiple representation. But the Supreme Court held that the right to a waiver was not absolute, since

> [f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. (*Wheat*, at 160.)

The question of disqualification involved not only the constitutional rights of the accused, but also the interests of the Courts in preserving the integrity of the process and the government's interests in ensuring a just verdict and fair trial.

The constitutional right of representation by the accused's chosen counsel has, in the US, been interpreted as giving rise to a presumption in favour of the counsel of choice. But where a motion for disqualification is brought before the District Court, the presumption can be overcome by showing an actual conflict of interest or a potentially serious conflict. (See *United States ex rel Stewart v Kelly*, 870F 2d 854, at 856 (2d Cir 1989).) The approach of Appellate Courts has tended to be to accord the decision of the District Court to disqualify an attorney "substantial latitude" and to review that decision only where there has been an abuse of discretion. (See *Wheat*, supra, at 163-164.)

It has been established in the US cases that there are many situations in which a District Court can determine that disqualification of counsel is appropriate. The most usual situation is whether the District Court finds a potential or actual conflict in the chosen attorney's representation of the accused, either in a multiple representation situation[6] or because of the attorney's prior representation of a witness. (See *Stewart*, supra). The US Appeals Courts have also upheld disqualifications where the chosen attorney is implicated in the allegations against the accused and could become an "unsworn witness" for the accused,[7] or where the chosen attorney is unable to represent the accused without unreasonable delay or inconvenience in completing the trial. (See *United States v Scopo*, 861 F 2d 339, at 344 (2d Cir 1988).)

In the *Stewart* case (supra), the Circuit Judges held that there was a conflict of interest in allowing counsel (Linn) to act for the accused (Tineo), when he had previously acted for a prosecution witness. This was a potential conflict of interest on counsel's part. Although Linn argued that all he knew about the witness, a confidential informant, was what was contained in his "rap-sheet" and he could accordingly limit his cross-examination to information contained in it, this argument was rejected:

> There was no guarantee that Tineo's interests could be served without vigorous cross-examination of the informant in a manner wholly inconsistent with the informant's interests. To limit cross-examination of the informant to his rap sheet may have prejudiced Tineo, had more searching enquiries been necessary for complete evaluation of the testimony against Tineo. . . . (at 857.)

There can be no doubt that Linn's potential conflict was serious, that his loyalty was divided between a client and a former client, and that representing Tineo would have created a strong appearance of impropriety. This is no less true, simply because Linn's representation of the clients did not concern the same matter, as was the case in *Wheat*. Two clients' interests in separate matters may be just as opposed, and the potential for conflict just as serious.

The *Gotti* decision

The various principles applicable to applications for disqualification in criminal cases were fully considered by the United States Court of Appeals for the Second Circuit in *United States v Gotti* (6 F 3d 924 (2d Cir 1993). Gotti and his co-defendant Locascio has appealed from convictions in the District Court on conspiracy charges under the Racketeer Influenced Corrupt Organisations Act 1988. The charges stemmed from their involvement in the Gambino Crime Family of La Cosa Nostra, an extensive criminal organisation.

Some of the allegations against the two accused involved tape recordings from four different locations over an eight year period. The most significant evidence consisted of conversations from such tape recordings at a New York address from late 1989 to early 1990. The tape recordings, as well as other evidence, demonstrated an involvement of the accused in large-scale enterprise of criminal activity. The evidence described various crimes with which Gotti and Locascio were charged, including murders, obstruction of legal proceedings, conspiracies, gambling operations and loan sharking activities.

One of the grounds of appeal related to the disqualification of counsel for both Gotti and Locascio on the grounds of conflicts of interest. Gotti's counsel was Bruce Cutler, who had served as Gotti's attorney in previous criminal trials in the Federal Court. Prior to this trial, the government had moved to disqualify Cutler from acting as Gotti's attorney, which application had been granted by the District Court.

The District Court Judge had found that Cutler had acted as "house counsel" to the Gambino Crime Family by receiving "benefactor payments" from Gotti to represent others engaged in criminal activities. The Judge concluded that the taped transcripts "left little doubt that Gotti paid significant sums of money for legal services rendered to others". The Judge further held that Cutler's participation in the taped conversations (in which illegal activity was discussed) would impair his ability to represent Gotti. The Judge found that Cutler's presence at the trial could make him an "unsworn witness" before the jury in explaining his own conduct and interpreting his client's conversations on the tapes.

Even if Gotti were to waive the conflict, and even if the government did not intend to call Cutler as a witness, the Judge found that Cutler's representation would still compromise the integrity of the proceeding. The District Court Judge accepted that disqualification was a drastic remedy for conflict of interest problems, but found that no less severe alternatives were available. He held that the "grave peril that continued representation by

[Cutler] poses to the integrity of the trial process" required disqualification.

In dealing with this ground of Gotti's appeal, the Court of Appeals found that there was sufficient evidence for the District Court to determine that Cutler had acted as house counsel to the Gambino Crime Family. This role raised "a credible issue of the ethical propriety of his representation of Gotti in this case". The Court held that "an attorney cannot properly serve two masters, and the evidence before the District Court indicated that Cutler had represented the Gambino Family as a whole . . ." The Court also examined as an "even stronger basis for disqualification", the possibility that Cutler would function in his representational capacity as an unsworn witness for Gotti. The Court pointed out that an attorney acts as an unsworn witness, when the relationship to the client results in having first-hand knowledge of the events presented at trial. If the attorney is in a position to be a witness, the ethical requirements of the Model Code of Professional Responsibility, require the attorney to withdraw from representation.

The Court of Appeals considered that, even if the attorney were not called as a witness, disqualification could still follow since the attorney's performance as an advocate might be impaired by involvement in the events in question. The attorney could well be constrained from making certain arguments on the client's behalf merely "because of [the attorney's] own involvement". Or, the attorney might be "tempted to minimise his own conduct at the expense of his client". (*United States v Gotti* at 933 citing *United States v McKeon*, 738 F 2d 26, at 34-35 (2d Cir 1984).) Moreover, the Court held that the attorney's role as an advocate could give the client an unfair advantage, because the attorney could subtly impart to the jury first-hand knowledge of the events without having to swear an oath or be subject to cross-examination. Hence, disqualification is appropriate where the attorney could essentially be acting as both an advocate and a witness.

The Court of Appeals also referred to the conflict issue in *Wheat* — multiple representation — which was a conflict which operated to the detriment of the accused. It was noted that, in such a case, waiver by the accused of a conflict can conceivably alleviate the constitutional defect, "so long as the representation by counsel does not seriously compromise the integrity of the judicial process". But, where the attorney would be an unsworn witness,

> the detriment is to the government, since the defendant gains an unfair advantage, and to the Court, since the fact-finding process is impaired. Waiver by the defendant is ineffective in curing the impropriety in such situations, since he is not the party prejudiced.

In conclusion, the Court of Appeals held that, although disqualification was a "drastic remedy", it was appropriate in the present case. For the reasons outlined above, the Court concluded:

> Although we are cognisant of the right of the accused to secure representation, we are also conscious of the institutional interest in protecting the integrity of the judicial process. If an attorney will not perform his ethical duty, it is up to the courts to perform it for him. Bruce Cutler had no place representing John Gotti in this case, and the District Court properly determined that he should be disqualified. (at 934.)

Balancing the public interest — Detection and investigation of crimes

When the New Zealand Courts come to consider representational issues in criminal cases, the US cases will undoubtedly provide useful guidance. It is likely that a range of public interest factors applicable to the criminal process will need to be taken into account. One such factor which may arise is the role of government agencies in detecting and investigating criminal offences.

It is well recognised that there is a public interest in allowing the proper detection and investigation of crimes. (See *Conway v Rimmer* [1968] AC 910, at 954 per Lord Morris.) This proposition finds support from the observation of the authors of *Freedom of Information in New Zealand,* (Eagles Taggart and Liddle at p 180), where it was stated that:

> a crime cannot be investigated if the investigator's every move is visible to those whose actions are being enquired into, and nothing should be disclosed which is likely to hamper the investigation while it is actually in progress. The point is obvious and has been made in public interest immunity cases. Those cases also recognise two very important qualifications as its principle: the information withheld must be germane to the investigation and the protection conferred should last only as long as the investigation can be harmed by the disclosure of the information.

It is to be observed that s 6(c) of the Official Information Act 1982 provides further recognition of the public interest in the investigation and detection of offences. The section states that:

> Good reason for withholding official information exists . . . if the making available of that information would be likely to prejudice the maintenance of the law including the prevention, investigation and detection of offences, and the right to a fair trial . . .

In *Commissioner of Police v Ombudsman* [1985] 1 NZLR 578 Jeffries J held that the Police investigation continued right up to trial. Thus, the progress of investigators should not be constrained by the prospect of disclosure under the Official Information Act prior to trial. The Court of Appeal disagreed with this approach. Cooke P stated ([1988] 1 NZLR 385, at 397):

> Generally speaking, investigations by the Police before the commencement of criminal proceedings should be protected from disclosure. But, once a case has progressed beyond the investigatory stage, to the point where criminal proceedings are actually under way, I think that the Act gives the person who happens to be the defendant a prima facie right to all the information held by the police which can truly be said to be personal information about that person and which contains or bears on the evidence of the offence charged.

> To make the Act reasonably workable it has to be recognised . . . that once criminal proceedings have been commenced the balance aimed at by s 6(c) (Official Information Act 1982) will usually shift. Until then police investigations and statements obtained and notes made in their course are generally protected from disclosure under the Act. After that stage the maintenance of the law and the right to a fair trial point generally to disclosure of personal information contained in briefs of evidence, witness statements or notes of interviews, as this should help to ensure the fairness of the trial.

However, the President recognised that the wording of s 6(c) of the Official Information Act suggested that information which related to the prevention, investigation and detection of offences, and which was compiled prior to the commencement of criminal proceedings, should be protected.

It is to be noted that the provisions of s 50 of the Serious Fraud Office Act suggest that, by contrast, in serious fraud cases, the balance referred to by the Court of Appeal in respect of s 6(c) of the Official Information Act does not shift until the investigative role ceases, ie it is maintained until the investigation has come to a final conclusion. This principle was recently confirmed by the Court of Appeal itself in *R v Curtis*. (Unreported decision of the Court of Appeal, CA 356/93, 3 December 1993, at p 10 of the joint judgment of Casey and Thorp JJ.)

The above public interest factors could well be relevant to any consideration by the Courts of representational issues arising in connection with criminal cases. Other relevant factors would include any prejudice or hindrance to such criminal investigations to which reference will now be made.

Prejudice to or hindrance of investigation

A Court considering the issue of an actual or potential conflict of interest in criminal cases will be required to consider the potential prejudice to the complaining party when determining whether intervention is necessary. In this regard, it is appropriate to recall the view of Ipp J in the *Mallesons Stephen Jacques* case, supra, at 367-368, that prosecution authorities should be permitted to have prosecutions tried free from all matters of prejudice. Accordingly, Courts should be alert to consider the existence of any evidence of possible prejudice, as part of a consideration of whether the judicial process is, as Richardson J suggested, "perceived to be at risk from the proposed or continuing representation by counsel on behalf of one party." (*Black v Taylor*, supra, at 412.)

How the prejudice or hindrance might manifest itself in a particular case will inevitably turn on the facts of the case. Cases will generally be fact specific and this is an added reason why the tests recently propounded by the Court of Appeal in *Black v Taylor* have attraction in the context of determining representation issues in criminal cases. If prosecution authorities are seeking to establish the existence of prejudice to the investigation, it may be necessary to seek to have the Court receive confidential evidence by affidavit, on an ex parte basis. While it has been held that this course will only be allowed "on strictly limited occasions", the reception of confidential evidence by the Court on the basis that it is not shown to the opposing party, may be permitted, if this is "the best way of doing justice." [8]

The Court of Appeal in *Commissioner of Police v Ombudsman* supra, recognised that there may be some special risk of interference with witnesses, fabrication of evidence or other perversion of justice which could amount to "good reason" within s 6(c) of the Official Information Act for withholding from a requesting person information to which that person would otherwise be entitled. The principles of disclosure in criminal cases are designed to ensure fairness to both sides in having access to all relevant evidence obtained during an investigation and generally involve the maintenance of the integrity of the Court process.[9] Fairness cuts both ways and in respect of s 6(c) of the Official Information Act, the Courts have accepted that "the right to a fair trial is a right to which the community as a whole is entitled as well as an accused person".[10]

In the context of considering prejudice or hindrance to the prosecution, it is also important to recognise that the law offers various protections to accused persons in the preparation of their defence. The duties of disclosure resting on the prosecution now ensure that all relevant documentary evidence is disclosed![11] Moreover, the ability of the defence to interview prosecution witnesses is preserved by R 10.08 of the Rules of Professional Conduct for Barristers and Solicitors. That rule provides as follows:

> In criminal as in all other proceedings before the Court, no practitioner or party has the sole right to call a witness or discuss the case with a witness.

However, the commentary to the rule sets out the circumstances in which defence counsel may interview a witness:

(i) In a District Court prosecution, counsel may interview any person who might be called as a witness by the Police prior to the Court hearing, without first notifying the prosecutor of counsel's intention.
(ii) In indictable matters, defence counsel may interview any Crown witness after the deposition hearing but before the trial as long as the Crown Solicitor is notified.

The Rules recognise the inherent difficulties for defence counsel when interviewing a prosecution witness, to ensure that nothing is said or done to intimidate that witness.

The Court of Appeal held in *R v Mason* [1976] 2 NZLR 122 that, as part of the process of criminal disclosure, where the Police have interviewed a person who can give evidence on a material subject and the prosecution does not intend calling that person, then whether the prosecution considers the person creditworthy or not, the person's name and address must be made available to the defence. These principles apply to Serious Fraud Office prosecutions.

Representational issues under the Serious Fraud Office Act 1990

Before drawing some conclusions on conflict issues arising in criminal cases, it is pertinent to refer to a situation under the Serious Fraud Office Act 1990 ("the Act"), where issues of representation may arise. Section 9(5) of the Act makes provision for potential witnesses in

serious fraud cases to be compelled to attend before the Director to be interviewed. Such a person has a right to be represented by a barrister or solicitor. Section 9(5) of the Act provides as follows:

> Any person who is required to attend before the Director under this section, shall, before being required to comply with any requirements imposed under this section, be given a reasonable opportunity to arrange for a barrister or solicitor to accompany him or her.

An important question arises as to whether it would be open for the barrister or solicitor representing a person accused of charges by the Serious Fraud Office to be the person accompanying a witness or potential witness, who is the subject of a notice under s 9 of the Act.

It is difficult to generalise without reference to specific factual circumstances. However, as a matter of principle, it would seem that there would be a conflict of interest which would prevent the defence counsel from being an accompanying person. Accordingly, although s 9(5) of the Act would on its face allow persons, the subject of a notice, to have counsel of their own choice, such a right would not be an absolute one. In order to maintain and preserve the independence of counsel and the integrity of the Court process, the right to choose one's own counsel would be balanced against the need to ensure that counsel, in acting for any client, did not place themselves in a situation where there is a real or potential risk of conflict of interest.

One problem which emerges from counsel seeking to act both for a defendant in a criminal proceedings and also purporting to act for a prosecution witness in the same proceeding, is that this could seriously affect the ability of the Serious Fraud Office to pursue its investigation. This would arise because the s 9 interviews are really a first step in the evidence gathering process which continues down to the time when the depositions statements of witnesses are settled, prior to depositions. Various types of prejudice to the investigation may be envisaged. Moreover, the position of the barrister or solicitor occupying the dual role would be untenable. How could such a person cross-examine his or her own client (the Crown witness) at the trial? This situation presents as a classic case for disqualification on the basis of a potential, if not an actual, conflict of interest. (Disqualification at a pre-trial stage would also be necessary to ensure that the accused was not setting up a potential appeal point, based on representation.)

Expanded Rules of Conduct or a Model Code of Professional Responsibility

The US authorities referred to above, have indicated various situations in which the Courts will intervene to protect the integrity of the judicial process and resolve conflicts of interest by disqualifying counsel in criminal cases. Examples range from disqualification for acting for a co-accused, or a Crown witness or where the counsel could become an unsworn witness. There can be no doubt that situations such as arose in the *Stewart* case, supra, (disqualification resulting from defence counsel previously acting for a Crown witness) are likely to occur in New Zealand. If anything, given the relatively small size of the criminal bar in this country, the prospects are reasonably high.

The US Courts have not been deterred from intervention in proper cases by concerns about the flood gates argument or the potential growth of a "disqualification industry"![2] The Courts are right to be concerned about the the possibility that applications to disqualify might become a "growth area". But one way of controlling this problem is to ensure that the rules of conduct are clear. This raises the question of the appropriateness of developing, for New Zealand, a Model Code of Professional Responsibility of the type which has been developed in the United States, by the American Bar Association.

It is instructive to refer, as examples, to three provisions from the Disciplinary Rules section of the ABA Model Code of Professional Responsibility:

DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness

(A) If, after undertaking employment in contemplated or pending ligitation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the

representation until it is apparent that this testimony is or may be prejudicial to his client.

DR 5-105 Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

The ABA Model Code of Professional Responsibility comprises three separate, but interrelated, parts: Canons, Ethical Considerations and Disciplinary Rules (of which the above Rules are part). The Model Code was designed to be adopted by appropriate US agencies as a guide to members of the legal profession and as a basis for disciplinary action where minimum standards are breached.[13] Many of the ABA model provisions have been adopted by various US State Legislatures as enforceable codes of conduct for lawyers.

It seems that such Model Code and Rules have provided useful guidance for both attorneys and the Courts in the United States. They appear to have introduced an element of clarity and certainty into the principles which govern the conduct of lawyers. The policy reasons for demanding clarity in this area, articulated in the *Mallesons Stephen Jacques* case in Australia, (at 368), seem compelling. There seems no good reason why such a Model Code or Rules should not be developed in New Zealand.

Concluding observations

The New Zealand Law Society's Rules of Professional Conduct do not set out to be an "exhaustive code" intended to give an exclusive definition of the rules of conduct. Nevertheless, in the areas affecting conflicts of interest in criminal cases, there would seem to be a sound case for further amplification. It seems that a more definitive statement of the applicable rules would be desirable. Some flexibility can be built into such rules to cater for new, unusual or special situations. At the very least, the case for a Model Code should be considered by the Ethics Committee of the New Zealand Law Society or the Law Commission as part of its Criminal Procedure Reference.

If greater definition of the rules of conduct were developed, in line with the precedents provided by the ABA Model Code and Rules, it would provide welcome assistance to all lawyers practising in the criminal law, and to the Courts called upon to determine representation issues. It will also help to give some meaningful content to the tests being developed by the Court of Appeal in the civil context, which are aimed at preserving and enhancing the integrity of the judicial process. Fairness requires the protection of the interests of all those involved in the criminal process. Clearly, it is desirable that criminal prosecutions be free from any contamination by actual or potential conflicts. Only in this way, can accused persons be sure that the criminal law is made, procedurally and substantively, as safe as possible. □

1 *Davies v Clough* (1837) 8 Sim 262; 59 ER 105; the inherent jurisdiction was recently invoked in Australia in *Mallesons Stephen Jacques v KPMG Peat Marwick & Ors* (1990) 4 WAR 357 and was confirmed in New Zealand by the Court of Appeal in *Black v Taylor* [1993] NZLR 403, at 408-409.

2 The American case of *Freeman v Chicago Musical Instrument Co* 689 F 2d 715 (1982) was followed. See also the dictum of Richardson J in *Black v Taylor*, supra, at 408 ("the integrity of our system of justice depends upon its meeting those standards").

3 The applicable test was formulated in somewhat differing terms. Parker LJ and Sir David Groom-Johnson preferred the reasonable anticipation of danger approach, while Staughton LJ held that the Court would interfere where there was "some degree of likelihood of mischief, that is to say that confidential information imparted by the former client being used for the benefit of the new client" (at 365).

4 See *MacDonald Estate v Martin* (1991) 77 DLR (4th) 249 (S Ct) and *Manville Canada Inc v Ladner Downs* (1992) 88 DLR (4th) 208; The *Rakusen* test was recently doubted in *Equiticorp Holdings Ltd v Hawkins* [1993] NZLR 737, at 739, per Henry J ("The need for protection [of solicitor client confidential information] has public interest as its basis, and one of the features of it is the avoidance of an actual or potential conflict of interest . . ."

5 Similar reliance on the Rules of Professional Conduct was placed by Thomas J in *Kooky Garments Ltd v Charlton*, supra, at 590.

6 See *Wheat*, supra, at 159-160; *United States of America v Di Tommaso* 817, F 2d 201, at 219 (2d Cir 1987); *United States v Curcio*, 680 F 2d 881, at 886 (2d Cir 1982)

7 See *United States v Arrington*, 867 F 2d 122, at 129 (2d Cir 1989); *United States v Kwang Fu Peng*, 766 F 2d 82, at 87 (2d Cir 1985).

8 See *Attorney-General v Hawkins* [1992] NZLR 664 (CA). The Court decided this issue by a majority (McKay J dissenting) and in so doing followed a similar approach in respect of American freedom of information cases eg *Carter v United States Department of Commerce* 830 F 2d 388 (1987).

9 See the observations of McMullin J in *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385, at 405 citing with approval the dictum of Sir Trevor Henry in *Attorney-General v Noonan* [1956] NZLR 1021, at 1027. See also *R v Greening* [1991] 1 NZLR 110, at 112 per Tipping J "ordinarily the Court might well be anxious to order the Crown to disclose information if it was thought that to do so was necessary to ensure a fair trial".

10 See dictum of Tipping J in *R v Greening*, supra, at 112.

11 See *Commissioner of Police v Ombudsman* [1988] 1 NZLR 385; *R v Tamihere* (No 2) (1990) 6 CRNZ 653 and *Nattrass v District Court at Auckland* (1992) 9 CRNZ 245 (which held that the duty of disclosure was part of the duty of fairness).

12 See observation of McKay J in *Black v Taylor* supra, at 420 referring to *Manville Canada Inc v Ladner Downs*, supra.

13 The ABA has also developed Model Rules of Professional Conduct which provide useful guidance to lawyers in a wide range of litigation situations: see eg Rule 1.7 Conflict of Interest and Rule 3.7 Lawyer as Witness.

Sources of funding for small and medium-sized companies in New Zealand

By Mark Fox and Gordon Walker, University of Canterbury

Big companies make the news, but it has been said it is smaller companies in New Zealand that create the wealth that gets measured as gross domestic product or GDP. Small businesses need capital to start and this cannot be got, obviously enough, from the sharemarket investor. In this article the authors look at the venture capital market which law firm clients are likely to want to learn about and to be advised on. A list of possible financing sources with contacts is given as an Appendix.

The authors acknowledge the assistance of Poutama Trust in obtaining the information contained in the article.

1 Introduction

As economic recovery continues in New Zealand in 1994, practitioners can expect more clients seeking their advice regarding funding options for business start-ups or expansion. One such option for smaller businesses is access to venture capital, a term which can be loosely used to describe any form of funding for enterprise growth. More specifically, venture capital is defined as long-term equity investment in small private companies with significant growth potential. The term "risk capital" is used where the investment strategy of a fund leads toward providing expansion capital for growing businesses rather than seed or start-up capital. McNaughton[1] has commented that:

> The study of the venture capital market itself is largely the domain of business and economic researchers who have shown concern for:
> (1) the investment decision-making behaviour of venture capitalists,
> (2) the performance of venture capital portfolios, and
> (3) the availability and cost of venture capital.

This description focuses on the availability question since it is this issue which most pre-occupies clients and their legal advisers. Further, there may be a tendency for practitioners to discount the possibility of finding venture capital on the largely accurate premise that it became extinct in late 1987 following the sharemarket crash of 1987. Our research shows a re-emergence of venture capital on a minor scale. In particular, we draw attention to three "seed capital" schemes operated by the Business Development Boards (BDBs). Two of these schemes offer fifty per cent assistance, up to a maximum of $20,000 per year, to businesses subject to certain criteria discussed below. The effect is this: suppose you have a client engaged in a start-up, entry into a new market or the development of a business new to the region in which the Business Development Board operates. Then, if the client can meet the requisite BDB criteria, and has up to $20,000 in funds for the project, the BDB will match funding up to $20,000 and it may be permissible for part of the grant to be spent on legal or accounting fees. For example, the BDB may provide up to $2000 to protect intellectual property rights.

2 Six stages of venture capital investment

One New Zealand study of the venture capital industry identified six distinct stages of venture capital investment. These are shown in the following table:

Stage	Characteristics
Seed	The venture is at the idea stage or may be in the process of being organised and needs finance for research and development.
Start-up	The company is organised, a formal business plan is available and finance is needed to initiate commercial manufacturing and sales.
Early	The company is producing products or services, is expanding, but may not be showing a profit.
Expansion	The company requires finance for major growth for plant expansion, marketing, working capital or development of a new product.
Mezzanine/ bridging	The company requires funds prior to a second board or main board listing.
Management Buyout	The company's managers require funds to acquire a product line or the operating business.

(Taken from: P Norman, *The Venture Capital Industry in New Zealand: An International Perspective (1989).*)

At present the majority of venture capital sources in New Zealand is concentrated at the seed capital end of the spectrum where relatively small sums (say up to $50,000) are sought. This concentration is not because this stage is regarded internationally as the most difficult stage to fund. Rather it reflects the relatively small amounts of venture capital available. Despite such concentration, Coopers and Lybrand have commented that

> . . . almost by default the primary source of equity funding for small businesses either recently-formed or facing growth opportunities has historically been provided by the founder and his or her direct family or business associates. (Coopers and Lybrand, *Factors Affecting the Supply of Capital for Small Company Growth* (1993) p 41.)

3 Economic development and venture capital

Venture capital funds have played, and will continue to play, a vital role in the economies of New Zealand's major trading partners. Invariably governments have played a key role in the development of venture capital funds.[2] Recently, Crocombe, Enright and Porter identified venture capital as critical to developing New Zealand's competitive advantage. They stated that

> the lack of a professionally organised venture-capital market in New Zealand is an important constraint on the development of New Zealand industries such as software and agricultural technology. (G Crocombe, M Enright and M Porter, *Upgrading New Zealand's Competitive Advantage* (1991) p 115.)

4 A brief history of venture capital in New Zealand[3]

Venture capital in New Zealand has its origins in the Applied Technology Programme which was administered by the Development Finance Corporation (DFC) in the late 1970s. This programme financed new technologies and was targeted primarily at small investors aiming to assist them in commercialising their ideas. Over then years, some $30 million was committed to this programme, which probably returned less than one million dollars in revenues.

In the early 1980s the Small Business Venture Capital Fund was established by the Government. This fund injected approximately $10 million of equity into small growing companies, focusing on those deemed to have export potential. The fund failed to provide a positive return on the funds employed. In early 1984 these two funds were merged to form DFC Ventures, a specialised venture capital company.

From 1985 onwards a number of specialised venture capital companies were established including Venturecorp and the New Zealand Venture Capital Corporation. Several investment capital companies became involved with venture capital at this time. In 1985 the New Zealand Venture Capital Association was established. The 1987 Directory of the NZVCA listed 14 members and 22 associate members.

Following the 1987 sharemarket crash and the sale of the DFC, virtually all sources of venture capital in New Zealand disappeared. This situation has left few alternatives for long term equity capital investment. It appears unlikely that the current financial infrastructure will become responsive to the equity needs of small high growth businesses.

In 1991 the Porter Report commented that

> New Zealand lacks much of the financial expertise and advanced specialised-capital markets that have helped industry in other nations. (*Upgrading New Zealand's Competitive Advantage* (1991) p 111.)

This still holds true, with Coopers and Lybrand recently commenting that:

> Large and sophisticated capital markets by definition offer a broad range of sources of debt and equity funding. The New Zealand market, however, is limited in size. Consequently, a small company seeking capital can soon eliminate possible sources which a large market might be willing, due to competitive pressures, to accept higher levels of risk. (Coopers and Lybrand, *Factors Affecting the Supply of Capital for Small Company Growth* (1993) p 38.)

5 The main players in the venture capital industry

There are very few players in the traditional venture capital industry in New Zealand. This can be attributed to:

(1) *High start-up costs:* it is estimated any new venture capital operation

Recent Admissions

Barristers and Solicitors

Allison GM	Christchurch	14 October 1994	Isac AN	Christchurch	14 October 1994
Brownlee KM	Christchurch	14 October 1994	Johnston JL	Christchurch	14 October 1994
Dawson FR	Christchurch	14 October 1994	King AJ	Christchurch	14 October 1994
Dunn SS	Christchurch	14 October 1994	Nalder KA	Christchurch	14 October 1994
Fletcher KJ	Christchurch	14 October 1994	Parker GN	Christchurch	14 October 1994
Ford CJ	Christchurch	14 October 1994	Peoples PJ	Christchurch	14 October 1994
Fulford SK	Christchurch	14 October 1994	Prebble AJ	Christchurch	14 October 1994
Hannan SA	Christchurch	14 October 1994	Reilly EM	Christchurch	14 October 1994
Hastrop AM	Christchurch	14 October 1994	Rooney AM	Christchurch	14 October 1994
Heyward T J	Christchurch	14 October 1994	Sharp PM	Christchurch	14 October 1994
Holloway LAM	Christchurch	14 October 1994	Taylor JM	Christchurch	14 October 1994
Horgan JA	Christchurch	14 October 1994	Unwin JL	Christchurch	14 October 1994
Howden AH	Christchurch	14 October 1994	Watson NJ	Christchurch	14 October 1994
Irving RF	Christchurch	14 October 1994	Zwart PD	Christchurch	14 October 1994

would require $10 million or more as initial capital;
(2) *High risk:* projects funded can vary widely in their success, some will be unsuccessful and provide no return to the venture capitalist, others will be spectacularly successful;
(3) *Lack of managerial expertise:* the lack of a venture capital industry may well lead to a situation where there is no substantial training ground for would-be venture capitalists to gain the experience they need to "pick winners".

In addition to private venture capital – as may be provided by wealthy families, high worth individuals or friends – there are several more public providers of venture capital, as it is broadly defined. These are as follows:

The Greenstone Fund (Sources: *Pencarrow Funds Management* (Promotional brochure, 1994); "Risk Capital Initiatives in New Zealand", Ministry of Commerce, 1994). The Greenstone Fund began operation in April 1993. The Fund has three institutional shareholders (AMP Society, National Provident Fund, National Mutual Life Association of Australasia) who collectively hold 80 per cent of the equity; the other 20 per cent is held by the New Zealand Government. The total committed capital of the Greenstone Fund is $25 million. To date, approximately $4 million of the Fund has been invested.

Greenstone will also invest in start-ups, but such investments will not comprise more than 20 per cent of Greenstone's investment portfolio.

Greenstone is managed by Pencarrow Funds Management, a joint venture between Willis Bond & Co and Morrison & Co, two Wellington-based investment banks. Greenstone focuses on investments of between 0.5 and $5 million and is primarily interested in established companies with high growth potential and sales of over $2 million per annum. Greenstone is an equity investor in such companies, taking a stake of between 25 and 49.5 per cent, and will plan to exit from the investment in 3 to 7 years.

ACMA Capital Ltd (formerly BLE Capital)
ACMA Capital is a subsidiary of ACMA Capital (Singapore) Ltd and focuses on management buy-outs (MBOs).

Merchant banks
Several merchant banks provide venture capital in small high growth companies. These include Dorchester and Smythe (controlling shareholder in Dorchester Pacific, a New Zealand public listed company) of Auckland.

Maori Development Corporation (MDC)[4]
The Maori Development Corporation was established in 1988 with the objective of being a development bank for Maori (the Maori equivalent of the Development Finance Corporation). Following a series of poor performing investments, the MDC changed focus and today operates as a niche merchant banker at the higher end of the market. Notable successes of the MDC include investments in Ngai Tahu Whale Watch, Moana Pacific Fisheries and the Maori Deka Consortium.

The Poutama Trust
Poutama was originally established to complement the activities of the Maori Development Corporation. Today Poutama's aim is to facilitate Maori economic development. This aim is currently met in four ways: (1) provision of feasibility study grants; (2) provision of management support grants; (3) giving free (independent) advice, and (4) broking relationships. No upper limit is placed on the size of grants that will be considered.

Economic Development Units
Most regions in New Zealand have an economic development unit. These organisations attempt to match companies seeking funds with equity investors. One of the most successful of these is the Canterbury Development Corporation (CDC). Every six months the CDC produces a directory Business Opportunities in Canterbury, listing investment opportunities. The July 1994 edition of this directory gives details on 85 investment opportunities. (Canterbury Development Corporation, *Business Opportunities in Canterbury,* July 1994). The Palmerston North Enterprise Board also provides a "dating service" for businesses and investors. This service (called LINC) requires potential investors with $10,000 or more to register with LINC. Following registration, the would-be investor is provided with updates of investment opportunities.

Pacific Island Business Development Trust
This Trust, targeted at Pacific Islanders, provides business loans of up to $250,000 provided that applicants can contribute at least 15 per cent of the total project cost and provide security for at least 70 per cent of the loan. ("Risk Capital Initiatives in New Zealand", Ministry of Commerce, 1994, p 11.)

Business Development Boards (BDBs)[5]
Business Development Boards do not provide venture capital per se. However, BDBs do provide important sources of funding and advice for small and medium-sized enterprises, which help increase the competitiveness of these businesses.

There are a total of 21 Business Development Boards throughout New Zealand: 14 in the North Island and 7 in the South Island. BDBs activities are in two main areas:

1 Providing information, advice and referrals to people looking at developing new ideas or improving/expanding existing businesses. This may include helping to locate business related information, assistance in researching business ideas, providing contact information and looking at avenues of finance.
2 Providing financial assistance for eligible projects through three Government funded schemes which the Boards administer. These schemes are:

- **Enterprise Growth Development Scheme (EGDS):** provides 50 per cent assistance, to a maximum of $20,000 per year to businesses to:
  - commission research into new markets
  - make exploration visits to new markets
  - participate in international trade fairs
  - undertake promotions in new markets
  - protect intellectual property rights
  - prepare development project proposals
  - undertake quality assurance audits and accreditation.

To qualify businesses must produce goods or services that already compete, or show potential to

compete, in both domestic and international markets. This encompasses businesses selling, or intending to sell, in overseas markets, and those competing with imports. Businesses also need an 18-month trading history and the goods/services for which assistance is sought need to be produced/provided in New Zealand. A maximum contribution of $2000 to assist applicants to protect their intellectual property rights is available.

● **Expert Assistance Grant Scheme (EAGS):** assists small to medium sized businesses seeking to improve their competitiveness. EAGS offer financial assistance of 50 per cent up to a maximum of $8,000 to assist businesses engage consultants to help with key management areas where better performance will lead to sustainable improvements in efficiency and competitiveness. An application must be made to the BDB before work commences. Grants are paid after an approved project has been completed and the consultant's fees have been paid. Legal and accounting costs do not qualify for grants under this scheme.

● **Business Development Investigation Grant (BDIG):** offers financial assistance to individuals, businesses and other organisations to investigate business ideas that are new to the region in which the BDB operates. A BDIG will provide 50 per cent assistance for such an investigation, up to a maximum of $20,000 per project. Qualifying costs include the fees of professional advisers hired for the investigation (for example, legal and accounting).

6 The TRADENZ Hard Business Network pilot programme in Canterbury[6]

The objective of the Hard Business Network pilot programme in Canterbury is to expand the capabilities of small and medium enterprises and enhance their ability to contribute to New Zealand's economic growth whilst increasing company profitability. A Hard Business Network is a formal arrangement whereby two or more businesses link to achieve a common goal. There are existing examples of such arrangements in New Zealand. A group of 13 Auckland furniture and interior product manufacturers has established Furnex which provides warehousing facilities in Brisbane, Sydney and Melbourne for members. The use of these joint warehouses provides the New Zealand companies with a competitive advantage in terms of service, quality and distribution.

The four key participants in Hard Business Networks are multipliers, spotters, brokers and exporters. Multipliers are governmental agencies (like TRADENZ), local trade associations (like Canterbury Manufacturers Association), business development groups (like the Canterbury Development Corporation), banks, financial and legal institutions, and, others who can see the benefits to be derived from small groups of companies working together. Spotters may be individuals working with multipliers who can see specific network opportunities. Brokers are skilled and specially trained business consultants who work with companies to set up hard business networks. Exporters are businesses which are either currently exporting or are ready to export.

The concept is of Danish origin. The Danish programme commenced in 1988 and focused on small to medium enterprise development. Over three years, 2500 companies became involved in 500 networks, 85 per cent of which had an export focus. The programme was credited with assisting Denmark overcome 25 years of current account deficits to have the highest per capita positive trade balance of any OECD country. Ten other countries have since established Hard Network programmes.

Financial assistance for network formation is available via the Business Development Boards. At the feasibility stage, EAGS provides assistance to individual network companies to employ a broker to carry out a business appraisal to assess the potential for joint involvement and collective benefit amongst a group of companies. EAGS provides financial assistance up to a maximum of $8,000 to eligible companies. At the planning stage, EAGS can be used by companies to employ a broker to formally plan the strategic direction a Hard Network should take. In addition to business plan preparation, marketing strategies, research and development initiatives, productivity and quality projects and human resource development are all eligible for grant assistance. Export oriented networks can use EGDS to assist in the development of identified new markets. The scheme provides 50 per cent assistance to a maximum of $20,000 per year. Networks involved in research and development co-operation may wish to contact The Foundation for Research Science and Technology (FORST), in Wellington to discuss eligibility under the Technology for Business Growth (TFBG) scheme.

7 Conclusion

Jane D'Arista has said

> Economic growth is crucial to our nation's future. And our financial markets must be able to raise the necessary capital to fuel this economic growth. (*The Evolution of US Finance, Vol 2: Restructuring Institutions and Markets* (1994) p xvii.)

Venture capital falls at the lower end of the capital formation spectrum but is critical for the start-up phase of many businesses. This article has reviewed present sources of venture capital in New Zealand. As we have shown, these are limited. Contacts for existing sources are listed in the Appendix. □

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1 R B McNaughton, "Venture Capital: The Developing Literature" in M B Green (ed) *Venture Capital: International Comparisons* (Routledge, 1991) For a good bibliography of recent writings, see, C E Thompson, *Venture Capital: A Select Bibliography for Professional Planners, Policy-Makers and the Interested Lay Persons* (Council for Planning Librarians, 1990).

2 *The Growth of Venture Capital and the Expansion of the Small Firm Sector in Britain* (Reference Services Central Office of Information, London, 1989); *Strategy for the Australian Venture Capital Industry: Facilitating the Innovation* (Process Australian Government Publishing Services, Canberra); *Government-Industry Cooperation can enhance the Venture Capital Process* (US General Accounting Office GAO/AFMD-82-35, 1982); OECD, *Venture Capital: Context, Development and Policies* (OECD, 1986).

3 Sources: New Zealand Trade Development Board, *A Review of Trade Development Board Studies and Options for Venture Capital Establishment in New Zealand (Trade Development Board, 1988);* M Perry, "Venture Capital in New Zealand" (1988) *New Zealand Geographer* April, pp 2-7; M Perry, "A Regional Analysis of Local Entrepreneurial Activity in New Zealand 1980-86" (1987) 9 *New Zealand Journal of Business* 37; M Perry, "The Rise and Fall of Venture Capital in New Zealand" in M B Green (ed) op cit, p 162.

4 Maori Development Corporation, *Annual Report* (1993); "Positive Steps" (1987) *New Zealand Business* November, pp 11, 14; G Kennedy, "We Want Young Maori People to Succeed" (1992) *National Business Review* July 3, p 24.

5 Sources: Bay of Plenty Business Development Board, *Introducing the Business Development Programme, Waihanga Kaipakihi* (1993); R T Hamilton and J English, *The Small Business Book: A New Zealand Guide* (1993); A Gray, *Women Establishing Businesses: Barriers and Solutions* (New Zealand Ministry of Commerce, 1993).

6 Source: New Zealand Trade Development Board, *Export Business Networks: A Proven Means of Stretching Export Performance* (1994)

Appendix

List of contact phone numbers

Organization	*Location*	*Contact Person(s)*	*Phone*
ACMA Capital	Auckland	Richard Ebbett	(09) 307 2703
Business Development Boards:			
Board	*Location*		
Aorangi	Timaru	Geoff Cloake	(03) 688 8106
Auckland	Auckland	Neville Collett	(09) 308 9141
Bay of Plenty	Tauranga	Grant Nordick	(07) 577 6000
Canterbury	Christchurch	Chris Pickrill	(03) 365 1918
East Coast	Gisborne	Graeme Hamilton	(06) 867 9744
Hawke's Bay	Napier	John Sharp	(06) 835 2044
Kapiti/Horowhenua	Levin	Roy Waterson	(06) 367 9669
King Country – Taupo	Te Kuiti	Brian Fenwick	(07) 878 8685
Manawatu	Palmerston North	Ian Gilray	(06) 355 0915
Marlborough	Blenheim	Anne Parker	(03) 578 2313
Nelson Bays	Nelson	Joe Stratton	(03) 548 8622
Otago	Dunedin	Rod Markham	(03) 477 6528
Southland	Invercargill	Janine Plank	(03) 218 9860
Tai Tokerau	Whangarei	Ces Burke	(09) 438 1339
Taranaki	New Plymouth	Keith Plummer	(06) 757 9993
Thames/Coromandel	Paeroa	Chris Hale	(07) 862 7423
Waikato	Hamilton	Mel Outson	(07) 862 7423
Wairarapa	Masterton	Tony Hocking	(07) 834 0100
Wanganui	Wanganui	Noel Gudsell	(06) 345 0949
Wellington	Lower Hutt	Anton Ferrari	(04) 566 9192
West Coast	Greymouth	Alistair Rivers	(03) 768 6334
Canterbury Development Corporation	Christchurch	Peter Townsend	(03) 371 1840
Dorchester & Smythe	Auckland	Brent King	(09) 377 0616
Greenstone Fund	Wellington	Shawn Beck	(04) 499 9191
		Mark McGuinness	(04) 499 9190
LINC	Palmerston North	Ruma Karaitiana	(06) 359 0152
Maori Development Corporation	Auckland	Joe Midgley	(09) 520 6282
Pacific Island Development Trust	Wellington Auckland	Frances Hartnell Bill Amosa	(04) 471 2281 (09) 303 0542
Poutama Trust	Wellington	Jeff Green	(04) 473 2652

Mystique of the law

To talk of legal practice as if it were akin to brain surgery, nuclear physics, or the highest levels of pure mathematics is nonsense. In this most hierarchical of professions the wisdom of ancients is often accorded the status of Holy Writ: consider, without disrespect, Sir Garfield Barwick's view of law as science: "The common man who thinks that the law is commonsense might be right if he watched the consummate lawyer at work in all his deep simplicity, and with that ease which conceals the great learning behind the apparent simplicity. But nevertheless the law is a mystery. . .". This strikes the seasoned ear as a little too liturgical description of even a special leave application, let alone moving a matter from Monday to next Tuesday before a listing officer.

If you are dealing with a science, or mathematics, the discoveries are inevitably made by young men. In law, on the other hand, the perquisites go to the liverish, those who have hung on, learnt human nature, and have a wide knowledge of men, judges and affairs. It follows that you cannot "discover" anything new about the law at all: there is no Kuhnian paradigm to break unless you are a Lenin sort of lawyer and, up early one morning, decide to overthrow the entire State.

Someone like Lord Denning, who moderately reconfigures a few of the working concepts, is greeted as an innovator. But you cannot be a *legal* Isaac Newton: if you appear in the Court of Appeal one fine day and suggest that the law of tort should be permanently suspended and replaced by a law of obligations of your own making you will be taken in hand by a tipstaff and made the subject of a care order. Once accept the absence of scientific knowledge, and for these purposes doing things with rules or "smoke and mirrors" hardly counts, and disdain from a misinformed public is sure to follow.

Lee Aitken
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Was Eve merely framed; or was she forsaken?

By The Hon Justice E W Thomas, Judge of the High Court of New Zealand

In Part I of this paper, Justice Thomas examined the brutalising impact of a rape trial on complainants and raised the question whether a more inquisitorial system would be more appropriate to resolve complaints of rape or sexual assault. In the second Part of this paper the Judge explores certain changes which would alleviate the complainant's distress without compromising the accused's right to a fair trial.

Part II

Some practice and procedural reforms

In suggesting the need for further reform, I do not wish it to be thought that I am denigrating the lawyer's healthy reluctance to change criminal law and procedure which has evolved over centuries. The lives, liberty and reputations of people are at stake, and the lawyer's inertia or resistance to change in itself provides a safeguard against the unwarranted erosion of hard-won rights which are fundamental to a fair and democratic society.[1] Such fundamental rights as the presumption of innocence, the principle that the onus of proving a person's guilt is on the prosecution, the cardinal requirement that guilt must then be established beyond reasonable doubt, and the exclusion of prejudicial or irrelevant evidence (such as the previous criminal record of the accused), not only ensure a fair trial, but secure the acquittal of the innocent. I am not challenging any of these basic tenets of British justice, and it would be erroneous to think that they are being challenged or are under threat when consideration is being given to alleviating the position of the rape victim.

1 No direct cross-examination by accused

By virtue of ss 23(c) and 23(f) of the Evidence Amendment Act 1989, an accused charged with a sexual offence cannot in person cross-examine a complainant under the age of 17 years. Any questions must be asked through a person approved by the Judge. This provision was obviously enacted having regard to the sensibilities of a young complainant confronted by the very person whom she alleges raped or sexually assaulted her. My experience in *R v M* (28 July 1993, T 173/91 – see above), has convinced me that this exemption should be extended to adult complainants.

The physical proximity of the victim to her assailant, the hated cause of her distress, is too close for it to be otherwise. Asking the questions directly when challenging the complainant's version of the incident imposes an intolerable burden upon even an adult woman and the slender defences which she will have erected to cope with the trauma. To her, the man who violated her person is being "let loose" upon her. Of course, the Judge will do what he or she can to ensure that the cross-examination does not become excessively cruel, but the torment and inhumanity of the situation is clear to see. The victim cannot avoid reliving the incident in all its horror simply because her interrogator is the very person whom she accuses of attacking her. This was the case in *R v M*, and I can see no reason why it should be any different with any other complainant.

2 Greater use of screens and closed-circuit television

An extension of the provision giving the Court a discretion to direct that a screen be used to shield the child or young victim from the accused during her evidence, or permitting her to give evidence outside the courtroom by closed-circuit television is also worthy of consideration. The use of these facilities in respect of child complainants has not impaired the conduct of a fair trial, and it has been held that the use of screens to protect young complainants and child witnesses during the trial does not violate the right of an accused to be present at the trial. (*R v Accused* (T 4/88) 1989 1 NZLR 660: Crime Appeal 163/88 3 CRNZ 315.) There is no reason to suppose that the extension of this provision to adult complainants suffering acute distress would have any different impact on the trial. Indeed, the extension could be welcomed by defence lawyers on the basis that the complainant's distress, often so telling with the jury, would or might not be so evident when the evidence is relayed to the courtroom by videotape.[2]

It is not suggested that a screen or television equipment should be used in every case of rape where an adult victim gives evidence. Rather, the use of these aids could be ordered by the Judge in his or her discretion where it is established that the victim's psychological and emotional condition could be further harmed by giving evidence in the presence of the accused or in the courtroom. The use of closed-circuit television, in particular, would permit the victim to give her evidence without undergoing

this ordeal or depriving the jury of the opportunity to assess her evidence. She might even give her evidence from her home as a suitable place, away from the Court altogether. A more relaxed environment in which to relate the incident and face cross-examination does not mean that her evidence will be any less truthful.

There is, of course, a reluctance to accept any relaxation in the practice of insisting that witnesses testify in the witness box in the presence of the accused. Traditionally, an accused has had the right to confront his or her accuser. It is said that this right of confrontation existed under Roman Law and that it was recognised in England, even before the right to trial by jury was established. (*Cov v Iowa* (1988) 487 US 1012, 101 L D 2 857.) In its traditional form, the right envisages face-to-face confrontation between the accused and his or her accuser. The accuser must be able to look the accused in the eye. (For a recent re-statement, see *Regina v Taylor*, The Times, 17 August 1994.)

I do not accept, however, that the right of confrontation today can be interpreted to include a face-to-face meeting in all circumstances. The New Zealand Bill of Rights Act 1990, affirms as fundamental the accused's right to a fair and public hearing, the right to be present at the trial and present a defence, and the right to examine the witnesses for the prosecution. (Section 27(a)(e) and (f) of the New Zealand Bill of Rights Act 1990.) But these rights do not necessarily connote a right to confront the prosecution witnesses in person. Indeed, no such right is possible where a statement is admitted in evidence, even though the complainant is dead. (See *R v L* [1994] 2 NZLR 54.)

I must admit that I find the reasoning behind the notion that the confrontation must be face-to-face unrealistic. It is exemplified in a judgment of Justice Scalia in the Supreme Court of the United States delivered in 1988. Reversing the conviction for sexual offending of a man who had sat behind a screen during a trial so that his young accusers could not see him, the Justice said; "It is always more difficult to tell a lie about a person to his face, than behind his back." He continued; "That face-to-face presence may, unfortunately, upset the truthful rape victim or abused child, but by the same token it may confound and undo the false accuser . . .".[3]

To my mind, an accused obtains an adequate and proper opportunity to challenge the evidence of the complainant, even though that evidence is given by closed-circuit television or the complainant is shielded by a screen. To suggest that a complainant will be more likely to withstand cross-examination in these circumstances and persist with a lie than when cross-examined under the baleful eye of the man whom she is accusing of rape is surely spurious. It is a notion which perpetuates the misconception that the evidence of complainants in a rape or sexual offence case is inherently prone to fabrication. The evidence of child complainants and witnesses is cross-examined now with the use of a screen or television equipment without detracting from the accused's right to a fair trial or his ability to challenge the evidence, including the veracity of the witness. It is difficult to see how there could be any greater intrusion upon those rights if the complainant was an adult suffering particularly from the acute symptoms of rape trauma syndrome.[4]

3 Not calling victim to give evidence

In almost all cases where rape is alleged, the victim is called to give evidence. The decision of the Court of Appeal in *R v Pauga* (1993) 9 CRNZ 685 opens up the possibility that the complainant need not be called where there is sufficient other evidence to justify a conviction. In *R v Pauga* the Court of Appeal held that a conviction for rape could be properly sustained in law on the basis of an accused's videotaped confession. The complainant in that case had never been located. If this is so, a conviction would be equally sustainable in law if it could be proved by other evidence and the complainant, although available, did not wish or need to appear as a witness.[5]

Occasions on which the Crown would feel sufficiently confident to advance a prosecution without the evidence of the complainant are likely to be rare. The possibility should be borne in mind, however, for it enables a conviction to gained without the victim having to confront the accused and relive the incident.

4 Adverse inference where accused does not give evidence

It is relatively unusual for an accused in a rape trial not to give evidence. Defence counsel take the view that it will not be possible to cast a reasonable doubt on the complainant's evidence unless the accused is prepared to testify. Rape cases do, however, take place in which the accused refrain from giving evidence.

There is no sound reason why, in such cases, the jury should not be instructed that it is open to them to draw an adverse inference against the accused on the question of consent. A growing number of lawyers and laymen alike are becoming increasingly disenchanted with an accused's so-called "right" to remain silent at his or her trial.[6] In the context of a rape trial and the suffering wrought to the victim, the practice of withholding comment on the accused's silence is difficult to justify. This is particularly so where the defence assert that the Crown has failed to establish beyond reasonable doubt that the accused had reasonable grounds to believe that the complainant had consented to intercourse. In such cases, the test proposed by Cooke P in *R v Butcher* [1992] 2 NZLR 257 (at p 268) is surely met. Once the complainant has given her evidence, and it is plausible, there is "evidence pointing to his guilt" in terms of the President's dictum. The jury can and should then be instructed that in such circumstances it is open to them to draw an inference adverse to the accused.

5 Complainant entitled to legal representation

In Denmark and Norway victims of sexual assault are entitled to legal advice or representation at the expense of the state. (Jennifer Temkin: *Rape and the Legal Process* 1987, Sweet & Maxwell.) Rape victims in New Zealand obtain the assistance of a number of support groups. These groups render victims immense assistance; in helping them to cope with the immediate trauma of the crisis; in preparing them for the investigation and trial, especially the nature of their ordeal in the courtroom; and in assisting them to adjust to the trauma and reorganise their lives in the long term. Certainly, I do not think that legal representation should be approached

as an alternative to the assistance rendered by these groups.

I also have misgivings about a legal representative of the victim participating in the process of the trial. This misgiving is shared by Helena Kennedy (*Eve was Framed* (1992, Chatto & Windus) pp 138-139). She nevertheless contemplates a possible role for a victim's representative in Court. It would be his or her function to explain the Court process to the complainant and to familiarise her with the procedure which will be followed, without coaching her evidence. Helena Kennedy envisages that the victim's counsel, or "amicus," would act only in sensitive cases. Although they would not participate in the adversarial process in front of a jury, she considers that they could participate in arguments to the Judge about the admissibility of evidence concerning the victim's history. Alternatively, she suggests, the Crown should have their own staff lawyers who are specially trained and charged with much of this task. (at p 139.)

I accept that there is a need to explore the feasibility of appointing a counsel to assist and advise rape victims. After all, an impecunious offender will be defended on legal aid, and it does not seem to be out of balance that an equally impecunious complainant should have access to legal advice at no cost to herself if she wants or needs that advice. How far the victim's counsel should be permitted to intervene in the conduct of the trial, however, I am uncertain. I suspect that the tension between the concept of a fair trial under the adversarial system and the needs of the complainant could lead to dissension during the course of the trial and be productive of numerous appeals.

One possible advantage of such a counsel could be his or her ability to confer with the defence lawyer at the earliest possible opportunity and so ensure that the victim's position was not overlooked when the decision was made whether the accused should plead guilty or not. I imagine that in sentencing a person who had pleaded guilty to rape at an early stage, a Judge would be strongly influenced by advice from the defence counsel and the counsel appointed to represent the complainant that an accused had decided to plead guilty following representations and discussions with the victim's counsel. No doubt, the converse would be true if, following such discussions, the accused decided to plead not guilty and was ultimately convicted. But that would be no bad thing. A counsel appointed to represent the complainant could also prove valuable if the victim's wishes are to be ascertained before determining whether or not to make an order prohibiting publication of the name of the prisoner in rape and sexual abuse cases.

6 Substantial discounts for early pleas of guilty

The principles applied by Judges in sentencing convicted persons already encompass making a reduction in what would otherwise have been the correct sentence where a person has pleaded guilty. In the case of sexual offences, the Courts have particularly stressed that this allowance is due in large part to the fact that the complainant is spared the ordeal of giving evidence. (See eg *R v Strickland* [1989] 3 NZLR 47, per Richardson J at p 51.) But it is not always possible to discern what reduction has been made, or that the person who has been sentenced would have received a significantly lesser term of imprisonment if he had pleaded guilty. Not unexpectedly, therefore, some defence counsel advise that the length of sentence is, more often than not, at best, a marginal consideration when advising an accused whether to plead guilty or not guilty.

It is suggested that in sentencing a convicted rapist, the allowance for a guilty plea could be more definitely spelt out and definitively applied. This approach is made possible now that the "starting point" for the sentence in a charge of rape is eight years imprisonment. (Section 2 Crimes Amendment Act (No 3) 1993. And see *R v A* [1994] 2 NZLR 129.) Where an accused has pleaded guilty and so spared the complainant the ordeal of a trial, the starting point could be fixed by statute or the Courts at a significantly lower figure. Of course, there will be occasions where the evidence against an accused is so strong or of such a nature that it is clear that a plea of guilty is unrelated to the inducement to obtain the benefit of the reduction. It would then be inappropriate to apply the reduction, at least in total. But the incentive to plead guilty and spare the victim the ordeal of reliving her traumatic experience should be more marked and certain than is the case at present.

An unforeseen consequence of the enactment of the provision exempting the complainant from giving evidence at the preliminary hearing adds force to the need for a marked disparity between penalties for those who plead guilty and those who do not. Defence lawyers do not now see the complainant give evidence until the trial. When advising the accused on his plea, they have only the depositions, together with their client's own instructions, to take into account. The strength of the complainant's evidence may not be apparent until her evidence has been given. In the absence of this knowledge, the accused may not be advised to plead guilty in cases which would otherwise attract a guilty plea.

It is, of course, no answer to seek to undo this enlightened piece of legislation. (See *Attorney-General v B* [1992] 2 NZLR 351, at pp 354-356 and 359-360.) Rather, having regard to the adverse effect of the Court process on a complainant, the accused and his legal adviser need to be encouraged to confront the decision whether to plead guilty and obtain the benefit of the reduction as soon as possible after the accused has been charged. It is in this regard that I have already suggested a counsel appointed to advise and represent the complainant could have a significant role to play.

Some substantive reforms

1 Recasting the definition of rape

The question arises whether the victim's Courtroom ordeal would be alleviated by recasting the definition of rape. Many commentators have pointed out that the substantive definition of rape must be re-evaluated if the victim is to be protected from further trauma caused by the legal process. (eg Simon H Bronitt, "Rape and Lack of Consent" (1992) CLJ 289; and Vicki Waye, "Rape and the Unconscionable Bargain" (1992) Crim LJ 94.) The present definition of consent, it is argued, is a major factor in making the victim the focus of the trial. There is undoubtedly considerable truth in this claim. The difficulty is to devise a definition which will shift the focus of the trial to the accused and not be

proved in practice to be merely an exercise in semantics.

Consent is a decidedly malleable concept. It can readily be vested with different meanings by different people. To some, consent may be inferred from a failure to demonstrate some form of resistance; to others it will be evident from the active participation or encouragement of another's approach. What is imported into the task of determining whether consent has been given in a rape trial, therefore, is a value judgment. It is implicit in the meaning of the word consent which is preferred. Women, I believe, correctly complain that the value judgment imported into the current law reflects a male perspective; the concept of consent applies in the negative. No real element of reciprocity need be shown. The law looks for manifest dissent, rather than positive assent.

To fully recognise the autonomy and dignity of women and "reaffirm the fundamental right of a person not to engage in sexual activity", the definition of rape should therefore be revised. In essence, it should in its terms extend notions of equality and mutuality between men and women to their sexual relationships. To establish such concordance, there needs to be clear assent to the sexual conduct. Formulating a legal standard in these terms shifts the emphasis from a negative notion of consent to a more positive concept of mutuality.

It is to be acknowledged that the formulation of a legal standard to reflect this notion is difficult. A number of alternative definitions have been proposed, some of which have been enacted in other jurisdictions. One proposal which found early favour was the suggestion that lack of consent be removed as an element of the offence, and be replaced by the requirement that the prosecution need only prove that intercourse took place in coercive circumstances. Michigan was the first of a number of American States to enact legislation dispensing with consent and framing rape solely in terms of the type and amount of force used.[7] The notion that consent is irrelevant where an accused intends to cause harm to another person compares with the approach taken in ordinary assaults where public policy prevents the victim from consenting to the actual infliction of harm. (Bronitt, above, at p 307.) Young, in *Rape Study Volume 1* (at pp 85-87), considered this alternative and was critical of it. First, with some justification, he concluded that the issue of consent could not be avoided by changing the wording in this fashion. In determining whether force is present it will frequently be necessary to consider whether or not there is evidence that the complainant consented to the sexual activity. Young therefore pointed out that the offender's force or coercion on the one hand, and the victim's lack of consent on the other, were merely opposite sides of the same coin. Nor, if this is the case, would the Michigan model help greatly in either shifting attention away from the complainant's behaviour or in alleviating the trauma of the trial for her.

Reference was also made by Young to the New South Wales Crimes (Sexual Assault) Amendment Act 1981, which makes the issue of consent completely irrelevant where the offender, with intent to have sexual intercourse, maliciously inflicts grievous or actual bodily harm, or threatens to inflict such harm, by means of an offensive weapon or instrument. Such a provision, however, would apply in only a small minority of rape cases. (Young, *Rape Study Volume 1*, at p 87.)

Another reform which has been widely mooted is to provide a list of objective criteria, proof of any of which may constitute evidence that consent was not given.[8] Again, however, consent will still be in issue in the vast majority of cases. It is difficult to see how such a suggested reform would assist the complainant or reduce the importance of the issue of consent where she alleges that she was forced to have intercourse, and the accused maintains that she was a willing party. (Young, *Rape Study Volume 1*, at p 90.)

Based on the recommendation of the Law Reform Commission of Victoria, the Legislature of that State adopted another alternative. Section 36 of the Crimes Act 1958 (Vict), as amended by the Crimes (Rape) Act 1991, provides that "consent" means "free agreement". Circumstances in which a person does not "freely agree" are specified without being exhaustive.[9] An important provision appears in s 37. That section provides that in a relevant case the Judge must direct the jury that

> the fact a person did not say or do anything to indicate free agreement for a sexual act, is normally enough to show the act took place without that person's free agreement.

In 1985, New Zealand chose to opt for a formula which spelt out matters which do not constitute consent (section 128A(2) Crimes Act 1961). Thus, the fact that the victim does not protest or offer physical resistance does not by itself constitute consent. Nor does the fact that a person submits or acquiesces in sexual connection by reason of force or the threat of force, or the fear of the application of force, constitute consent. While the amendment was well-intentioned and represented an improvement over the previous law, it does not appear to have achieved the objective of reducing the impact of the trial on the victim to any noticeable extent. Rape trials remain dominated by the question of consent. The issue is not redirected from a negation of consent to the more positive concept of mutuality.

An amendment along the lines of the statute in Victoria is to be preferred. While it would not eliminate the requirement of consent as attempted in Michigan, it would require the consent to be positively communicated in an unequivocal manner. The prosecution would be required to establish that the complainant had not freely agreed to have intercourse with the accused. Conversely, the doubt which the accused would then need to raise to avoid conviction would have to be a reasonable doubt that the complainant had freely agreed to the intercourse, and not just the negative notion of lack of consent.

A change along these lines would not be merely semantic. It would reflect a shift in emphasis from bare or negative consent to mutuality, and more directly focus the jury's attention on that issue. Moreover, it would enable the Judge to direct the jury in terms which would be inappropriate at present. The impact of the change on the victim's ordeal in the courtroom is more speculative. It is possible that, with the shift in emphasis, much of the cross-examination which presently takes place would be irrelevant and, in at least some cases, the position of the victim would improve with the

realisation that she is not on trial herself.

2 Abandoning the reasonable belief of the accused

To be unlawful, the sexual connection must have taken place not only without the woman's consent, but also without the accused believing on reasonable grounds that the woman consented (section 128(3)(b) Crimes Act 1961). In the vast majority of rape cases this latter element does not seem to loom large in counsels' arguments. The essential issue placed in dispute is whether the complainant consented or not, and it appears to be accepted that, if consent was not present, the accused would not have had reasonable grounds for believing that she had consented. Perhaps defence counsel do not like focusing on this provision for fear that it will prejudice the jury's decision on the issue of consent. Possibly it is thought that, if it is accepted that the complainant did not consent, the jury are not going to be unduly worried about the accused's belief. For the most part, this provision seems to be reserved for cased where, for example, the complainant was asleep or unconscious through over-indulgence in drugs or alcohol, and the accused claims to have thought, for one reason or another, that she was consenting at the time of intercourse.

In one sense this requirement is desirable in that it qualifies the mens rea which is necessary to establish the offence. It is not enough that the accused believes that the complainant consented to intercourse; his belief must be based on reasonable grounds. In another sense, however, the requirement is unfortunate in that it reinforces the notion that the issue is one of consent rather than mutuality.

One solution would be to discard this element altogether so that the crime of rape would be complete on proof that penetration had taken place without consent. Another solution would be to shift the burden of proof to the accused in respect of this element of the crime. It is to be noted, however, that this requirement would lose much of its force with a change in the law defining consent to mean "free agreement". It would be rare for a sleeping or unconscious woman to be able to convey her free agreement, and for the accused to be able to complain that he had reasonable grounds to believe that she had freely agreed to have intercourse.

3 Abandoning the concept of recent complaint

On a charge of rape, the fact that a complaint was made to a third person by the complainant shortly after the alleged offence, and the particulars of that complaint, are admissible as evidence of the consistency of the complainant's story. The complaint must be made at the first reasonable opportunity by the complainant. Whether it was made at the first reasonable opportunity is a question which is determined by the Judge having regard to the particular circumstances of the case. Evidence of a fresh complaint cannot be used to show the truth of the facts upon which the complaint is based. It does no more than buttress the credibility of the complainant. Conversely, if no recent complaint was made, the defence will seek to use that fact to damage her credibility.

This rule is inappropriate. Essentially, it reflects the popular belief or misconception as to how a rape victim will behave. Yet, as has been repeatedly pointed out, there are many reasons why a genuine victim may delay mentioning the offence to anyone. Many of these reasons are subtle and difficult for the victim herself to articulate. They may not even have been understood by the victim herself.[10] As Young states in *Rape Study Volume 1*, the real issue is whether the timing of the complaint should be regarded as having any bearing on the issue of credibility at all. He acknowledged that his available research did not provide enough data, either to support or refute the contention that an early complaint is more likely to be a genuine one, and tha the validity of any distinction between early and late complaints is therefore purely a matter of opinion. (pp 147-148.)

It is arguable that the existing rule should be abandoned altogether. Both evidence relating to a complaint, whether recent or not, and cross-examination relating to the absence of or delay in making a complaint could be disallowed. It adds nothing to the law to perpetuate a rule allegedly relevant to the credibility of the victim when there is no valid evidence that the absence of an early complaint bears upon her credibility at all.

The difficulty with this proposal is that cross-examination as to the time and circumstances of a complaint, either to another person or to the police, is not precluded in respect of other offences. Moreover, to exclude evidence or cross-examination relating to a complaint altogether would, it is suggested, be difficult to enforce. The best solution simply might be to bring the rule relating to the admissibility of evidence relating to a victim's complaint into line with the ordinary rules. If and when the criterion for the admissibility of evidence is directed at the reliability of the evidence rather than the directness of the evidence, so that a complaint could in certain circumstances become evidence of the truth of the matter, the rule relating to rape and sexual offence cases could move in tandem with the general law.[11]

Dispelling the myths

In his book, *The Face of the Rapist*, David Shapcott asserts that our approach to rape rests on a foundation of ideas known as "rape myths". He identifies no less than ten such myths; "I couldn't stop myself"; "She asked for it"; "It just happened"; "He's not normal"; "A real man doesn't take no for an answer"; "She deserved it"; "She lied"; "She loved it"; "No big deal"; and "Lie back and enjoy it." That rogue maxim, " 'No' can mean 'Yes' ", no doubt intrudes upon a number of these myths.

Expressed in this broad language, the myths probably obscure the subtlety of the beliefs and misconceptions about rape which are pervasive within the community and which undoubtedly influence juries called upon to deliver a verdict in a rape trial. Reference to these beliefs and misconceptions, at times open and direct, at other times insidious and indirect, can be often heard from counsel during the course of a trial. Defence counsel may play upon one or other of them. But it is not only defence laywers, but also Crown counsel who will advance their case within the framework of these popular beliefs and misconceptions. The art of advocacy frequently demands that points be made in terms which the jury will readily understand and be receptive to accept.

The key point is that, more often than not, victims of rape do not behave or react in a manner which ordinary people who have not themselves been victims of sexual assault expect. Victims do not always act hysterically, they do not always report the incident to the police, they may even act in a way which is hostile

to the police, they may delay confiding to a friend, they may be unemotional, or emotionally flat, and appear indifferent or distant. They may even continue to associate with their alleged rapist. They may have memory lapses or be vague or inconsistent in relating details of the incident. They may behave in a way which the ordinary man or woman in the street would regard as "surprising" or even "strange". It is now well documented that the response of women who have been raped is complex and diverse and frequently does not fit the popular presumed pattern of behaviour.

Yet, to fail to understand that women adopt many and different devices in an effort to cope with the task of living after being raped is to fail to appreciate the profound traumatic impact of their experience. It is therefore unfair to expect women to respond in conformity with expectations divorced from reality. The fact that a victim of rape may behave in a manner which does not fit common preconceptions, does not mean that she has not been raped. Indeed, the presence of some of the recognised signs of rape trauma syndrome may suggest its occurrence. Moreover, where the reaction of the victim is passive and controlled, or her demeanour composed, distant and unemotional, the effect on the jury may be exactly the opposite to that which is appropriate. Negative inferences may be drawn for no reason other than that the victim's reaction does not accord with the popular perceptions of how she should have reacted.

It is therefore important that those involved in the trial process should positively endeavour to refute these beliefs and misconceptions. Judges and counsel need to be alert to Helena Kennedy's admonition that the singularity of the law of rape stems mainly from a deep distrust of the female accuser and from a view of sexual relations seen from a male perspective. (Kennedy, *Eve was Framed*, p 139.)

Distrust of the female accuser is deeply embedded in the history of our criminal law. Lord Hale articulated it in the 17th century; rape is

> an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.

It is an adage passed on to juries even today in simpler form;

> Remember, rape is an allegation which is easy to make but difficult to refute.

It suggests that complainants have concocted their claim to have been raped for vindictive, malicious and mendacious motives. As Helena Kennedy puts it: (*Eve was Framed*, at 113.)

> Rape summons up long-learned fears whispered into the ears of boys about the fickleness and deceit of women – fears that women are vindictive and bitter, that they will stop at nothing to trap a man and stoop to anything to make him pay; fears that the line which separates rape from seduction is easily crossed, and any decent fellow is at the mercy of an unscrupulous female. Our judges are not immune.

It has now been pointed out in many different works that there is no evidence that fabrication occurs more often in cases of rape than in other crimes. (Eg, Temkin, at p 4.) Any conclusion that there is a special danger of unfounded complaints being made in rape cases is dependent on anecdotal evidence and personal opinions of various "legal authorities". (Young, *Rape Study Volume 1*, at pp 139-140.) Young demonstrated, based on the empirical evidence of his study, that the reverse was the case; rape is *not* a charge easily to be made; and a complaint to the police is usually made at considerable personal cost to the complainant. Moreover, an examination of police files did not disclose any evidence to justify the conclusion that there were significant numbers of false complaints motivated by jealousy, spite or fantasy. Those complaints which did appear to be false were often made by third persons and were usually perceived very quickly by the police to be unfounded. (ibid.) This finding is repeated in the latest edition of *Cross on Evidence* (1989, Butterworths, para 8-10, pp 178-179.)

Yet, with varying degrees of forensic resonance, echoes of this discredited adage continue to be heard today. It is unacceptably anomalous that, having statutorily discarded the corroboration requirement, the reason for that requirement still obtains currency in the courtroom. To permit such latitude to persist is to indirectly allow the discarded corroboration requirement to hold continued validity.

The notion that the line which separates rape from seduction is easily crossed is apparent in the expression that " 'no' can mean 'yes' ". But "no" never means anything other than "no". There is no ambiguity in the word itself. The ambiguity lies in the male perception that a woman's refusal to submit to intercourse, particularly women who act or dress in an "unworthy" or "provocative" manner, cannot be taken at face value and that the line between seduction and rape is not easily appreciated, even by the woman herself. In all such circumstances the jury should be left under no misapprehension as to the woman's right to say "no".

Myths of this kind must be positively refuted in a rape trial. It behoves responsible defence counsel not to press them, unless there is a firm basis for doing so in the evidence, for to take advantage of a misconception is to effectively mislead the jury. The Judge's direction to the jury must also encompass an attempt, as required having regard to the nature of the case, to dispel the popular beliefs or misconceptions. Where a complainant has reacted passively to the alleged rape and given evidence in a calm and detached manner, the Judge must be prepared to address the jury on the traumatic effect of rape, the often unexpected and diverse reactions of victims, and point out that the fact the complainant might not have exhibited the expected behavioural characteristics does not mean that she has not been raped. Where appropriate, the jury should be advised that the claim that rape is easy to allege but difficult to disprove is outdated and discredited, and that empirical studies now suggest that the opposite is true. The jury should be firmly instructed on a woman's entitlement to say "no" and equally firmly directed, that the notion that " 'no' can mean 'yes' " has no foundation in our law. It is vital to disabuse the jury of these and any other myths which might be overtly or furtively influencing the course of the trial.

The institutional gender bias inherent in a system which defines rape from a traditionally male

perspective and subjects women to the ordeal of reliving the rape trauma in the courtroom is plain to see. A legal system which adopts or perpetuates stereotyped roles for women or misconceptions about the realities of their experience must be open to that charge. Judges in New Zealand, however, are sensitive to the issue of gender bias and sympathetic to any suggestion which would ensure that women are not disavantaged by the law or the operation of the law. But the judiciary will not be free from allegations of gender bias if the above myths are perpetuated in the courtoom without deliberate challenge.

In the absence of that challenge, the existence of gender bias can be asserted, not so much in what *is* said in a rape trial as in what is *not* said. Misconceptions are, in effect, prejudices. No Judge would conclude a trial without instructing the jury that they are to put all prejudices to one side, and specifically refer to those prejudices relevant to the particular case. So too, any misconception should be addressed and corrected. At times, debunking a myth may be as critical to a fair deliberation of the charge as instruction on the law.

Conclusion

It is suggested in conclusion that the matters dealt with in Part II of this paper reinforce the suggestion made in Part I. The trauma to the victim of rape is not sufficiently appreciated. Complainants are then subjected to a further ordeal in the Courtroom, being required to relive the rape in a manner which is nothing short of brutal and barbaric. The adoption of further reforms in the practice and procedure followed in rape trials and a change in the substantive definition of rape, together with an approach designed to dispel the popular beliefs or misconceptions relating to rape, will improve the situation. But these changes will not remove the courtroom ordeal. To achieve a significant advance a more radical change needs to be contemplated. The question, therefore, must be repeated whether the adversarial system is in fact appropriate for rape trials and whether that hallowed legacy may not need to give way to a more inquisitorial system which will both protect the interests of the accused and the interests of the complainant. □

1 The author, "The So-Called Right to Silence" (1991) NZULR 299, at p 300.
2 *R v Accused* (T 4/88) 1989 1 NZLR 660: Crime Appeal 163/88 3 CRNZ 315. See "The Use of Closed-Circuit Television in New Zealand Courts: The First Sex Trials", a Report of the Policy and Research Division, Dept of Justice, 1990.
3 *Cov v Iowa*, at p 866. See also David G Savage, *Turning Right: The Making of the Rehnquist Supreme Court* (1992 – John Wiley & Sons) at pp 330-332.
4 Extending certain of the provisions of the enlightened 1989 legislation relating to children to adult complainants may, at first glance, seem paternalistic, as discussed in Part I. But any such suggestion can only arise because these provisions were not applied to all complainants in the first place.
5 Kerry R McQuoid, "*R v Pauga*: Making the Rape Complainant Invisible?" (1993) AULR 509, at pp 512-513.
6 See the author, fn 1.
7 The Criminal Sexual Conduct Statute, 1974, Mich. See also, Martha Chamallas, "Consent, Equality, and the Legal Control of Sexual Conduct", [1988] Vol 61:777, Sth'n Cal LR 777, at p 799.
8 For a discussion, see Rosemary Barrington. "The Rape Law Reform Process in New Zealand" (1984) 3 Crim LJ 307, at pp 311-313: and Bronitt, at pp 307-308.
9 This format has been previously adopted in some American States such as Wisconsin – Wisc Stat Ann s 940.225(4) (West Supp 1982). In Illinois the accused must present some evidence of consent before the onus rests upon the prosecution to prove beyond reasonable doubt that the complainant did not consent – Ill Ann Stat ch 38 s 12-17 ((Smith-Hurd) 1986). See also, Chamallas, at pp 799-800.
10 Young, *Rape Study Volume 1*, at 747. See also, Easteal, (ed) "Without Consent: Confronting Adult Sexual Violence", *Survivors of Sexual Assault; A National Survey* at p 80.
11 See the Law Commission's discussion paper, *Evidence Law: A Discussion Paper* (NZLC, pp 15, April 1991) para 4, at p vii). See also *R v Baker* [1989] 1 NZLR 738, per Cooke P at p 744, and the regrettable decision of *R v Reddy* [1994] 1 NZLR 457.

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continued from p 411

5 From Anna de Jonge "Benzodiazepines" Paper presented to the Fifth International Congress on Women's Health Issues, 25-28 August 1992, Copenhagen.
6 See Isla Lonie "Borderline Disorder and Post-Traumatic Stress Disorder: An Equivalence?" *Australian and New Zealand Journal of Psychiatry* 1993; 27:233-245, Mark Creamer "Post-Traumatic Stress Disorder: Some Diagnostic and Clinical Issues" *Australian and New Zealand Journal of Psychiatry* 1990; 24: 517-522, Heins et al "Persisting Hallucinations Following Childhood Sexual Abuse" *Australian and New Zealand Journal of Psychiatry* 1990; 24:561-565.

As to the problems relating to the diagnosis of schizophrenia see Scott Wetzler ed *Measuring Mental Illness: Psychometric Assessment for Clinicians* (American Psychiatric Press: 1989), especially chapter 5.

In relation to the diagnostic problems attaching to anxiety disorders, see M G Gelder "The Classification of Anxiety Disorders" *British Journal of Psychiatry* (1989) 154, (suppl. 4), 28-32.

7 Harvey Whiteford and Bruce Westmore "Biopsychosocial Psychiatry and the Criminal Justice System: A Case Report" *Australian and New Zealand Journal of Psychiatry* 1991; 25 : 211-214, at 214.
8 Elaine Murphy "Psychiatric Implications" in *Consent and the Incompetent Patient: Ethics, Law and Medicine*, edited by Steven R Hirsh and John Harris (Alden Press, Oxford: 1988) pp 65-75, p 68.
9 James Durham "The Gravely Inadequate Definition of a Mentally Ill Person in the Mental Health Act (New South Wales) 1983" *Australian and New Zealand Journal of Psychiatry* (1988) 22: 43-68.
10 Louis McGarry and Paul Chodoff "The ethics of involuntary hospitalisation" in *Psychiatric Ethics* edited by Sidney Bloch and Paul Chodoff (Oxford University Press: 1981), pp 203-220.
11 Derrick Silove et al "The Contest Between Psychiatrists and Lawyers Over Involuntary Detention: The Effects of Recent Changes in Mental Health Legislation in New South Wales: *Australian and New Zealand Journal of Psychiatry* (1986) 20: 294-302, 294.

Rights and responsibilities

The West has finally achieved the rights of man, and even to excess, but man's sense of responsibility to God and society has grown dimmer and dimmer. In the past decades, the legalistic selfishness of the Western approach to the world has reached its peak and the world has found itself in a harsh spiritual crisis and a political impasse. All the celebrated technological achievements of progress, including conquest of outer space, do not redeem the twentieth century's moral poverty, which no one could have imagined even as late as the nineteenth century.

Aleksandr I Solzhenitsyn
A World Split Apart
Commencement Address
at Harvard University 1978