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Televising trials

As a guest editorial there is published below the synopsis of a lengthy paper on televising trials prepared by the Public Issues Committee of the Auckland District Law Society. This synopsis was distributed by the Committee from whom the longer paper is available. As practitioners will be well aware the statements and papers of the Committee represent only the views of the Committee members. They do not and cannot represent the views of all lawyers.

Attention is drawn to the situation in Canada of refusing to allow televising of trials as noted in the item published at [1994] NZLJ 450; and the recent development in Scotland noted at [1995] NZLJ 15. No televising at all of trials in England is permitted. Sir Ivor Richardson in the course of his article "The Courts and the Public" at [1995] NZLJ 11 referred at some length, on p 14, to the attitude of the Courts Consultative Committee to televising Court proceedings. He explained the rationale behind the decision to go electronic. It had been understood by some people that the requirement in New Zealand for two continuous minutes of a trial being televised meant that; and not, as has already occurred in the first televised trial, bits and pieces being edited together out of sequence, to make a two minute news story. On the TV3 6pm news on 30 March for instance the evidence of one police officer was sandwiched in between two very short extracts of the evidence of another policeman, and part of the news item was taken up with the Judge coming onto the bench, in close-up, and a shot of Counsel sitting waiting, and one of the prisoner coming into the dock. Two continuous minutes of the trial: not likely!

An earlier editorial on the issue of television in Court was published at [1992] NZLJ 1. Short extracts from that editorial are reprinted after the Public Issues Committee statement.

Public Issues Committee Paper Synopsis

In this paper we consider some implications of the three year pilot project of televising Court proceedings which came into effect on 1 February 1995. The project is governed by "rules regulating coverage by the electronic media of Court proceedings".

The two main arguments in favour of the televising of the Courts are:

- Allowing cameras in the Courtroom promotes the open administration of justice.
- Showing cases on television has an educative value.

To these reasons of policy can be added one of law under the New Zealand Bill of Rights Act 1990. By s 3 the Act applies to the judicial branch of government. Under s 14 everyone has the right to receive and impart information. In exercising their inherent jurisdiction to allow television coverage of proceedings the Courts are subject to the Act. Of course, everyone charged with an offence has under s 25(a) a right to a fair (and public) hearing. Under s 5 the rights and freedoms in the Act,

> . . . may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

We are of the view, however, that the most important question is whether the outcome of a trial will be any different on account of television. What is of significance is that in the United States of America which has had considerable experience of television in the Courts this issue is still hotly debated.

In the United States of America there is empirical evidence for the proposition that the outcome of a trial may well be different on account of television. Of particular significance in this regard was the publication in 1994 after six years research of *The Watchful Eye – American justice in the age of the television trial* by Professor Paul Thaler, Director of Journalism and Media at Mercy College in New York. His thesis is that television

> . . . is hardly a glass eye, a benign and remote technology rather it is a powerful and active observer – a watchful eye – that narrowly frames the world. In its frames, pictures are enlarged, reduced, or eliminated to dictate "meaning" that fits into the specific constraints and structural makeup of this image-driven medium. As audience members, we are affected and influenced by what we see, but so, too is the event itself.

One problem, for example, identified by Thaler is mediated feedback whereby the family and friends of jurors view the proceedings on television and express their opinions to the juror. In Scotland, because of this

danger all appeal procedures must be completed before the programme is shown.

To these general matters of concern there are specific issues arising out of the wording of the rules governing electronic media coverage in New Zealand which are referred to in the paper.

Although the results of the pilot scheme will be monitored we are unaware of any formal arrangements in that regard. We are of the view that a special advisory body should be established to have control and responsibility over the monitoring and evaluation process. The body should be composed of members of the judiciary, the legal profession and representatives of the media. Helpful research is available from the United States of America on the necessary methodology.

NZLJ editorial extract January 1992

The importance of television, with its inevitable distortions and often false excitements, was emphasised by the selection by the editors of *Time* magazine of Ted Turner of CNN News as Man of the Year [for 1991]. They justified this choice with the statement that he had turned viewers in 150 countries into instant witnesses of history and helped affect the way events unfold. It is that last comment, "and helped affect the way events unfold" that is particularly interesting.

TV is not merely a neutral eye. The camera is itself a part of the process. A simple proof of the recognition of this is the common scene when a participant in an event will try to cover the camera with a hand or otherwise deflect it. The cameraman is selective in what part of a scene is recorded, and then the producer cuts and splices the tape to shape a story. What the viewer sees is not what he or she would have seen had they been there. . . .

A television trial cannot be the real thing. There is a relationship it is true, but it is only a relationship. TV is at best only an abridged rendering of the real thing. It has been shortened, it has been given emphasis, it has necessarily been selectively presented visually (usually in falsifying close-up), and is viewed in a context of "explanatory" commentary. This is not necessarily to suggest a conspiracy. It is the nature of the TV medium in a technological sense, although it can be, and often is, also affected by the preferences, prejudices and ideological or political views of the producer. A "televised trial" is like confusing a slice of ham with a pig, without realising that one is a dead, partial and *processed* version of the living other. . . .

Even if the whole of a major trial is televised very few people will take days off to sit in front of their screens for the whole time. And the viewer will still see a selective view. With television cameras in the courtroom it is not simply the defendants who will be on trial, it will be the witnesses, the counsel, the Judges and eventually the juries. It is clearly impossible to stop the process, but we should at least be honest and have a realistic understanding of what we are doing. It will have nothing to do with justice, and even less to do with truth. □

Television in Court – the saga continues

In England televising of trials is prohibited by statute. The situation in Scotland where trials can now be televised but only if everyone involved – Judge, jurors, counsel, solicitors, witnesses, Court clerks, Court reporters and the accused all give formal consent in advance. The rule is: one out, all out. Furthermore the filmed version can only be screened after the trial and any appeal has been concluded. The following extract is from a piece by Sir Michael Davies in The Australian Law Journal *for March 1995.*

If the present strict United Kingdom rules are maintained, and there does not seem to be any will or room for modification, there may be a shortage of consented cases dramatic or interesting enough to hold the attention of viewers. And I suspect that unanimous consent in the right sort of case may become increasingly difficult to secure.

Much has been made of the educational value of TV trials. Certainly almost anything would be an improvement on the ludicrously inaccurate misrepresentation of the court processes in films and television programmes, but query whether there will be enough genuine courts on our screens to counter the powerful existing myths.

Televised hearings in the House of Lords and of the Court of Appeal would be much easier to produce and would indeed be educative, but would anyone except lawyers watch them more than once?

It is always urged by the media that if a court is open to the press and anyone who chooses to drop in, what reason is there for keeping the cameras out? This is surely a non sequitur. Television selects and shapes the raw material in its own way, differently from the press, and it bashes the viewer with images and a non-stop flow of words. Above all, television has to entertain.

My guess is that the majority of judges and lawyers in England and Wales are still against televised trials – the Scottish experience may increase that majority or dissipate it. When all the current series has been seen it may be easier to prophesy.

What is certain is that in the foreseeable future there will be no live trials – instant or "same night" – in the United Kingdom. The American experience has seen to that. □

Case and Comment

Suspended sentences and s 5 of the Criminal Justice Act

In *R v Wright, R v Malcolm* (Court of Appeal, CA 390, 391/94, 23 February 1995) the Court of Appeal again considered the relationship between suspended sentences under s 21A of the Criminal Justice Act and the presumption of imprisonment for violent offenders provided by s 5 of that Act. The prior decision of the Court of the Appeal, *R v Petersen* [1994] 2 NZLR 533, left room for doubt as to the crucial issue of whether there must be special circumstances relating to either the offence or the offender under s 5, as commonly understood in that context, before a suspended sentence could be imposed.

Wright & Malcolm was an appeal by the Solicitor-General against a sentence of two years' imprisonment, suspended for two years, 12 months' periodic detention and 12 months' supervision imposed on the respondents who pleaded guilty to a joint charge of wounding with intent to cause grievous bodily harm. The respondents were young, aged 15 and 16 at the time of the offence, March 1994. The pair set upon the defenceless victim who was sleeping on a park bench in the early hours of the morning. The victim was repeatedly punched and kicked about the head and the body, sustaining massive head injuries which resulted in his hospitalisation for 12 days. At the time of the appeal he was still unable to return to full-time employment and medical opinion was that he was unlikely to fully recover. The sentencing Judge was influenced by the favourable probation reports, expressions of remorse, otherwise good character, and youth of the respondents. The Judge stated that prison would have an adverse effect on persons of this age and although he was unable to see any special circumstances which would enable s 5 to be avoided, decided that s 5 could nonetheless be satisfied by a suspended sentence. In terms of result, the Court allowed the appeal, quashed the sentences and substituted two years' imprisonment, although describing this as merciful.

The Court had no difficulty in finding, based on the reasons stated in *Petersen*, an error of principle in the Judge's sentencing. For the Court, the Chief Justice remarked:

> Thus if s 5 applies but the Court is minded to consider a suspended sentence the first enquiry must be whether there are special circumstances within the meaning of s 5; if not that is the end of the matter. If there are, the Court has to consider whether their quality is such that they justify avoiding a full-time custodial sentence only by the exercise of the s 21A power and by no other sentencing option.

The first part of this reasoning has commendable robustness because it gives predominance to the clear legislative direction of full-time custodial sentences for serious violence offenders, save in special circumstances. Otherwise there would be a complete inability to reconcile s 5 with s 21A. If the two provisions are read literally, there could never be a suspended sentence in cases to which s 5 applies, whether or not there are special circumstances. This is because of the wording in s 21A(2) which states that the Court shall not suspend a sentence under s 21A if it would not have sentenced the offender to imprisonment in the absence of power to make the suspension order. Obviously if there are indeed special circumstances relating to the offence or the offender in a case to which s 5 applies, then the Court would not sentence the offender to prison at all and the necessary pre-condition under s 21A(2) would not be met – an obviously intolerable situation which would make the valuable s 21A power worthless. This point was recognised in *Petersen* at p 538:

> [Crown Counsel] said that once special circumstances are found, the whole range of non-custodial sentences, of which a suspended sentence is one, is available to the Court. But there is this difficulty, that under s 21A(2) a suspended sentence may not be imposed unless the offender would have been sentenced to imprisonment in the absence of the new power. It would seem to follow that if special circumstances exist, which would have led the Court to conclude that imprisonment should not be imposed, the use of s 21A is prohibited. But so to hold would unduly limit the usefulness of the new sentence; and it would qualify s 21A in a manner which the legislature has not thought fit to do, at least not overtly.

This is where the confusion seems to have stemmed from. The possible interpretation is that a suspended sentence cannot be imposed where there are special circumstances which would justify a community-based sentence. However, where the circumstances are of a somewhat different quality, and presumably of a less compelling nature than the circumstances necessary to justify a community-based sentence, a suspended sentence may be imposed. In short, while the circumstances of a particular case may not justify a departure from s 5 by a community-based sanction, they may be sufficient to justify a suspended sentence which is ostensibly still imprisonment. This apparently two-tiered approach is reinforced at p 540 of the case where it is held in relation to one of the respondents that "although the special circumstances were not sufficient to avoid a sentence of imprisonment, they were such that the Judge could properly suspend the sentence". This leads on to the second point from the *Wright & Malcolm* extract

above concerning the quality of the special circumstances.

Although the Court of Appeal has held that a suspended sentence is indeed a sentence of imprisonment (*R v Hapuku* CA 62/94, 27 May 1994), the offender does not actually have to go to prison. A suspended sentence has no punitive effect whatsoever, although it probably will have if a further imprisonable offence is committed within the period in which the suspension lasts. The principal purpose of the power to suspend is deterrence, and hopefully to thereby assist rehabilitation. Because suspended sentences have no punitive component per se, and due to the statutory preconditions suspended sentences are only considered in respect of reasonably serious offending. Judges typically impose some other concurrent sanction or combination of sanctions, such as periodic detention, supervision, or a fine. Accordingly it is difficult to see why the quality of the special circumstances may justify a suspended sentence coupled with a community-based sanction but not a community-based sentence alone, when at least in terms of punishment and protection of the community – the philosophies underlying s 5, there is no practical difference in sentencing response. Again, and unfortunately in my view, the Court seems to have left the way open for a differentiation in the quality of the special circumstances which is hard to justify. Practically speaking, this will hopefully be little more than a semantic point.

What is important from this decision is the paramountcy given to the policy in s 5 of the Criminal Justice Act and the clear direction to sentencers that there must be truly special circumstances before a suspended sentence can be imposed on offenders who commit offences of serious violence – that is, the case at hand must have a feature or features which take it out of the ordinary range of cases in terms of the offence or offender.

Michael Bodie
Assistant Crown Counsel
Wellington

Media and a fair trial

A short sabbatical in the United States in the "fall" of 1994 gave me the opportunity to compare Australian and American law relating to media contempt and juries against the background of the pending trial of Mr Simpson in California. Charged with the stabbing murder of his wife and her lover, this football idol's court appearances have attracted saturation media coverage even at the pre-trial stages.

I discovered that the print and television media in the United States exercise no apparent restraint in disseminating any category of "information" about a pending criminal trial that attracts reader and viewer attention. Revelations about "evidence" are freely reported, whether or not that evidence is credible, or admissible, or even if it has been suppressed by pre-trial motion. One network reported, despite prosecution denial, that blood-stained socks had been found in Simpson's home and that the blood matched that of the deceased. Nightly panel discussions on television speculate freely about guilt, tactics and "evidence". Viewer polls as to guilt or innocence are reported at periodic intervals. . . .

For my part, I hope that Australian law firmly resists these American trends which have resulted in an absolute licence to the media and which have lengthened and complicated trial processes. For similar reasons, the "fair reporting" of committal and bail hearings ought to exclude information about (disputed) confessions and certain categories of information such as prior convictions: compare Canadian Criminal Code, ss 539 and 542(2).

In *Maryland v Baltimore Radio Show*, 338 US 912 (1950) Frankfurter J said:

> Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for adjudication when they are before the Court for adjudication. It has taken centuries of struggle to evolve our system for bringing the guilty to book, protecting the innocent, and maintaining the interests of society consonant with our democratic professions. One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right. On the other hand our society has set apart court and jury as the tribunal for determining guilt or innocence on the basis of evidence adduced in court, so far as it is humanly possible. It would be the grossest perversion of all that Mr Justice Holmes represents to suggest that it is also true of the thought behind a criminal charge ". . . that the best test of truth is the power of the thought to get itself accepted in the competition of the market". *Abrams v United States*, 250 US 616, 630. Proceedings for the determination of guilt or innocence in open court before a jury are not in competition with any other means for establishing the charge (at 919-920).

Frankfurter J's vision of the fair trial-free speech balance was and apparently remains a minority one in the United States, at least as regards his resolve to use the contempt power. In *Stroble v United States*, 343 US 181, 201 (1952) he was alone in protesting against the suggestion that newspaper reportage of highly inadmissible and prejudicial information instigated by a prosecutor was part of the "traditional concept of the American way of the conduct of a trial".

Keith Mason QC
Solicitor-General for
New South Wales
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Medical misadventure: 1992 style

By D M Carden, Barrister of Auckland

The Accident Rehabilitation and Compensation Insurance Act 1992 came into force on 1 July 1992. Specific provision for cover for medical misadventure was prescribed by s 5. That included (subs (9)) that before making a decision under that section the Corporation should take independent advice pursuant to Regulations. The Regulations are the Accident Rehabilitation and Compensation (Medical Misadventure) Regulations 1992 and there are two Medical Misadventure Advisory Committees formed under those Regulations. This article will consider the specific provisions of s 5; the procedures followed by the Accident Rehabilitation and Compensation Insurance Corporation and the Medical Misadventure Advisory Committees; relevant criteria and other factors to be considered in a claim for medical misadventure; and other alternatives if there is no cover under the Act. The recent amendment to the Act does allow for some degree of discretion in dealing with claims.

The extent of cover

Under the 1982 Act medical misadventure was not defined in any way and was only referred to by the definition section (s 2) as "Medical, surgical, dental or first aid misadventure". Until 1992 reliance had to be placed on Accident Compensation Appeal Authority and Court decisions for the exact parameters of that expression. Generally the authorities developed until *Bridgman v ACC* [1993] NZAR 199. One could say that this set the groundwork for the specifics of s 5.

Medical misadventure is personal injury resulting either from medical error or medical mishap (but not both). Medical mishap only requires consideration where the treatment is "properly given" which automatically excludes any error situation.

Physical injury

There must be personal injury. This is defined by s 4 as ". . . the death of, or physical injuries to, a person, and any mental injury suffered by that person which is an outcome of those physical injuries to that person . . .". There must first then be some physical injury. It is not enough that there be mental injury only. Any mental injury consequences must flow from the physical injury. It is not enough that there be mental consequences from the physical injuries to another person. This means that to qualify for medical misadventure cover (and indeed any other cover under the Act) there must be physical injury to the claimant, and the claimant and the claimant only, can claim his mental, psychological, etc, losses flowing from that physical injury. The treatment itself is not sufficient to constitute the physical injury. There must be something resulting such as division of a nerve, formation of a thrombosis, paraesthesia (numbness), scarring or the like. If these physical injuries lead to psychological injuries such as feelings of embarrassment, insecurity, inadequacy, etc from surgical scarring, then there is cover for these.

If there is no physical injury there is no cover. The Corporation takes the view that if there is a failed sterilisation, such as tubal ligation or vasectomy, and the woman who has had the treatment or the woman of the partner of the treatment becomes pregnant this is not a physical injury resulting from the medical treatment itself. It is simply a normal and natural act of nature. Fallopian tubes which have been ligated, even sometimes if completely properly done, can re-canalise and pregnancy can occur. There may be fault on the part of the practitioner carrying out the procedure but that does not give rise to cover as the patient has suffered no physical "injury". The Corporation takes this view even in the case of a resultant pregnancy which requires Caesarian section or a resultant ectopic pregnancy (that is one forming in the fallopian tube rather than the uterus itself). The Auckland Medical Misadventure Advisory Committee has taken the view that the surgical procedure required in those cases (that is the Caesarian section delivery or the operative procedure to remove the ectopic pregnancy) are in themselves a qualifying physical injury. The Accident Rehabilitation and Compensation Insurance Corporation does not give cover in any of these cases.

Registered health professional

Cover is only available for treatment from a registered health professional who is specifically defined in s 2 as the holder of a current annual practising certificate from various specified Councils and Boards.

It is noted that this does not include para-medics, school dental nurses, and other helpful bystanders. Any treatment given by any person not a registered health professional is not covered by medical misadventure. The one exception is in the case of medical mishap if the treatment is given under the direction of a registered health professional. The consequence of this is that there is no cover for any medical error by a non-registered person. There is only cover for such treatment if it is under the direction of a registered professional and otherwise qualifies as a mishap.

Medical error

This is defined by s 5(1) as "the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances". This has been generally regarded as a lesser test than that of negligence, one reason being because negligence is not specifically mentioned

whereas it is in the cases of failure to diagnose or failure to obtain informed consent (see below).

If a registered health professional has carried out any procedure in a way which does not measure up to the standard of care and skill reasonably to be expected in the circumstances and this has caused personal injury then there will be cover. There will be obvious cases such as swabs being left in during a procedure or the wrong limb being operated on (there was even one case of the wrong patient). Other cases will involve matters of professional judgment where it cannot be said that, although another practitioner may have acted otherwise, there has been a failure to meet standards or any compensatable error. The definition should be noted for its specific provision that the failure to achieve desired results or that, with hindsight, different decisions may have produced better results is not medical error. It is more than a matter simply of judgment or hindsight; it is a matter of failure to observe standards at the time.

Medical mishap

As already stated, there can be no medical mishap where there is a case of medical error and the two are mutually exclusive. Medical mishap only arises where the treatment is "properly given".

There are then two criteria to be satisfied, those of rarity and severity.

Rarity

The rarity test (defined in subs (2)) requires that the adverse consequence which leads to the claim would probably not occur in more than 1% of cases for such treatment. Sometimes there are helpful statistics. Sometimes it is merely a matter of clinical assessment based on experience. Sometimes precise probabilities are elusive. An assessment must be made of the likely probability of the adverse consequence occurring from that treatment. If this is higher than 1%, (as for example in the case of complications following open-heart or by-pass surgery) there is no cover. If the adverse consequence normally happens in less than one case in 100 then the rarity test is met.

A complication arises in the case of a person having a particular condition which means the consequence is not rare for that particular person. These could be categorised as egg-shell skull cases. Normally the adverse consequence does not occur in more than one in 100 cases but for persons with this condition the adverse consequence is more common. A normal claimant would qualify but this claimant is disqualified by virtue of her particular condition. The claimant is only disqualified in those circumstances if the greater risk was known to that person or her parent, legal guardian or welfare guardian. This means that a person in that category would get cover for a qualifying rare consequence unless that person had the particular condition which made the result more common and this was known to that person or her guardian.

Severity

The second qualifying factor for medical mishap is that of severity. The adverse consequence must be sufficiently severe. There are four things that constitute severity:

(a) Death.
(b) Hospitalisation as an in-patient for more than 14 days.
(c) Significant disability lasting 28 days in total, or
(d) Qualification for an independence allowance under s 54.

Sometimes severity is obvious, as in the case of death. The 14 days hospitalisation must be as a consequence of the mishap and not as a consequence of the original treatment. Surgery may normally require a certain number of days of hospitalisation for the operation and post-operative care. If a complication arises which is sufficiently rare even then it is the *extra* period of time that counts and this must be *another* 14 days. The Act does not say whether subsequent periods of hospitalisation can be aggregated but that is an obvious interpretation, that is when the extra days of hospitalisation for the adverse consequence are added together they must total at least 14 days. This must be hospitalisation as an in-patient and not out-patient care.

It is more difficult to determine whether there is significant disability for the qualifying period. The Act specifically says "28 days in total" allowing aggregation of periods of disability. "Disability" is defined in s 3 as "any restriction or lack (resulting from impairment) of ability to perform an activity in the manner or within the range considered normal for a person". The expression "impairment" is also defined and means "any loss or abnormality of psychological, physiological or anatomical structure or function". When combined the two definitions, therefore, require a restriction from performance of an activity or a lack of ability resulting from loss or abnormality of one of those structures or functions outside normal range. In addition the disability must be "significant" which could be said to mean more than nominal or could be said to mean substantial. If the claimant is off work for periods totalling 28 days this is normally regarded as a significant disability. What is more difficult are cases of scarring. Scarring to the face and other prominent body parts can have significant effect on employment prospects (as in the case of a model) and important psychological results. There are many claims made for bruising, chipping of teeth and the like, all of which do not qualify on the grounds of severity simply because there is not a sufficiently significant disability for a long enough period.

The fourth test of severity (and they are in the alternative) is that of qualification for an independence allowance. The procedure to determine eligibility for an independence allowance is prescribed by the Accident Rehabilitation and Compensation Insurance (Independence Allowance Assessment) Regulations 1993/195. There is a long questionnaire of 127 propositions determining the claimant's "functional limitations profile". This puts such propositions as "I stay in bed more", "I do not do any of the clothes washing that I used to do", "I am disagreeable with my family; for example I act spitefully or stubbornly" and even "I communicate mostly by nodding my head, pointing or using sign-language, *or other gestures*" (emphasis added). The questionnaire is extremely subjective. Any claimant (and this goes for other accident compensation claimants as well who may be eligible for independence allowance) who purchase a copy of the Regulations would quickly learn what the

propositions are and, perhaps more importantly, what weight is attached to a positive response to each proposition. For example "I get about in a wheel-chair" earns 121 points while "I stay away from home only for short periods" only earns 46 points. Whatever the weighting, if the proposition is answered in the affirmative then the eligibility increases. Following the 127 propositions there are further questions relevant to different claimants, the total score is added and there are formulas for determining first the degree of disability and secondly, the weekly rate of independence allowance. There is no entitlement to an independence allowance under s 54 unless there is at least 10% disability. To determine whether a claimant does qualify for an independence allowance and therefore meets the severity test mentioned this procedure must be followed. Any claimant whose claim is turned down on the grounds of severity who has not had an independence allowance test should request to do so. If the appropriate answers to the questionnaire are given such that there is proved to be a 10% disability score or more, the severity test would then be met.

I understand that it is considered by the Accident Rehabilitation and Compensation Insurance Corporation that the four tests for severity mentioned are in decreasing order of importance, that is, that if the claimant has not died, the next level of severity would be the hospitalisation for 14 days, after that the significant disability for 28 days in total, and after that the qualification for an independence allowance. The four tests are in the alternative and any one would qualify the claimant.

Both rarity and severity tests must be met for there to be medical mishap.

Failure to obtain informed consent

This matter is dealt with at subs (6) and it provides that a failure to obtain informed consent to treatment from the patient or, where appropriate, the guardian, is medical misadventure only if there was negligence in the failure to obtain the informed consent.

As mentioned earlier, this is one case when negligence is specifically mentioned rather than the "standard of care and skill reasonably to be expected in the circumstances" terminology relating to medical error.

There must be consent. The consent must be informed. Standard forms are often used in which the patient acknowledges in writing that he has been informed of the consequences and consents to the treatment. The day may not be far away when it is specifically required that the risks of treatment be spelled out in the consent form. Medical practitioners are reluctant to dwell on possible problems. This can have a detrimental effect to the recovery of the patient and it is undesirable to create undue alarm. On the other hand, every patient has the right to know and to consent or not to the treatment in question. Sometimes there could be a very lengthy list of possible adverse consequences and the question is where to draw the line in those things which are mentioned and those which are not. The Auckland Medical Misadventure Advisory Committee generally takes the view that if a consequence is so unlikely that it would qualify for rarity on medical mishap then it is sufficiently unlikely that it need not be specifically mentioned in the context of informed consent. This means that if that consequence does occur then the claimant may have cover for medical mishap (provided the consequences are sufficiently severe). Conversely, if the consequence is more likely to happen than 1:100, then it is a consequence of which the patient should be informed and to which he should give his consent.

Of course, it does not follow that the mere failure to obtain informed consent is going to cause personal injury. It may be an infringement of other personal rights and/or a breach of professional standards justifying disciplinary proceedings. To qualify for cover for medical misadventure the negligent failure to obtain informed consent must result in some personal injury and otherwise amount to an error or mishap. A negligent failure to obtain informed consent where the treatment is otherwise given according to appropriate standards and where there are not adverse consequences which are rare and severe to a qualifying degree will not, of itself, give rise to cover.

Failure to diagnose

This topic is dealt with at subs (7) and again requires negligence. If there is a negligent failure to diagnose then there is cover. A failure to diagnose would include a misdiagnosis. The normal tests of negligence would apply such as what procedures and facilities and expert assistance is available to carry out diagnostic tests; whether these are availed of properly; whether all the alternatives to the symptoms are considered; and whether the laboratory tests, X-rays, CT scans and the like are adequately followed up and assessed.

Again, the negligent failure to diagnose must result in personal injury for there to be medical misadventure cover.

Discipline

Under subs (1) the Accident Rehabilitation and Compensation Insurance Corporation is required to report any medical misadventure which "may be attributable to negligence for an inappropriate action on the part of a health professional" with a view to the institution of disciplinary proceedings. It must first give the health professional a reasonable opportunity to comment and must be satisfied that there may have been negligence or inappropriate action. This is a matter upon which the Corporation is to obtain and have regard to the independent advice of the Medical Misadventure Advisory Committees. It will be noted that it is a question of "negligence or an inappropriate action" which is different terminology from that applicable to medical error.

The Medical Misadventure Advisory Committees are not fully resourced to explore questions of breach of standards to the same extent as appropriate disciplinary committees are. They comprise only one lay person, one lawyer and one health professional from the particular branch of medicine involved. There are normally no appearances made by claimants or health professionals and no opportunity for cross-examination. Decisions are normally made on the basis of documentary evidence and written reports and largely express the professional view of the one health professional member involved in that particular decision. Some claimants see this means as a way of obtaining censure and discipline for the health professional but

that does not necessarily follow. Some claimants who already have cover under s 8(2)(a) or (d) seek to have cover for medical mis-adventure as well, sometimes solely to determine whether there has been a breach of standards. This is not the appropriate forum for that. The Medical Misadventure Advisory Committees are adequately resourced to determine whether there has been medical error if this is critical to advise the Corporation whether or not there is cover but those resources do not stretch to full disciplinary proceedings which are better brought before the appropriate disciplinary body of the profession concerned.

Exceptions

Exceptions are provided for in subss (5) and (8). Medical misadventure does not include personal injury arising from abnormal reaction from a patient or later complication arising from treatment procedures unless medical error or medical mishap occurred at the time of the procedure (subs (5)). Clearly there will be cases where the adverse consequence of medical mishap does not occur until after, and indeed it could be some time after, the treatment in question. There may be some cases where it is difficult to draw the line between a consequence which has occurred in that way from the treatment but later, and cases where subs (5) may apply. It is a question of causation. The Auckland Medical Misadventure Advisory Committee gives the claimant the benefit of any doubt about this.

Subsection (8) deals with clinical trials and is self-explanatory. There is only cover where the trial has been authorised by an approved Ethics Committee which has certified that the trial was not conducted principally for the benefit of the manufacturer or distributor of the medicine or item or where the claimant has not agreed in writing to participate in the trial.

Procedures

Claim form

A claim for medical misadventure is normally initiated by an M 46 or an M 46(a) form. The former includes a section for completion by the claimant's general practitioner. If a claim is made on the latter form there must accompany it an explanation why there has not been the appropriate information and certificate given by the general practitioner. Accordingly, the best place to initiate a medical misadventure claim is at the claimant's general practitioner's by appointment. The form should be completed by the claimant and the GP and lodged with the Corporation (partly to include the portion of the GP's fee for that consultation). There would be nothing to stop a claim form M 46 once completed by the GP being lodged by the claimant's solicitor. Alternatively, the M 46(a) form can be used with the covering form explaining why there is not the GP's certificate. These forms can be obtained from the Accident Rehabilitation and Compensation Insurance Corporation.

Timing of claim

A claim must be made normally within twelve months of the date of personal injury. This is because s 63(2) provides that a claimant is not entitled to payment unless the claim is lodged within that time. It has been argued that there is a distinction between eligibility for cover on the one hand and entitlement to payment on the other. If a person is not entitled to cover then s 14 does not apply and that person can exercise any common law damages claims rights. This distinction would effectively prevent any common law damages claims by the operation of s 14 while at the same time disentitle the claimant to any payment to which she would otherwise be entitled by virtue of s 63(2). This distinction is not recognised by *Smith v Accident Rehabilitation and Compensation Insurance Corporation* [1994] NZAR 249 or *Hill v Accident Rehabilitation and Compensation Insurance Corporation* [1994] NZAR 357 where claims for cover were made by persons who had suffered personal injury from accidents before 1 July 1992 (when the 1992 Act came into force) and would have been entitled to cover under previous legislation. The Accident Rehabilitation and Compensation Insurance Corporation had argued that, despite s 135(5) (a transitional provision which continues cover under the 1992 Act), s 63(2) precluded entitlement. Neither judgment in the District Court contains reference to any distinction between cover and entitlement and that remains to be resolved in the Court. At the time of writing it is understood that both those judgments are subject to appeal.

The recent amendment (Accident Rehabilitation and Compensation Insurance Amendment Act 1995) has inserted subs 2A which allows the Corporation a discretion to accept a claim out of time if it is "of the opinion that the Corporation has not been prejudiced in determining cover or payments in respect of that personal injury by the failure to lodge the claim within the time specified". Various political statements and news media releases at the time attempted to define areas in which the discretion would be exercised but the statutory basis is clear, that of prejudice to the Corporation. Any apparent exercise of discretion against a claimant outside of those grounds should be the subject of a review and appeal. Prejudice to the Corporation was one of the grounds for extension of time-limits under s 98(2) of the Accident Compensation Act 1982.

The Medical Misadventure Advisory Unit of the Accident Rehabilitation and Compensation Insurance Corporation had developed a concept of "deemed date of injury" in which it will take the date of injury (from which the 12 months under s 63(2) runs) as being not the date of the actual medical procedure or the adverse consequence that flows from it but rather a later date which is more relevant, such as when the first consultation occurred which revealed the adverse consequence or its connection to the treatment or the like. That process assisted some claimants by bringing their claim within the 12 month time limit. It should no longer be necessary for this process to be followed if the Corporation properly exercises the discretion it now has to accept late claims.

Process of claim

Once it is realised that a claim includes medical misadventure it is referred to the Medical Misadventure Advisory Unit which initiates its own inquiries by obtaining reports from the health professional involved, independent medical assessment if appropriate, further submissions and details from the claimant where necessary and the like.

It is important that at that stage legal practitioners representing claimants make as detailed and full submission as possible. The M 46 is quite inadequate for any necessary detail and is simply the initiating document. Full details of the background to the treatment, the adverse consequences suffered, allegations of any negligence or other error, and detail of on-going disability are required for an informed decision.

If the claim is for medical mishap the Accident Rehabilitation and Compensation Insurance Corporation has, under the 1995 Amendment, (now s 5(9)(b)) a discretion whether the advice of a Medical Misadventure Advisory Committee is obtained. If the claim is for medical error the Accident Rehabilitation and Compensation Insurance Corporation is obliged to obtain that independent advice. In those cases the material is then sent to a Medical Misadventure Advisory Committee which will comprise (ideally) a health professional from the particular speciality affected. The Corporation has had difficulty in having ophthalmologists available for Committee members but generally an appropriate specialist will be a member of the Committee, such as orthopaedic, obstetrics and gynaecology, paediatrics, etc.

At its first meeting the Committee considers whether there is any evidence of error or further information is required on that. At the same time it considers whether there has been mishap, that is whether the adverse consequences of the treatment are sufficiently rare and severe. If further information on either topic is required the Committee will request that through the Secretariat. If there is sufficient information for the Committee to reach a tentative view it does so. Any decision on mishap is on the basis that the treatment was properly given, but it can reserve that question for later. This is simply because many cases qualify for mishap and cover should be afforded on that ground even though further enquiry might be required on the matter of error. If the Committee can it will make a recommendation to the Accident Rehabilitation and Compensation Insurance Corporation that cover be accepted if either medical mishap or medical error are established, or otherwise declined. If the recommendation is on the basis that there are grounds for medical mishap but reserving the question of medical error, then the recommendation is that cover be accepted on that ground but further inquiry be made on the matter of error.

The claimant, the registered health professional and other affected parties are advised of the recommendation and invited to make further submissions or asked to give additional information that is needed. In due course if further submissions are made they are considered and the Medical Misadventure Advisory Committee then gives its final advice to the Accident Rehabilitation and Compensation Insurance Corporation on whether cover should be accepted or declined and the grounds for that.

The Regulations prescribe 15 working days after dispatch of material for responses, although there is provision for extension of time.

Advice to the claimant and the health professional involved of the proposed recommendations of the Medical Misadventure Advisory Committee is an ideal opportunity for further response and input. If a claimant has not adequately covered the disabilities from which she is suffering as an adverse consequence of the original treatment to bring her within the 28 days aggregate of significant disability the claim might otherwise be declined, but the opportunity is there then to give that detail. If it is appropriate that there should be an independence allowance assessment made steps should be taken to ensure that that is done. If there is further evidence of breach of acceptable standards on the part of the health professional which is not already presented or which is inaccurately presented by the health professional the chance is there to provide the balance. Conversely, if a health professional needs more detail to justify the judgment decisions she made, that can be produced.

The Accident Rehabilitation and Compensation Insurance Corporation is not obliged to accept the advice of the Medical Misadventure Advisory Committees and the ultimate decision is by the Corporation. There are rights of review and appeal thereafter (although of note is the fact that a registered health professional can only seek review of a decision concerning negligent failure to obtain informed consent or negligent failure to diagnose correctly and not a straight finding of medical error (s 89(3)).

If the Accident Rehabilitation and Compensation Insurance Corporation elects not to take independent advice from a Medical Misadventure Advisory Committee on a claim for medical mishap the claim is then directly processed through the Medical Misadventure Advisory Unit and the claimant is advised either that cover is accepted or declined. Media publicity indicates that this will be done where there are straightforward and obvious cases one way or the other. What is not covered is a situation where there has clearly *not* been medical mishap but there may have been medical error. In declining to seek independent advice from a Medical Misadventure Advisory Committee, the Corporation is deprived of independent comment and advice on the question of error. The Corporation should exercise its discretion in these matters so that all issues are given proper consideration.

Once a decision is made that the claimant is entitled to cover, the extent of that entitlement, the compensation to be paid, rehabilitation and other assistance to be given, etc, is then decided and processed as with any other cover normally by the appropriate local branch.

Other remedies

If a claimant has cover under the Accident Rehabilitation and Compensation Insurance Act 1992 he cannot bring proceedings for damages (s 14(1)). If the claimant does not have cover then he can.

There will be few cases of medical misadventure where a claimant does not have cover but does have some available cause of action. If there has been negligence there will have been medical error and therefore cover.

An argument to be resolved is whether there is the right to sue when a claim is out of time under s 63(2). If there is a distinction between cover and entitlement then the existence of cover despite loss of entitlement will mean the right to sue will be lost. A failure or refusal to lodge a claim does not of it-

continued on p 110

The bias rules in administrative law reconsidered

By Philip A Joseph, Senior Lecturer in Law, University of Canterbury

It is one of the essential principles of the rule of law that decision makers should not have a personal interest in the matter to be decided. In this article Mr Philip Joseph considers this issue as illustrated by the recent case of Auckland Casino Ltd v Casino Control Authority. *The author acknowledges that the* Auckland Casino *case was one of difficulty. He questions, however, whether the decision accorded sufficient importance to the public interest in terms of public confidence in the way decisions are reached, as distinct from the situation as between the parties.*

A Introduction

1994 saw three administrative law cases of importance in New Zealand – *Mercury Energy Ltd v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) (on the reviewability of state-owned enterprises), *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641 (CA) (on substantive unfairness as a ground of review), and *Auckland Casino Ltd v Casino Control Authority* (unreported, Court of Appeal, 20 October 1994) (on the bias rules disqualifying decision makers). This article examines the last-mentioned of those decisions – *Auckland Casino Ltd v Casino Control Authority*. In October 1994 the Court of Appeal dismissed the appeal from the decision below, declining the appellant's application for review, and on 7 March 1995 refused Auckland Casino's application for leave to appeal to the Privy Council.

From time to time, cases come before our Courts which call for reappraisal of the law, leading to subtle and sometimes major adjustments to common law principles. Much of our legal change is incremental. Unusual or novel fact patterns produce "accidents" of litigation which visibly move the law in one direction or another. *Auckland Casino* was a decision in point. This case called for reappraisal and restatement of the doctrines of presumptive and apparent bias applying to persons under a duty to act judicially.

The unfolding of disqualifying interests in *Auckland Casino* sheets home the "closeness" and interlocking of the New Zealand business and professional communities and the potential for conflicts of interest to pass unnoticed, if those who would "decide" exercise less than professional diligence. The Court of Appeal issued a salutary reminder that any difficulty would have been largely averted had the Authority chosen to disclose all arguable conflicts of interest. This was an "obvious" and "standard precaution", observed Cooke P, the "importance of [which], especially when so great a prize as a casino licence is at stake, should need no labouring" (p 9 of the transcript of the judgment).

B The decision

The Casino Control Act 1990 authorised the licensing and operation of casinos, subject to strict controls and management criteria laid down in the statute. The Casino Control Authority was established for granting licences and determining

continued from p 109

self give rise to a right to sue (s 14(2)(a)), but what of a genuine delay in bringing a claim? In a genuine case of mistaken understanding of rights, is a claimant to be denied entitlement by virtue of s 63(2) but also the right to sue on the ground there is nevertheless cover?

If there is a medical mishap which does not qualify because it fails to meet either the rarity or severity test, or both, this does not then open the door to a right to sue because a medical mishap anticipates treatment "properly given" and the question then reverts to one of whether or not there is negligence.

Where there has been negligence but no personal injury as such then there is a right to sue. Claims for failed sterilisations are refused by the Corporation on the grounds that there is no personal injury. If the failure of the sterilisation is because of negligence (or possibly even some breach of contract or other available cause of action), then it becomes actionable.

Personal injuries caused by the actions of persons who are not registered health professionals are not covered for medical misadventure. The question then would be whether they are covered under the general cover provision of s 8(2)(a), that is being caused by an "accident" which is defined as including

> a specific event or series of events that involves the application of a force or resistance external to the human body and that results in personal injury . . . but excludes [this is if it is] treatment by or at the direction of a registered health professional . . . (s 3).

Individual cases would need to be assessed on their own merits but it could well be argued that any treatment from a para-medic falls within that definition and is covered. There would then be no right to sue.

Conclusion

A claim for medical misadventure must be made promptly. It does take time to follow the procedures involved. The criteria are clearly spelt out in s 5 but a claim can stand better chance of accurate assessment if it is accompanied by full detail. □

policy for the supervision and inspection of casinos. The statute provided initially for one casino licence to be granted in the North Island and one in the South Island, with restrictions hedging the issuing of further licences.

In January 1994, the Casino Control Authority granted the Brierley subsidiary, Sky Tower Casino Ltd, the North Island casino licence over another applicant, Auckland Casino Ltd.[1] Auckland Casino then sought judicial review of the Authority's decision in the High Court (unreported, HC Auckland, Robertson J, 13 July 1994), but the application failed, and Auckland Casino appealed to the Court of Appeal. Two causes of action were taken, each alleging bias and disqualification of members of the Casino Control Authority. The Court of Appeal dismissed the appeal but introduced several changes to the law: *Auckland Casino* qualifies the automatic disqualification rule for presumptive bias, stakes out the New Zealand position between conflicting Australian and United Kingdom authorities on apparent bias, and holds that waiver applies for failure to object to a known disqualification. It was held that, if there was bias (and the Court thought there had been), the right to object had been waived when, late in the hearing, the appellant learned of a disqualifying interest but allowed it to pass without protest.

C The causes of action

The appellants alleged both presumptive and apparent bias. "Presumptive" and "apparent" were epithets used by counsel in argument and adopted by Cooke P in giving judgment of the Court. Presumptive bias was a shorthand for disqualification through direct pecuniary interest. Nemo judex in causa sua – no one may judge his or her own cause. The reports are replete with statements that, if a decision maker has a pecuniary interest in the case, no matter how small, or an interest capable of a monetary value, then the law raises a conclusive presumption of bias. (*R v Rand* (1867) LR 1 QB 230 at 232 per Blackburn J; *Serjeant v Dale* (1877) 2 QBD 558 at 566-567 per Lush J; *R v Camborne Justices; Ex parte Pearce* [1955] 1 QB 41 at 47 per Slade J.) The decision maker is disqualified. Bias is presumed from the mere existence of the interest, and the Court need inquire no further. The law demands general impartiality in decision-making for doing justice between parties and for maintaining public confidence in the administration of justice. Lord Hewart's axiom is a truism: "Justice must not only be done, but should manifestly and undoubtedly be seen to be done." (*R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 256. But cf the critical comments in *R v Gough* [1993] AC 646 per Lord Goff and Lord Woolf.)

Apparent bias serves the same ends but has different ingredients. Apparent bias raises no irrebuttable presumption of disqualification but turns on outward appearances and overall evaluation; whether there is a manifest likelihood or danger of actual bias influencing the outcome (*Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 at 258 (CA). Apparent bias may emerge from a decision maker's predisposition towards a particular result,[2] or from statements revealing prior judgment,[3] or from outward personal favour or disfavour towards a party or witness,[4] or from a relationship the decision maker has to a party or witness,[5] or otherwise from apparent conflicts of interest howsoever arising.

D Presumptive bias

(a) The facts

Presumptive bias was alleged against two members of the Authority by reason of shareholdings in Brierley Investments Ltd, a New Zealand public company and parent of the successful applicant, Sky Tower Casino. Brierleys held 80 per cent of the shares in Sky Tower, with an American company holding the remaining 20 per cent. One member held 12,538 Brierley shares "worth more than a dollar each" and 1567 convertible notes, and his wife held 6228 shares and 778 convertible notes (p 6 of the transcript). Another member had earlier disposed of his Brierley holding but retained a residual parcel of 880 bonus-issue shares.

Thirty-nine days into the 49-day hearing, the appellant learned of the members' shareholdings. Six days later, counsel for Auckland Casino informed the Authority's chief executive who consulted the members concerned, and they took immediate steps to dispose of their interests. On the final day of the hearing, the chief executive notified plaintiff's counsel that, "to avoid any possible difficulty both members had now disposed voluntarily of their shareholdings" (pp 6-7 of the transcript). On those facts, the appellants argued automatic disqualification through direct pecuniary interest.

(b) The ruling

The Court of Appeal was "disposed to think" that the larger Brierley shareholding would have been fatal to the Authority's decision (presumptive bias) but held against the appellant on grounds of waiver and delay (discussed below). On the presumptive bias argument, the Court laid down six propositions.

First, the pecuniary interest rule should apply as fully to a licensing authority (semble any administrative authority acting judicially) as to a Court, especially when the subject-matter of the inquiry was of a commercial kind. Cooke P described the licensing authority as a body required to act judicially.

Secondly, the members' interests, held through their shareholdings in Brierleys, were sufficiently *direct* to trip the disqualification rule. The respondents had argued that the rule was a strict one, not to be extended, and that the members' interests were not direct because they held shares in the parent company, Brierleys, and not the Brierley-owned subsidiary, Sky Tower Casino. This argument failed since it was publicly perceived that Brierleys itself had won the casino licence. Cooke P quoted a press report of a Brierley media release given in evidence: "'Winning the Auckland casino licence was the highlight of the financial year for Brierley Investments Limited (BIL)', said the chief executive, Paul Collings". (p 10 of the transcript.)

Thirdly, not every direct pecuniary interest in the subject of an inquiry will disqualify a decision maker. It was said that the words "however small", when describing the interest, should be treated today as an exaggeration and should be read subject to the de minimis rule. Thus Cooke P thought that the smaller holding of 880 Brierley shares (representing roughly $1000 in value) would be an insufficient interest to disqualify the member

concerned or invalidate the Authority's decision.

Fourthly, a decision maker must know of the pecuniary interest in the inquiry for there to be presumptive bias. Commonsense dictated. Cooke P extemporised about a Judge sitting in ignorance that one of the parties was a subsidiary of a company in which the Judge held shares: "[T]here would be no real danger of bias, as no one could suppose that the Judge could be unconsciously affected by that of which he knew nothing." (p 10 of the transcript.)

Fifthly, the disposal of a pecuniary interest prior to the actual decision may not negate an allegation of bias. Here, the Court did not think that the "last-minute" disposal of the members' shareholdings could affect the situation. The final decision could not realistically be isolated from the preceding lengthy hearing, when the Authority was feeling its way to a collective view and may have been open to adverse influence.

Sixthly, the law does not require actual bias to vitiate a decision when there is established a direct pecuniary interest. The facts in *Auckland Casino* illustrated the automatic disqualification rule. Those behind Auckland Casino's application regarded the member with the larger Brierley shareholding as one of two members of the Authority who were most sympathetic to their cause. These members had dissented in the course of the hearing, when the Authority handed down a majority ruling refusing the appellant leave to call further evidence. The member's shareholding was capable itself, however, of raising an irrebuttable presumption of bias.

(c) Comment

Those rulings establish the following principles:

(a) The bias rule is fundamental for maintaining the integrity of decision-making, including that of lay persons or bodies determining public or private interests, when the duty to act judicially applies;

(b) Arguments based on the corporate veil (parent v subsidiary company) may be dismissed as artifice when assessing the directness of a potentially disqualifying interest;

(c) No purpose is served in disqualifying a decision maker for a minimal or "peppercorn" interest which could not reasonably exert adverse influence, or when the decision maker is oblivious to an interest held and could not realistically be influenced or partial;

(d) A pecuniary interest may vitiate a decision before it is reached and the interest disposed of, as manifestly bearing upon and influencing the decision maker in the course of the inquiry; and

(e) It is not necessary to show actual or apparent influence or bias when there is established a direct pecuniary interest. The public interest in the administration of justice demands complete and transparent impartiality. Disqualification flows automatically from the interest held.

Those propositions may now be taken as established, although they were obiter and not the subject of binding rulings. Nothing rests on the point that the decision did not actually overrule *R v Rand* (1866) LR 1 QB 231 which established automatic disqualification for any pecuniary interest, however small. Cooke P cited Blackburn J's oft-quoted dictum (at 232), that any pecuniary interest will suffice, then introduced the de minimis rule which he suggested would apply to the smaller Brierley shareholding. It did not weigh with the Court that Blackburn's dictum had been repeated as recently as by the House of Lords in *R v Gough* [1993] AC 646 at 661 per Lord Goff and 673 per Lord Woolf. No authorities were cited for (or against) the further propositions (a) - (e) above.

E Apparent bias

(a) The facts

The appellant again relied on the two members' Brierley shareholdings to argue apparent bias, but alleged further grounds also. It was argued that there was a reasonable suspicion or a real danger or likelihood of bias through conflicts of interest involving the chairman and the deputy chairman. The chairman was a senior partner in a national law firm (Simpson Grierson Butler White) which had acted for the Auckland City Council in an earlier land exchange deal with Sky Tower Casino, and in filing a statement of defence to the appellant's action to stop the land exchange transaction. The firm had also acted for Fletcher Construction in reviewing the contract between it and Brierleys for the construction of the Sky Tower complex, and for Brierleys in other matters through the firm's Wellington office.

The Auckland City Council was a major client of the chairman's firm, although the chairman was unaware his firm had acted for the Council to prevent Sky Tower's land exchange deal. He did know of his firm's involvement with Brierleys, although he had never personally acted for them. It was accepted in evidence that his personal financial benefit accruing from these clients was "quite small" (pp 7-8 of the transcript).

Further conflicts of interest were alleged against the chairman through shareholdings in another company, La Roche Investments Ltd. The company had 500,000 issued shares of which the chairman held two parcels of 31,250 shares, one in a representative capacity, the other jointly with his wife. Former Labour Minister and a non-executive director of Brierleys, Sir Roger Douglas, held a similar parcel of 31,250 shares in the same company. Through their respective shareholdings, the chairman and Sir Roger met "on one or two occasions" in the course of shareholders' meetings (ibid, p 8).

The deputy chairman was Mr Trevor de Cleene, also a former Labour Minister and colleague of Sir Roger Douglas, and a close personal friend of Sir Roger. The appellant alleged apparent bias on the strength of their former political association and continuing friendship, and Sir Roger's involvement with Brierleys.

(b) The ruling

Cooke P prefaced the Court's ruling with the disclaimer: "Again it becomes unnecessary to express a concluded view on the facts of the present case" (ibid, p 12). But he did indicate the strength of the appellant's argument:

> We go no further than saying that, but for waiver, the appellant would have had a seriously arguable case of apparent bias, arising less from matters relating to any

> one member of the Authority than from the cumulative impact of the various matters relating to four members. (ibid, pp 12-13.)

The Court thought there may have been a "synergistic tendency", predisposing the Authority unconsciously to focus on the weaknesses in Auckland Casino's application and the strengths of Sky Tower Casino's application.

The primary importance of the Court's ruling rests with the appropriate test for apparent bias. The Court of Appeal addressed conflicting lines of authority between the Australian and English Courts, and endorsed the English approach.

In some earlier New Zealand cases, the Courts recognised a distinction between a "reasonable suspicion" and a "real likelihood" of bias, as positing different standards of proof. These cases established (or tended to establish) that the tests had different application according to the type of decision maker. The "reasonable suspicion" test focused more readily on outward appearances. When it was most crucial that justice be seen to be done (eg with Judges or jurors), the Courts applied the stricter test and asked whether a reasonable person might have suspected bias in the decision-making (eg where a Judge continually interjects or excessively questions a party or witness).[6] This was considered the stricter test for it imposed a lesser standard of proof (it is easier to establish a reasonable suspicion than a real likelihood. (See *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252 at 277.)

The Courts applied the more exacting "real likelihood" standard of proof when the decision maker was combining administrative or policy functions with judicial functions. In *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252, where it was alleged that the Commissioner's vigorous questioning and strong language revealed bias, the Court of Appeal stated the test to be "whether an informed objective bystander would form an opinion that a real likelihood of bias existed" (at 277). The Court applied the stricter standard of proof since the Commission was not a Court making binding determinations, but an inquisitorial body for reporting to the executive. The Court of Appeal observed that:

> The Commissioner is not acting as a Judge, and he is not to be expected to project the same standards of detached impartiality. . . . [I]n the case of a Commission appointed to inquire and advise the Government considerable latitude must be allowed. (ibid.)

In *Auckland Casino*, the Court of Appeal welcomed the opportunity to rationalise the tests for bias. The Court thought there was little, if any, practical difference between the two tests – citing its own decisions in *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146 at 153, *R v Te Pou* [1992] 1 NZLR 522 at 527 and *Matua Finance Ltd v Equiticorp Industries Group Ltd* [1993] 3 NZLR 650 at 654. Earlier cases addressed in these decisions, said Cooke P, recognised the possibility of a genuine distinction: "But once it is granted that the hypothetical reasonable observer must be informed . . . the distinction becomes very thin" (p 12 of the transcript). His Honour reasoned that:

> If a reasonable person knowing all the material facts would not consider that there was a real danger of bias, it would seem strained to say nevertheless he or she would reasonably suspect bias. (ibid.)

An *informed* observer was pivotal, although the law had long supplied such a person. In *Re Royal Commission on Thomas Case* [1982] 1 NZLR 252, the hypothetical observer was both "informed" and "objective", as "one [who was] sufficiently informed of the nature and conduct of the proceedings to be able to form a sound opinion" (at 277). In *R v Gough* [1993] AC 646, the House of Lords explained that, since bias turns on outward appearance and the Court investigates the actual circumstances, "knowledge of such circumstances as are found by the court must be imputed to the reasonable man" (at 667-668 per Lord Goff of Chieveley delivering the leading speech). Lord Goff's rationalisation made the "informed observer" all but redundant. Since the Court personified the informed observer, there was no need for the Court to look at the matter through any hypothetical eyes (ibid, at 670). But whereas *Gough* and the *Thomas Case* (and a good many other decisions) distinguished between a "reasonable suspicion" and a "real likelihood or danger", *Auckland Casino* did not.

The Court of Appeal followed their Lordships in *Gough* and held that the test always was whether there was a real danger or likelihood (in the sense of a real possibility) of bias. For the House of Lords, it mattered not whether the case concerned justices, members of inferior tribunals, arbitrators or jurors – the test was the same. In following *Gough*, the Court of Appeal cast adrift from the High Court of Australia which, in *Webb v R* (1994) ALR 41, had declined to follow *Gough* and endorsed the "reasonable suspicion" test for persons acting judicially. In *Webb*, it was stated prophetically that the New Zealand Court of Appeal was still effectively applying the reasonable suspicion standard and not some higher standard. ((1994) ALR 41 at 45 per Mason CJ and McHugh J, citing *R v Papadopoulos (No 2)* [1979] 1 NZLR 629 at 634; *R v McCallum and Woodhouse* (1988) 3 CRNZ 376; *R v Pou* [1992] 1 NZLR 522 at 527.)

(c) Comment

Simplifying the law is to be encouraged. Their Lordships in *Gough* had referred to the authorities as "large in number" and "bewildering in effect", calling on examinations and analysis, that lower Courts might be spared "a trawl through authorities . . . by no means easy to reconcile" ([1993] AC 646 at 659 per Lord Goff). But not all rationalisations lead to simplification. The rules in *Gough* and subsequently *Auckland Casino* do not relieve the law of all complexity or doubt.

Their Lordships in *Gough* did not regard the reasonable suspicion/real likelihood tests as identical, leading in practice to the same result. There, the outcome of the appeal turned on which test was the appropriate test. The appellant had been convicted of conspiracy to commit robbery and he alleged that a juror, who it transpired was his co-accused's next-door neighbour, could not have discharged her task impartially.[7] The Crown argued for the stricter standard of proof (real danger or likelihood), the appellant for the lesser

standard (reasonable suspicion). Counsel for the appellant acknowledged that, if the former test applied, the appeal must fail. In the event, the House of Lords rejected the choice of tests, endorsed the real likelihood threshold, and held that the reasonable suspicion test had muddied the waters following some unguarded comment in *Metropolitan Properties (FGG) Ltd v Lannon*,[8] and was not the true metewand of bias.

The Court of Appeal in *Auckland Casino* reasoned differently. Cooke P proffered there was little, if any, difference between the tests. (See also *Matua Finance Ltd v Equiticorp Industries Group Ltd* [1993] 3 NZLR 650 at 654.) He cited Court of Appeal decisions (see above) in which the expressions "reasonable suspicion") and "real likelihood" were used interchangeably, or where the Court had said it would not be useful to try and distinguish between the tests, as tending to produce the same result. This approach does not match that of the House of Lords in *Gough* where the choice of tests was treated as crucial. If the tests are indeed the same and produce the same result, why is the real likelihood test now to be preferred? Why not use both tests interchangeably, as alternative expressions of the same? Endorsing the one expression (real likelihood or danger) may not simplify the law but simply restrict our choice of legal diction.

Endorsing a universal test (real likelihood or danger) does not remove all distinctions from the law. In *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146, Cooke P and Somers J (at 149) distinguished between a purely judicial officer and an officer or body combining administrative and judicial functions. The appearance of bias was not the same for each. Stricter standards of "detached impartiality" were required of Courts than, for example, inquisitorial bodies such as Royal Commissions or Commissions of Inquiry which are expected to take freer initiative in questioning and examining witnesses. In *Cochrane*, it was said (at 153) that Courts "should be examples of judicial standards" – "[a]dherence to such standards is part of their raison d'etre" – but that there was room for the "somewhat less exacting standard of real likelihood of bias for Royal Commissions and Commissions of Inquiry". Cooke P and Somers J observed (at 149, 153) that the alternatively-worded tests "reflect a difference in emphasis and approach", and commented: "The tests regarding bias and excessive questioning *are not necessarily the same* for them [Royal Commissions and Commissions of Inquiry] as for Courts" (at 153, emphasis added). Might we conclude that a difference in *emphasis* and *approach* produces, in fact, different tests? If so, does *Auckland Casino* overrule *Cochrane*?

Whatever the true test (or tests), the law must make distinctions which inevitably affect the bias threshold to be applied. The application of the bias rules must be "tempered with realism", said Richardson J in *CREEDNZ Inc v Governor-General* [1981] NZLR 172 at 194. Stricter observance of judicial standards is demanded of Judges and jurors than of non-judicial officers or persons combining judicial and policy functions. There are strong suggestions from *Re Commission of Inquiry on Thomas Case* that a non-judicial body may evoke quite strong suspicions of bias, when a judicial officer would stand condemned.

In some contexts, the terms "bias" or "predetermination" have little credible application. The statutory setting is all important. In *Jeffs v New Zealand Dairy Board* [1967] NZLR 1057, the Privy Council held that a marketing board was not disqualified from making a zoning order determining the area of operation of a dairy company, although the board had a direct pecuniary interest arising from a loan to the company. The board's statute had conferred on it dual powers to determine zoning applications *and* to advance moneys to dairy companies. The statutory context may indicate that a deciding body is expected to hold preconceived views or that it should develop and apply policy in exercise of its discretion. In *Turner v Allison* [1971] NZLR 833, the Court of Appeal thought an element of predetermination inevitable when planning policy was being administered and ruled out allegations of bias. It was not a ground for complaint that members of a planning appeal board had sat in previous related proceedings and expressed views about the best use of the land in question. In *Devonport Borough Council v Local Government Commission* [1989] 2 NZLR 203 (CA), too, allegations of bias seemed superfluous. It was held that the commissioners were not required to dispel all former views formed as a result of previous hearings, but should consult freely their knowledge and expertise in local government matters.

Judges are not at such liberty. The law imposes more rigorous standards. In *Black v Black* [1951] NZLR 723, a magistrate had sat in an earlier case involving the parties and had formed a view on the credibility of a witness, and he was held to be disqualified from hearing the custody application before him. Judicial demeanour may readily manifest the appearance of bias. Rigorous or excessive questioning of witnesses can trigger bias in the forensic setting. (See eg *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146; *Eygermans v Ministry of Transport*, unreported, HC Auckland, Robertson J, 19 July 1991.)

The alternatively-worded tests served as shorthand for the differing standards of impartiality required and seemed to be used to good effect by lower Courts. Their utility may well have outweighed any imprecision in the expressions used, or the fact that any real difference between the tests collapsed when the impartial observer was knowledgeable and informed. Expunging the reasonable suspicion test requires Courts to make longhand reference to the policy of the law which imposes different standards on different bodies. This may be easier said than done when the administrative State comprises countless agencies and authorities, all of diverse and varying complexion, each adjudging contesting interests and claims.

F Waiver

(a) The facts

The primary facts are recounted above. Before the Authority's hearing had begun, some behind Auckland Casino's application had known that one member of the Authority held a small parcel of 880 Brierley shares, that the chairman's law firm acted for the Auckland City Council, that deputy chairman Trevor de Cleene and Sir Roger

Douglas were close associates, and that Sir Roger was a Brierley director. During the hearing, the appellant learnt that Simpson Grierson had acted also for Brierleys and that the chairman of the Authority held a sizeable parcel of Brierley shares. About ten days from the end of the hearing, judicial review proceedings were discussed but the appellant pressed on without raising the bias objection. On those facts, the Court of Appeal upheld Robertson J below; that if bias was established, it had been waived by the appellant's inaction.

The appellant had found itself in a dilemma. Auckland Casino had spent $5 million in costs of the application and had been pressing its case for 35 days, when the possibility of bias dawned. Challenging the Authority would have risked jeopardising the hearing or alienating the Authority and public opinion. The Court confessed to some sympathy with the appellant (pp 14-15 of the transcript). Faced with an "agonising choice" (ibid, p 17), Auckland Casino felt it had no option but to proceed, reserving (as far as that was possible) its right of challenge in the event of an adverse decision.

(b) Counsel's argument

A litigant's dilemma – the "agonising choice" – is seldom itself sufficient to oust the waiver rule, although Courts are quick to sympathise. (see eg *Shrager v Basil Dighton Ltd* [1924] 1 KB 274; *R v Nailsworth Licensing Justices, ex parte Bird* [1953] 2 All ER 652; *Corrigan v Irish Land Commission* [1977] IR 317; *Vakauta v Kelly* (1989) 167 CLR 568.) Counsel for Auckland Casino argued rather a public policy ground; that it would undermine public confidence in the administration of justice for the Court to find that the appellant had lost its right to object. The House of Lords in *Gough* (at 659) termed it an "overriding public interest" that the Courts should seek to maintain the impartiality of adjudication. Lord Goff: "[T]here is an overriding public interest that there should be confidence in the integrity of the administration of justice."

In *Auckland Casino*, counsel conceded the legitimacy of express waiver based on full disclosure of a disqualifying interest. Acceptance by decision makers that they have *an obligation* to disclose maintains public confidence in the administration of justice. Disclosure becomes a necessity when interested parties must adjudicate in the absence of any other competent person or body (eg when Judges must interpret statutes or hear cases which invariably touch their private interests). But, counsel argued, different considerations applied when there was no disclosure and a litigant, in the course of proceedings, dawns to the possibility of danger of bias. A failure to object had to be assessed in the overall context of the public interest and whether non-disclosure by the decision maker erodes public confidence in fair and impartial adjudication. Counsel cited *Goktas v Government Insurance Office of New South Wales* (1993) 31 NSWLR 684 where Kirby P stated (at 686-687) that it was not ordinarily open to a litigant unilaterally to waive an appearance of bias on the part of a Judge:

> This is because the existence and appearance of impartiality on the part of the judiciary belongs [sic] not to the litigant alone but to the public at large and to the legal system of which the judge is a member.

(Kirby P accepted that he was bound by the Australian High Court decision in *Vakauta* to hold that an individual litigant has a privilege of waiver.)

(c) The Court's ruling

Cooke P responded, "there is force in that view" (p 18 of the transcript), and identified two categories of bias: displays of blatant bias likely to undermine public confidence in the justice system, and bias in criminal cases. He thought private waiver would be unlikely in the former category and "normally not possible at all" in the latter (ibid). *Auckland Casino* was termed a "borderline case", falling within neither of those categories. In the result, waiver was upheld.

(d) Comment

The Court of Appeal may not, with respect, have given the waiver argument the consideration it deserved. This commentary identifies the public interest in impartial adjudication and makes four points: that the public interest is not confined to Courts but applies to all decision-making, that disqualification ought not be capable of waiver once bias manifestly compromises the public interest, that a strict rule insisting that a party voice objection may impose unreasonable burdens, and that a failure unreasonably to object to a disqualifying interest may justify a Court refusing discretionary relief.

(i) The public interest

Shakespeare's *Merchant of Venice* captures the public interest as powerfully as any words can. For the Elizabethans, the ancient republic of Venice held special appeal, having earned a reputation for political astuteness, greath wealth, and legal justice. Thus when Portia posed as a young but wise Doctor of Laws (Balthasar) to plead, in the Duke's Court, Antonio's cause, she extolled the rigorous and just application of the law even when it seemed to conspire against Antonio. She resisted Bassanio's advances to alter the law a little ("To do a great right, do a little wrong, And curb this cruel devil [Shylock] of his will"), gravely answering: "It must not be. There is no power in Venice can alter a decree established." Portia implored Shylock to release Antonio from his bond, that he may be spared his pound of flesh, and spoke of the noble quality of mercy as being not strained: "It droppeth as the gentle rain from heaven upon the place beneath. It is twice blest: It blesseth him that gives and him that takes." Shylock, who would stand upon technicality ("I crave the law, the penalty and forfeit of my bond"), discovered that justice too is "twice blessed"; for the law was his to plead, but he was bidden also to accept what disadvantage the law imposed, and this, as Portia told it, dispossessed the rapacious Shylock and had him beg mercy for his life. Shylock's final words, "I am content", were resigned and fraught with heaviness. Portia's uncompromising application of the laws was a triumph of justice.

The public interest in the forensic setting has two components – independence and impartiality. A Judge who would be partial would flout the judicial oath and forfeit the right to independence of office. Of the two components, impartiality represents a higher constitutional value than a formal guarantee of independence. In Canada, the

Courts have examined the twin concepts of "impartiality" and "independence" under their Charter guarantee (s 11(d)) that accused persons have the right to be tried by "an independent and impartial tribunal". In *R v Lippe* [1991] 2 SCR 114, the Supreme Court held that these concepts were separate and distinct, but closely functionally related. "Impartiality" referred to a tribunal's "state of mind or attitude . . . in relation to the issues and the parties in a particular case"; "independence" implied "a status or relationship to . . . the executive branch of government, that rests on objective conditions or guarantees". (See also *R v Genereux* (1992) 70 CCC (3d) 1 (SCC).) For Lamer CJ, judicial impartiality represented the higher constitutional value. The purpose of an independent judiciary, he said, was to ensure a "reasonable perception of impartiality" (ibid). Judicial independence was critical to the appearance and public perception of impartiality, so that even if a tribunal were found to be independent, that did not end the Charter inquiry under s 11(d). Independence was only a component of impartiality which could be compromised by a reasonable apprehension of bias.

Lay decision makers lack the Judges' constitutional guarantee of independence but remain bound by the public interest in fair and just adjudication. It has long been the law. In *Sergeant v Dale* (1877) 2 QBD 558 at 567, Lush J examined the position of tribunals and identified the rationale for the strict rule of disqualification for pecuniary interest:

> . . . to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security.

Impartiality is the essence of decision-making. Decision makers of all types must decide "fairly" and not taint their office with bias. *Auckland Casino* affirmed that the bias rules applied equally to all persons under a duty to act judicially; that they were perforce *bound* by the public interest.

(ii) The argument against waiver

In *Goktas*, Kirby P appealed to the constitutional principle of an independent and impartial judiciary when he inveighed against waiver through inaction in the Courts. The existence and appearance of an impartial judiciary, said Kirby P, "belongs to the public at large and to the legal system of which the judge is a member" (*Goktas* at 686-687). Thus the bias disqualification was no-one's to waive on behalf of the true beneficiary – the people. It was, he said (at 687), "as a general rule, not for the individual litigant to waive the public's rights to a manifestly fair conduct of a public trial".[9]

Commonwealth Courts have been at pains to establish the same rule against waiver with public interest immunity, once loosely referred to as "Crown privilege". The House of Lords put an end to this usage in *Rogers v Secretary of State* [1973] AC 388, where their Lordships dismissed the term as a "misnomer" (at 406-407 per Lord Simon of Glaisdale) and as "misleading" and "wrong" (at 400 per Lord Reid). Public interest immunity is an evidential rule which excludes the admission of evidence that would be injurious to the public interest. The term "privilege" was inappropriate since the rule protected public, not private, interests and could not be waived but was an absolute bar, once the production of evidence was seen to harm the public interest. "Public interest immunity is not a privilege", said Lord Fraser in *Air Canada v Secretary of State for Trade (No 2)* [1983] 2 AC 394 at 436, "which may be waived by the Crown or by any party". The bias rule stands in like stead and ought not to be subject to waiver once a pecuniary interest or predisposition throws into question a decision maker's impartiality. The issue then is one no longer of private law, but of paramount importance in the administration of justice.

The public interest does not end at the Courthouse door. Hapless litigants such as Auckland Casino would find feckless any distinction based on the type of decision maker (Tribunals v Courts). They would dispute why this should determine whether a failure to voice protest had or had not waived the protection of natural justice: "Why should my silence forfeit the protection of the law because it is a Tribunal and not the Courts that determines my rights?" Which agency Parliament decrees appropriate for decision seems inconsequential (the "quality of [justice] is not strained"). A casino licence is no less valuable because it is issued by an administrative authority and not the Courts. In *Auckland Casino*, the duty to act judicially applied especially where the decision-making was of a commercial kind (p 10 of the transcript).

(iii) How reasonable is the waiver rule?

As a matter of practicality, it may be preferable that a party or its representative voice objection once bias is manifest and ask that the fact be recorded and the substance of the objection noted. This makes future complaint easier to consider and warns the Judge or decision maker of the conduct or attitude complained of. A warning may be sufficient to cause the rest of the hearing to be conducted properly. But consider Kirby P's observations in *Goktas* (at 686-687) where he thought counsel's decision not to object understandable:

> It will be rare that it is to a party's advantage for its representative to challenge the fairness of a judge. Or to impugn the judge's neutrality. Still more rare will it be to suggest bias, or the appearance of bias, on the part of that judge. To the end of the trial, the parties and their representatives depend so heavily upon the opinion of the judge that there will be natural inhibitions, psychological impediments and forensic constraints, which restrain challenges of this kind where they are not absolutely necessary. Where there is a professional Bar, the ongoing relationships with judges in other cases adds a further restraint which it would be naive to ignore.

But for the final sentence, those observations apply equally to lay adjudicators. Thus how realistic is it to insist on a rule which says that litigants must stand on their rights and object, when so much may be at stake? In some cases, it may be reasonable to insist that a party voice objection immediately they learn of the disqualifying interest. One could imagine cases where a rehearing would cause little inconvenience or expense and the matter for decision was of little public moment. But in

other cases, the rule imposes a Hobson's choice and reduces administrative adjudication to a lottery – to object and to start again at the litigant's expense, or not to object and to risk an adverse decision. It has not been the experience elsewhere that relieving parties of their "agonising choice" encourages fabricated complaints for relitigating unfavourable decisions. Kirby P observed no ostensible change when his Court adopted the practice of allowing ex post facto objections.[10] Abolishing the waiver rule would ease the burden of parties and their counsel, without reducing the law to inflexible solutions.

(iv) Discretionary relief

A failure to object in cases where it would be reasonable to voice protest may be treated as going to discretionary relief, not waiver. In *Auckland Casino*, the Court of Appeal upheld the discretionary remedy of judicial review as an alternative ground for decision. Auckland Casino had failed to show the "utmost expedition" in issuing and prosecuting its Court proceedings and this delay caused prejudice to the successful applicant. Sky Tower Casino claimed in evidence that it had been incurring construction costs in excess of $250,000 a day on its casino complex. Placing to one side the Court's finding that Auckland Casino had in fact been dilatory, a failure unreasonably to object or to move with reasonable expedition may justify the Court refusing relief. The discretionary nature of judicial review forecloses any need for concepts of waiver or estoppel.

G Conclusion

Auckland Casino was one of those typically "hard" cases which cause difficulty for the Courts. These cases present no easy solution, when the decision must be "all or nothing", winner take all. The writer agrees with the Court's suggestion of bias (or the appearance thereof) on the part of the Authority, but disagrees with the finding of waiver. The Court was confronted with a hard choice, but the decision establishes a precedent which may not accord sufficient gravity to the public interest. "At stake is something greater even than the interests of the parties to the case. At stake is the integrity of our system of law and justice.[11] The Courts must be alert to issues which touch public confidence in the way decisions are reached. Future Courts may need to reconsider.

The implications of the *informed* observer are also troubling. If the public interest is paramount – to maintain the public confidence – then it seems misplaced to view apparent conflicts of interest strictly through the hypothetical eyes of the fully knowledgeable and informed. Lord Goff would do away with any hypothetical observer and view the matter solely through his own eyes (*R v Gough* [1993] AC 646 at 670). But whether he or his fellow Judges entertain a danger of bias seems almost irrelevant to the governing principle – whether the facts as publicly perceived suggest bias. It is *the public's* confidence in the administration of justice that is paramount, and it is too high a standard to suppose that the public is perfectly knowledgeable and informed. Focusing too inwardly on the informed observer may invite unwarranted judicial introspection.

In other respects, the decision in *Auckland Casino* is to be welcomed. The Court of Appeal gave "direct pecuniary interest" more realistic definition through the de minimis rule and rationalised the tests for apparent bias. But questions remain. Different standards of impartiality are required of deciding bodies and one ponders whether a universal test of "real likelihood or danger" will assist Courts settle on bias standards appropriate to the deciding body. Counsel advising parties will need to second-guess the standard applying, at risk of parties being held to have waived their right of objection. □

1 The Authority handed down an interim decision on 17 December 1993, indicating a preference to award the licence to Sky Tower, and entered a final decision on 21 January 1994.

2 Eg *Black v Black* [1951] NZLR 723 (SC) (Magistrate had sat in an earlier case involving the parties and had formed a view on the credibility of a witness).

3 Eg *Isitt v Quill* (1983) 11 NZLR 224 (CA) (prohibitionists elected on to a licensing committee publicly pledged their cause and refused all applications for licence renewals); *English v Bay of Islands Licensing Committee* [1921] NZLR 127 (SC) (committee members announced in advance no licence renewal unless premises rebuilt).

4 Eg *Black v Black* [1951] NZLR 723; *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146.

5 Eg *Ex parte Blume; Re Osborn* (1958) 58 SR (NSW) 334 (decision maker a personal friend of the applicant's husband who appeared on his wife's behalf).

6 For example, *Eygermans v Ministry of Transport*, unreported, HC Auckland, Robertson J, 19 July 1991. See also *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146 (CA); *Inform Group Ltd v Fleet Card (NZ) Ltd* [1989] 3 NZLR 293; *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd* [1989] 3 NZLR 304 (CA).

7 The co-accused (the appellant's brother) had been discharged at the committal hearing and the juror only recognised the co-accused when he started shouting in Court after the appellant had been convicted and sentenced. The House of Lords dismissed the appeal for want of any real danger of bias.

8 [1969] 1 QB 577 at 606 per Edmund Davies LJ, cited by Lord Goff. But it is clear that the reasonable suspicion test has a longer lineage than Lord Goff supposed. See eg *Eckersley v Mersey Docks & Harbour Board* [1894] 2 QB 667 at 670 and the authorities canvassed by Slade J in *R v Camborne Justices, Ex parte Pearce* [1955] 1 QB 41.

9 Albeit the American authority cited by Kirby P – *Lustman v United States* 258 F 2d 475 (1958) opposed rather than supported his proposition which he attributed to the American courts in general. *Lustman* affirmed that the constitutional right to a speedy trial under the 6th Amendment is waived if not promptly asserted.

10 *Goktas v Government Insurance Office of New South Wales* (1993) 31 NSWLR 684 at 688, citing *Builders Licensing Board v Mahoney* (1986) 5 NSWLR 96.

11 Ibid at 90-91 per Kirby P.

A Judge's lot is not a happy one?

(With apologies to W S Gilbert)

I am, for reasons which may be apparent to counsel, reminded of the observation of Judge Learned Hand in *The Preservation of Personality* (1929) on the travails of being a Judge:

> A judge's life, like every other, has in it much of drudgery, senseless bickerings, stupid obstinacies, and captious pettifogging. . . . These take an inordinate part of his time; they harass and befog the unhappy wretch, and at times almost drive him from that bench where like any other workman he must do his work . . .

Thomas J
Grant v Grant
(High Court Auckland
15 December 1994)

The Criminal Appeal Division: the first three years

By Elana Geddis, Judges' Clerk, Wellington

This article surveys the case law over the past three years in respect of the decisions of the separate Criminal Appeal Division of the Court of Appeal. The author suggests that the use of this Division has been successful and expresses the opinion that it can be expected that the Division would assume responsibility for an even greater proportion of criminal appeals.

The Criminal Appeal Division of the Court of Appeal was constituted in 1991 by an amendment to the Judicature Act 1908 (s 52B(1)). The main purpose of a separate Criminal Appeal Division was "to relieve the Court of Appeal of a substantial amount of criminal appellate work to liberate it for its role of judicial standard-setting in New Zealand".[1] As the Division has reached the close of its third full year, it seems proper to consider its operation.

The first sitting of the Division, on this occasion comprising Cooke P, Jeffries J and Henry J, was in Auckland in November 1991. Since then, the Division has sat regularly once a month, usually for two weeks at a time. The Division rotates, with sittings in Auckland, Wellington and Christchurch. The Division is composed of Judges from both the High Court and the Court of Appeal. Although other combinations are permitted by the Act, to date, the Division has generally taken two forms. Primarily, it has been presided over by the Chief Justice, accompanied by one Judge of the Court of Appeal, and one of the High Court. Alternatively, in the absence of the Chief Justice, the Division has comprised one member of the Court of Appeal and two High Court Judges.

Reflecting its specialist jurisdiction, the Division has had a regular membership since it was established. The Chief Justice has sat in the Division most often, having sat for 35 weeks over the past three years. Justice Casey has sat in the Division for 31 weeks since 1992. The High Court Judges assigned to the Division by the Chief Justice have been Jeffries J and Holland J (both now retired), Thorp J, Henry J and Williamson J. Of the current Judges, Thorp J and Henry J have sat for 26 and 25 weeks respectively. These regular members have been joined from time to time by Justices Richardson, Hardie Boys, Gault and McKay.

One expectation in forming the Criminal Appeal Division was that the establishment of a specialist body would lead to greater efficiencies, in particular, by reducing the period of time taken to hear and decide appeals. In 1992, the average time taken between the date of sentence and the date of the appeal hearing was 18.9 weeks. In 90 per cent of cases, the appeal was heard within 15.4 weeks. In 1993, the majority of appeals were heard within 17 weeks. In 1994, in half the cases the hearing was within 17 weeks of the date of sentence. The spacing of sittings between the three main centres, however, makes it difficult to achieve a shorter time span. Although the period could be reduced by hearing some Auckland appeals in Wellington, that would undermine the purpose of rotating the Division between centres. Further, although there may be a delay in the hearing of an appeal, judgment is generally delivered promptly. In the clear majority of cases in the past three years, judgment has been given on the day of the hearing itself. A large proportion of the remaining decisions were delivered before the conclusion of the particular sitting. In 1993, for example, only 43 of the 200 appeals heard were reserved for judgment.

The Division does not have exclusive jurisdiction over criminal matters. Although as introduced, the amending legislation proposed to establish a separate and exclusive appellate body, that intention was not carried through into the 1991 amendments. In 1992, the Division heard 134 appeals, 40 per cent of the total number of criminal appeals before the Court of Appeal. 1993 saw an increase in both the number and proportion of appeals heard by the Division. The 200 appeals before the Division in 1993 comprised 54 per cent of the criminal appeals for that year. This trend continued in 1994. Reflecting its successful operation, the Division was assigned 231 appeals, 75 per cent of the total number before the Court of Appeal.

The Criminal Appeal Division was designed to deal mainly with run of the mill appeals, leaving those involving particularly difficult or important questions to be heard in the Court of Appeal itself. Therefore, the bulk of the decisions of the Division apply established law and do not require an extension of existing legal principle. This does not mean, however, that the Criminal Appeal Division has made no contribution to New Zealand law – rather, it has produced a number of decisions of interest and importance.

A large part of the Division's work consists of sentencing appeals. Throughout 1994, the Division was required to consider the 1993 amendments to the Criminal Justice Act 1985. The decision in *R v Petersen* [1994] 2 NZLR 533 was the first to consider the relationship between the s 21A suspended sentencing power and the s 5 presumption of imprisonment. The Division held that a suspended sentence of imprisonment did not amount to a "full time custodial sentence" within the meaning of s 5. The Division concluded however, that a suspended sentence can be imposed in a case coming under s 5

where the special circumstances of the case are such as to justify avoiding a custodial sentence by the exercise of a suspended sentencing power, and by no other sentencing option. Ultimately, the Court must determine whether imprisonment is required or whether a suspended sentence may be given, which is to be a matter of commonsense judgment rather than formulaic principle. This decision remains the leading authority on the suspended sentencing power under the Criminal Justice Act 1985.

Section 21A was again considered by the Division in *R v Accused (CA 62/94)* (1994) 11 CRNZ 471. The decision concerned the imposition of a suspended sentence of two years' imprisonment, for the sexual violation and indecent assault of the respondent's nine-year-old niece. The Crown appealed the sentence on the ground that it was wrong in principle. The Division held that a suspended sentence is a sentence of imprisonment, albeit one of a special and provisional character, and thus was in accordance with s 128B(2) of the Crimes Act 1962 which requires that everyone convicted of sexual violation shall be sentenced to imprisonment. This decision opened the door for the use of the suspended sentencing power in respect of sexual crimes.

The first appeal relating to the new power to nominate a minimum period of imprisonment in excess of ten years for offenders sentenced to an indeterminate sentence came before the Division in *R v Hapi* (CA 260/94, 21 December 1994). The Division upheld a minimum period of 15 years' imprisonment imposed in the High Court for wounding with intent to cause grievous bodily harm, and rape. The Division stated that the principal purposes of the power were "punitive and denunciatory", and added that although the terms of s 80 made it clear that "instances where the new power will be available are to be limited, plainly the provision is there to be used and in qualifying cases the Court should not shrink from using it". In outlining the approach to be followed, the judgment recognised that use of the power may produce results seemingly out of line with previous sentencing tariffs, but made it clear that the philosophy underpinning the new provisions required that "in qualifying cases the Courts are authorised and expected to consider the imposition of a sentence in excess of what was hitherto regarded as appropriate".

R v Grey (1992) 8 CRNZ 523, which the Division described as the "worst case of driving causing death to come before the Courts in New Zealand", is a leading current authority relating to sentencing for motor manslaughter. The case concerned an offender who, while driving under the influence of alcohol or drugs, killed two 11-year-old schoolboys. The Division upheld a sentence of eight and a half years' imprisonment, commenting that "in such cases the sentence had to reflect the need to punish the offender, to act as a deterrent, and in particular to mark adequately the community's sense of outrage over such wantonly irresponsible driving". The case reflected a new attitude towards motor manslaughter:

> the continuing road toll, the repetition of personal tragedies, . . . and a growing sense of public outrage have led to a rapid hardening of the attitude of sentencing Courts to such cases. Imprisonment is now regarded as the norm. . ..

Many of the appeals against conviction heard by the Division turn on questions of evidence or procedure, and there are a number of interesting cases in these areas. The difficult question of secondary identification evidence received full discussion in *R v Birkby* [1994] 2 NZLR 38. The case turned on the question whether evidence of a witness's prior identification of the accused could be admitted at trial. The judgment distinguished between cases where the witness remembered making a prior identification which he or she believed was correct, and those where the witness had no memory of the previous identification at all. In the former case, the evidence is admissible not to prove the truth of the identification, but in order to show consistency with the witness's testimony and show that the identification had been made. In the latter case, the evidence may not be heard, as no foundation has been laid by the witness's own testimony. This decision clarified a point of law that had previously been the subject of conflicting obiter dicta.

The use of identification evidence was also at issue in the Division's decision in *R v Waipouri* [1993] 2 NZLR 410. This decision considered the admissibility of evidence of voice identification. The Court highlighted the special nature of voice identification evidence, in that unless a voice has a strong accent or speech impediment it is almost impossible to describe. Given that, care must be taken to obviate the danger of mistaken identification. Following the Court of Appeal's decision in *R v Wickramasinghe* (1992) 8 CRNZ 478, the judgment stated that Judges must give the jury a careful warning, emphasising that the dangers of visual identification evidence are even greater with evidence of voice identification. The Court went further to hold that where the quality of the identification evidence is insufficient to satisfy a reasonable jury, the Judge must withdraw the case.

Another interesting point of law arose in *R v Sew Hoy* [1994] 1 NZLR 257, in relation to the issue of impossibility in conspiracy cases. Before this decision there was confusion as to the availability of the defence of impossibility in such cases, and it was unclear whether New Zealand would follow the decision of the House of Lords in *DPP v Nock* [1978] AC 979. The Division held that no defence of impossibility was available, on two grounds. First, it held that the conspiracy had failed only because the accused had adopted insufficient means. Thus, the case fell within the fourth category in *R v Donnelly* [1970] NZLR 98, and no defence would be available even if, following *Nock*, conspiracy were to be treated the same as an attempt. The Court rested its decision on a second and wider ground, however, indicating that conspiracy could be distinguished from attempt. The judgment stated that "there is much force in the view that conspiracy is properly to be seen as an act inherently culpable", complete when the agreement to commit the crime is made. It is thus irrelevant whether or not it is possible in fact to carry out the agreement. Although it was not expressly stated, the judgment implies that *Nock* should not be followed. The Division preferred the principle that impossibility is not a defence to conspiracy, adding the

continued on p 120

Fencelines or welcome signs?

By Richard Fowler, a Wellington practitioner

This article is a further consideration of the decision of the House of Lords in Spring *which involved the negligent provision of a reference regarding a former employee. Aspects of this important case on the duty of care have appeared in the* New Zealand Law Journal *in an editorial at [1994] NZLJ 273 and articles at [1994] NZLJ 320 and [1995] NZLJ 61. In this article Mr Fowler approaches the case from a different viewpoint. He considers the difference in approach between the New Zealand Court of Appeal and the House of Lords in respect of the relationship between defamation and negligence. The author considers the difference between the New Zealand Court of Appeal and the House of Lords on this matter to be ironic and suggests that the present trend as represented in the New Zealand case of* Balfour v Attorney-General *should be reconsidered with a view to it being reversed.*

The torts of negligence and defamation come face to face in New Zealand and the United Kingdom with dramatically different outcomes.

> *Owing to the excitement that prevails in connection with the Boer War, and the departure of so many New Zealanders to the scene of action, together with the universal sadness caused by the death of Queen Victoria, the game of cricket suffered throughout New Zealand.* (Cricket Council Annual Report for 1900-1901 season reflects on the sad state of the game apparently caused by the trickle down effects from the mother country).

For those who view the strains of common law jurisprudence as requiring some degree of consistency, the apparent standoff between the House of Lords and the New Zealand Court of Appeal on the extension of a duty of care to negligently prepared employee references otherwise protected by qualified privilege from defamation suits, would surely be a cause for a wringing of the hands or other quaint forensic exasperation.

Unlike other areas where our New Zealand jurisprudence has chosen a divergent path, such as local authority liability, this particular conflict is not easily explicable by reference to unique New Zealand conditions, or social policy, etc. Indeed, as explored below, if anything, New Zealand domestic law might have suggested an approach consistent with that taken by the House of Lords.

But at a more fundamental level, from a perspective of simply seeking a just and fair result that accords with social justice, the divergence could be greeted with some dismay.

Spring facts

Although it is the most recent decision, it is convenient to commence the analysis of this issue with *Spring v Guardian Assurance* [1994] 3 All ER 129 since it is something of a paradigm of the problem.

The plaintiff, Mr Spring, was employed in a relatively senior position by one of the defendants, all of whom were involved in the insurance industry. In a familiar scenario, following a takeover of one of the defendants on 7 July 1989, a new chief executive was appointed who did not get on with Mr Spring and on 26 July 1989 he dismissed Mr Spring without explanation.

Mr Spring, a career insurance man, then sought employment with two other insurance companies. These two insurance companies along with the defendants, all belonged to a trade association known as "Lautro", whose rules provided for prior obtaining of satisfactory references before appointment of persons as company representatives, and for mutual exchange of full and frank disclosure in respect of personnel shifting between members of the association.

Unfortunately for Mr Spring, the reference compiled by the defendants portrayed him as both incompetent and dishonest and unsurprisingly, he failed to secure employment with these two other insurance companies.

Mr Spring sued for malicious falsehood, breach of contract and negligence. Interestingly, the trial Judge found on the facts that there had been some incompetence on the part of Mr Spring in the matters referred to in the reference, but there was no dishonesty, and that had reasonable care been taken by the defendants, the investigation would have shown Mr Spring had not acted dishonestly. However, in compiling this part of the reference, the Judge found that the defendants had not acted with malice and genuinely believed in the truth of the allegations.

Accordingly, the trial Judge rejected the claim for malicious falsehood. He also rejected the

continued from p 119

caveat that it is never an offence to commit an "imaginary crime".

Against the background of decisions such as these, as well as the host of more mundane appeals against conviction or sentence, it seems likely that the Division will continue to hear criminal appeals in the foreseeable future. Given the existing trend, it can only be expected that the Division will assume responsibility for an even greater proportion of the criminal cases brought before the Court of Appeal. □

1 Hon WP Jeffries (Minister of Justice), speech to the House on the introduction of Courts Amendment Bill, 4 September 1990, PD vol 510, 4297.

contract claim on the basis that there was either no contract with the respective defendants, or, if there was, then no term to provide a reference prepared with reasonable care could be implied.

But he found in favour of Mr Spring on the negligence claim, with damages to be later assessed. On appeal by the defendants, the Court of Appeal set the judgment aside: [1993] 2 All ER 273. Mr Spring then appealed to the House of Lords.

Spring decision

The decision was four to one to allow the appeal. Lords Goff, Lowry, Slynn and Woolf comprised the majority. Lord Keith dissented. But the fascinating aspect is the degree to which the speeches confront the dicta of our own Court of Appeal and wrestle with the points of policy and principle involved. Such an obvious clash of titans in a House of Lords' decision is presumably a rare sight for us.

There are slightly different emphases in the majority speeches, but the common denominators are:

1 The incremental step from *Hedley Byrne v Heller* [1963] 2 All ER 575 to extend liability to include economic loss by an employee for failure to obtain employment as a result of a careless reference provided by a former employer; and
2 A rejection of the concept that because the plaintiff might have another tort (defamation) available to him for damage to his reputation (albeit that such a proceeding would have failed because of the defence of qualified privilege) a duty of care should not intrude. Lord Woolf is emphatic to his metaphor here:

> I can see no justification for erecting a fence around the whole of the field to which defamation can apply . . . (176f)

The New Zealand position

The New Zealand case with the closest factual kinship is *Balfour v Attorney-General* [1991] 1 NZLR 519 (CA), although there are in reality a trilogy of cases of which *Balfour* chronologically is the second.

The first New Zealand case to survey the field was *Bell-Booth Group v Attorney-General* [1989] 3 NZLR 148. In that case the Ministry of Agriculture and Fisheries (MAF) had taken part in a television broadcast where it was asserted that the plaintiffs' plant stimulant ("Maxicrop") was useless. The plaintiffs sued in defamation and negligence. The defamation action failed because the trial Judge found that Maxicrop was indeed useless, and thus the assertion was true. But he upheld the negligence claim on the ground that MAF owed the plaintiffs a duty to inform them of the results of the MAF trials before publication.

On appeal, the Court of Appeal set aside that latter finding, but in doing so Cooke P, giving the judgment of the Court, said (at 156):

> The important point for present purposes is that the law as to injury to reputation and freedom of speech is a field of its own. To impose the law of negligence upon it by accepting that there may be common law duties of care not to publish the truth would be to introduce a distorting element.

And later (at 157):

> For these reasons in our opinion justice does not require or warrant an importation of negligence law into this class of case. Where remedies are needed they are already available in the form of actions for defamation, injurious falsehood, breach of contract or breach of confidence.

The second case was the *Balfour* decision. That case concerned a schoolteacher who claimed that his employment prospects had been seriously jeopardised by a note on his Department of Education file stating that he was a long-practising and blatant homosexual. He sued for negligence (and breach of statutory duty) but not defamation – presumably aware that faced with the impossibility on the facts of proving malice, a defence of qualified privilege must defeat him. The claim failed and the plaintiff's appeal was dismissed, principally on causation, but not without further fenceposts being driven demarcating the inviolable turf of defamation; see Hardie Boys J giving the judgment of the Court (at 529):

> This second aspect comes perilously close to defamation. Any attempt to merge defamation and negligence is to be resisted. Both these branches of the law represent the result of much endeavour to reconcile competing interests in ways appropriate to the quite distinct areas with which they are concerned, but not necessarily appropriate to each other: see *Bell-Booth Group Limited v Attorney-General* [1989] 3 NZLR 148, 155-157. An inability in a particular case to bring it within the criteria of a defamation suit is not to be made good by the formulation of a duty of care not to defame.

The final case in the New Zealand trilogy was *South Pacific Manufacturing Co Limited v New Zealand Security Consultants & Investigations Limited, Mortensen v Laing* [1992] 2 NZLR 282 (CA) where, on a striking out, claims in negligence against fire loss investigators, whose reports to insurers had resulted in declinature of claims, were considered. In a distillation of the New Zealand position, to continue the metaphor, the barbed wire was added to complete the fencing off exercise; see Cooke P (at 302):

> Qualified privilege can be defeated by proof of malice, but not by proof of mere negligence. The suggested cause of action in negligence would therefore impose a greater restriction on freedom of speech than exists under the law worked out over many years to cover freedom of speech and its limitations. By a side wind the law of defamation would be overthrown. That this is reality, not mere theory, is apparent from the various causes of action in defamation pleaded in the *South Pacific* case and from the plea in *Laing v Mortensen* that the plaintiffs have suffered loss of reputation. Qualified privilege is conferred because of reciprocal duty and interest between a writer or speaker and those with whom he communicates. To cut down the practical scope of the protection would run counter to public policy in this field.

The conflict

The *Bell-Booth* and *South Pacific* decisions are both capable of being

reconciled with *Spring* in terms of the respective results. In *Bell-Booth* the statement was found to be true and Lords Goff, Slynn and Woolf all accepted that this would have defeated liability.[1] Indeed, there is a suggestion that given that context, the dicta of Cooke P are supportable.[2] In *South Pacific* (but not in *Mortensen*) the lack of proximity would have defeated a negligence claim.[3]

But *Balfour*, because of its factual kinship, poses a far greater problem. At least one of the law Lords openly recognises this (Lord Slynn 162a). Furthermore, while the narrow results of *Bell-Booth* and *South Pacific* can be reconciled with *Spring*, the above-cited dicta concerning policy in those cases cannot.

To be fair to our Court of Appeal, this is not a sudden colonial insurrection against mother country jurisprudence: the reality is that having been possibly beguiled by the incipient direction of English authority on the "ring fencing" issue, the New Zealand cases have simply developed the ring fencing as and when called upon, only to be caught out by a sudden "deposting" by the House of Lords.

The better view: Ring fencing or overlap?

It is difficult not to read the *Spring* decision without the impression that the New Zealand Courts have been left high and dry on this issue.

The heart of that issue is the concept of negligence liability overlapping the fenced off area of defamation – at least when it comes to liability of an employer to an employee for a negligent reference. The New Zealand rationale seems to be a fear of distortion of the defamation tort if the qualified privilege defence could be defeated by negligence rather than malice. (*Bell-Booth* [1989] 3 NZLR 148, at 156-157 per Cooke P; *Balfour* [1991] 1 NZLR 519 at 529 per Hardie-Boys J; *South Pacific* [1992] 2 NZLR 282 at 301-302 per Cooke P).

The interesting thing about that approach is that it admits of only one ground of liability for any particular set of facts. In other words, it is the complete antithesis of concurrency, or co-termination, or any other epithet that attempts to capture the simple concept of layers of liability.

What makes this all the more ironic is that it arises in our jurisdiction where so much confusion was caused by the spectre of the apparent negation of concurrent liability in *McLaren Maycroft v Fletcher Development* [1973] 2 NZLR 100 for so many years before it was finally laid to rest. The laying to rest, of course, means that the New Zealand Courts should be free to recognise concurrent liability arising in tort and contract.[4] (While dealing in layers, an added layer of irony here is that it is quite arguable that the whole *McLaren Maycroft* "deviation" likewise arose when the New Zealand Courts perceived an apparent direction that English authority was taking, but then were later left high and dry as subsequent English authority veered away in the other direction).[5]

Yet it does not need reference to the well-trampled ground of *McLaren Maycroft* to emphasise this factor. There are plenty of cases where one set of facts establishing liability for non-economic loss will give rise to overlapping liability in a number of torts. (*Attorney-General v Geothermal Produce* [1987] 2 NZLR 348.) The substance escape type of case has provided fertile ground (pun unintended) for raising overlapping claims in negligence, nuisance, trespass and *Rylands v Fletcher* (to the extent that the latter can still be recognised as a separate tort since it seems to be an instance of a tort in transit to fusion with another).[6]

The irony continues when one considers that New Zealand has a reputation for being relatively expansive in its approach to claims in negligence for pure economic loss. Lord Keith in *Spring* (at 141b) refers to this in his dissent, although in his case more as a cautionary note against expansion.

It is hard to perceive why, of all jurisdictions, ours should balk at overlapping negligence with defamation, unless there were particularly compelling policy reasons not to do so.

When one turns to consider policy factors, they seem, if anything, to favour the overlap.

Employment considerations

First, policy would surely favour the protection of the employee from the possibly capricious career crushing effects of an employer's careless reference. The *Spring* decision touches upon a number of factors: that any inhibitory effect of liability is present in any event (Lord Goff 151f; Lord Woolf 177c); that it is only reasonable care that is required – not a guarantee of accuracy (Lord Lowry 153j; Lord Slynn 162f); that it is inconsistent that the recipient of a negligently given reference can sue (*Hedley Byrne*) yet the subject of a negligently given reference cannot (Lord Slynn 161j; Lord Woolf 172g); that even if some employers are deterred by possible negligence liability it would be better to have fewer but more careful references (Lord Slynn 162g); that references can be limited or qualified or writers could first seek disclaimers (Lord Slynn 162h); that greater encouragement to accuracy is beneficial because frequently employees do not get to see references if they are given directly (Lord Woolf 172e).

Another policy factor mentioned in *Spring* is that it is bizarre that an employer could be sued by an employee for negligence resulting in serious injury and yet be immune from suit for a negligent reference that could have consequences just as great (Lord Woolf 168j). This, of course, is not a factor of application in New Zealand because of the accident compensation legislation, but what it nevertheless does raise is the extent to which the New Zealand employment law environment provides a discretely New Zealand desirability for such liability.

The point is this: our domestic employment law provides a personal grievance procedure that covers both dismissal *and* pejorative treatment of or comment on employees (Employment Contracts Act 1991, s 27(1)(b)). Employers who transgress can be treated with some rigour. (See for example *L v M Ltd* [1994] 1 ERNZ 123.) Dovetailing in are our domestic privacy laws which now provide for strict codes on the storage of personal information and its accessibility to those to whom it relates (Privacy Act 1993 s 6 principles 5 and 6). It is surely odd that an employer can be subject to quite severe penalties for adverse treatment of an employee that jeopardises just that particular or current employment, such as recording incorrect adverse comment on an employment file, but that employer is immune for an adverse reference that could harpoon future employments for years to come.

Defamation considerations

Secondly, the mayhem supposedly caused to defamation law generally and qualified privilege in particular, may not withstand close scrutiny.

Starting from first principles, defamation law focuses on the protection of a reputation generally. It is not directed to a particular recipient or audience, limited publication being more a matter going to damages.

An action for a carelessly given work reference focuses on an employment history – an ability or otherwise to carry out a work function – which is only a sliver of the much broader concept of general reputation among "right thinking people". (For a summary of the classic definitions of what is defamatory see *Laws NZ*, Defamation para 40.) Further, unlike defamation, causation comes directly into play with the remedy directed to the effects, if any, on a very limited audience – potential future employers.

In other respects, too, the coverage of the tort of defamation is demonstrably different from negligence in this area. Lord Slynn, with respect, captures this well (at 161b) when he makes the point that a statement carelessly made may not be defamatory, giving the example of a labourer who is said to be lame when the statement is untrue, but true of some other employee who is mistakenly confused with the person named.

Turning then to examination of the effect on the defence of qualified privilege, its survival seems safely assured. Its ambit at common law extends to publications in situations of reciprocal duty and interest, and of common interest. That the area of employee references could be removed should not make any discernible difference. Even in this area it would not be removed altogether. The defence would still protect the employer from any defamation action by an employee for damage resulting from publication beyond the range of potential employers.

This is just another way to demonstrate that the sliver of overlap is small – liability still requires proximity/foreseeability, and only affects a particular chapter of general reputation.

But even if the alternative view has any validity (ie that the qualified privilege defence is somehow undermined) would that necessarily be such a bad thing in this area? After all, the net state of affairs of allowing the "intrusion" of negligence would be to leave the duty on an employer to use care when compiling a reference for an employee as opposed to leaving that employee without remedy at all in the absence of malice. As a matter of striking a better balance in social justice as between employer and employee, that is surely a better result. At least one of the law Lords in *Spring* ventures this far (Lord Slynn at 163e-f).

Before leaving qualified privilege, once again a glance at our domestic law reveals a small point that nonetheless would favour the *Spring* approach. In as much as defamation law in New Zealand is now partially codified under the Defamation Act 1992, under s 19(2) the plea of malice no longer defeats a defence of qualified privilege. Of course, it has been replaced with a statutory plea (s 19(1)) that is similar to the old plea – yet it is by no means a carbon copy and is almost certainly narrower in ambit than the old plea and possibly a more difficult threshold for a plaintiff to attain. This means that if the difficulty of proving malice was a formidable hurdle confronting a plaintiff in this situation before 1993, it is now rendered even more formidable by the Act.

In other words, the inviolable fenced off area has been increased by that statutory provision.

Other factors

There are two other factors as to common law development worth a mention at this stage. First, to rationalise ring fencing on the basis that it has taken the tort of defamation at common law many years to evolve its balancing and counter balancing rules is an argument just as susceptible to being applied in favour of *Spring* liability (Lord Slynn 158j-159c). In as much as the rules regarding qualified privilege and malice were established long before *Donoghue v Stevenson* [1932] AC 562, and certainly well before *Hedley Byrne*, the emerging tort of negligence could quite justifiably expect to now share the same stage with its older sibling. That its presence was never contemplated when the defamation laws were first developed is not a reason for banishment, but is entirely consistent with the "incremental" approach of Lord Bridge in *Caparo Industries Plc v Dickman* [1990] AC 605, 617-618 and recently reaffirmed in *White v Jones* (House of Lords, 16 February 1995).

Secondly, in an admirable attempt to co-ordinate and rationalise the common law, the fusion of law and equity has been emphasised in *Day v Mead* [1987] 2 NZLR 443, at 451. Where liabilities do overlap, the Courts have sensibly worked to render the respective remedies consistent with one another. (*Day v Mead* supra, 468 and *Mouat v Clark Boyce* supra, 574-575.) It would be equally consistent with the spirit and direction of that approach to permit *Spring* liability in New Zealand.

Conclusion

The conflict is fascinating on a number of levels. At the highest, has our classy judicial backline been stood up by an English feint to the right, followed by an incisive cut to the left? Is there not irony in the fact that our appellate Courts, who have carved a reputation for liberalism and a more pervasive attribution of obligations on policy issues, are on this issue taking the path of conservatism and are resistant to a new tendril of liability?

It does not look a comfortable position and, if anything, the New Zealand conditions are more inviting for *Spring* liability.

Correction could be a matter of statutory reform, although that would have every appearance of being a "bandaid" measure. Preferable would be a full Court reversal of *Balfour*, leaving *Bell-Booth* and *South Pacific* to stand on their narrow ratios. □

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1 Lord Goff 150h, Lord Slynn 162d and Lord Woolf 173e.

2 Lord Slynn 162d and Lord Woolf 175a-j.

3 *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations* [1992] 2 NZLR 282, 283, headnote holdings 3 and 4.

4 *Mouat v Clark Boyce* [1992] 2 NZLR 559, 565; but for contra see *Simms Jones Ltd v Protochem Trading NZ Ltd* [1993] 3 NZLR 369, 377-378.

5 *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp* [1979] Ch 384 and *Forsikringsaktieselskapet Vesta v Butcher* [1986] 2 All ER 488.

6 *Cambridge Water Co v Eastern Counties Leather plc* [1994] 1 All ER 53; *Burnie Port Authority v General Jones* (1994) 68 ALJR 331.

Correspondence

re Section 5 of the Resource Management Act: [1995] NZLJ 40

Dear Sir,

I note that you have published an article by Kerry James Grundy in your February 1995 issue. Mr Grundy had previously sent it to me for comment. I consider Mr Grundy to be seriously wrong and make the following comments.

Sadly, I haven't the time to write a detailed critique which is a pity as there is much to reply to and some material I would endorse. Let me confine myself to a couple of points.

In the first place, it seems to me that the argument, engaging as it is, proceeds from a wholly inaccurate premise: Mr Grundy has chosen to interpret s 5 in a way that can't be supported by the plain words of the section. In the last paragraph of the section headed "Interpretation", it is stated that:

> . . . people and communities can provide for their social, economic and cultural well-being and for their health and safety *only by ensuring* (my emphasis) that the reasonably foreseeable needs of the future are met, the ecological base for their well-being is sustained, and adverse effects of their activities are avoided, remedied or mitigated.

But s 5 does not spell out how "well-being" is to be achieved or what it is; it does not implant an ethic that well-being is only achieved when there is an integration of economic, socio-cultural and ecological concerns (however attractive that may be). In short "while" simply does not translate into "only by ensuring".

It may be that that is what the Act *should* say – Mr Grundy's advocacy suggests there is an interesting article waiting to be written promoting this ethic. But Parliament hasn't gone that far. It didn't claim to have knowledge about what well-being was in a holistic sense or any other sense. It simply acknowledged that human beings are concerned with the pursuit of their well-being in a *subjective* sense, and said that in so doing people should see to it that certain positive attributes should be sustained and safeguarded and certain negative effects avoided, remedied or mitigated. Hence, Mr Grundy's argument on p 5 that unsustainable activity could never by definition contribute to the well-being of people and communities fails.

Please don't mistake me; the argument is very attractive and one that would appeal to many people. But it asserts a knowledge of sustainability and well-being that simply isn't provided for in s 5. Whether the Act should assert a knowledge of well-being in an holistic sense is a profound question. I would simply observe here that to take that step and replace "while" with words like "only by ensuring" would invoke a claim to knowledge of the Good (in a philosophical sense) which is light years away from the value pluralism that pervades so much of our social thinking.

The Act pursues a more cautious, less robust formula. It says that whatever people and communities conceive their well-being to be they shouldn't pursue it in a way that prejudices the matters set out in paras (a), (b) and (c) of subs (2).

You may be perplexed by the definitive way in which I state this. After all if a statutory code like the Resource Management Act is given life through interpretations that tribunals and Courts impose why should the Minister for the Environment have a privileged view of the meaning of a particular section?

The answer is that, despite the curious artefactual nature of statutes in our legal system, Judges and others are supposed when the words on the face of that statute are less than clear, to frame their interpretation in terms of what Parliament intended. And in this instance, I am perhaps uniquely aware of what was intended. That is because the drafting of s 5 is largely mine. I chaired the Cabinet Committee that settled the final form of the bill and maintained a close oversight of its metamorphosis through the Select Committee. I was well aware of the "holistic" view Mr Grundy was arguing for as one policy alternative; and equally aware of the "balancing" view espoused by the development lobby. We consciously chose to impose a biophysical type of test because of a pragmatic view that there was a better chance of getting agreement on sustainability in those terms than the broader terms Mr Grundy argued for.

That is the policy fact of the matter. It is open to challenge and debate – and I sense that Mr Grundy may wish to open that debate. But he would be better advised to tackle that philosophical issue head on than try to extract that view from a reading of the section that can't support it and was explicitly considered and rejected by those who drafted it.

With respect, the paper makes some pretty heavy references to "neo-liberal ideology" and the like. Mr Grundy's own viewpoint is as ideologically saturated as anyone's and I don't think this sort of labelling is very useful. Neither is the critique enhanced by repeated claims that my viewpoint is "illogical". He may disagree with my premises as I may his, but that isn't a ground for querying the *logic* of our respective conclusions.

As a general observation, I would have to say that Mr Grundy is putting up a bit of a straw man in discerning reliance on market rationality at the bottom of my thinking. If I was as enamoured of free markets as implied I would scarcely have gone along with the approach of the Resource Management Act. It is heavily bureaucratic and seeks to inject precisely the sorts of values that highly disaggregated systems of market exchange will frequently undervalue. (I would observe in

passing, that markets are social constructs and always subject to social limitation and control – in the case of the Resource Management Act, very heavy control.)

Finally, a point with which I agree. Mr Grundy correctly notes that the Fourth Schedule of the Act requires those preparing environmental assessments to consider socio-economic and cultural effects which certainly does seem somewhat at odds with the view of s 5 that I have advanced. It is. The fact is that the schedule was not amended in line with the changes made to the purpose section. As a matter of statutory construction the Courts are bound to limit their reading of the schedules by the overriding considerations of the purpose section, but I would happily concede the inconsistency in drafting that has emerged from the Bill's gestation.

Mr Grundy clearly has a different view of what the Act *should* say and I respect that. Could I suggest he advance that cause on its merits rather than try to detect it where it cannot be located.

Hon Simon Upton
Minister for the Environment

Reply to the Minister for the Environment from Kerry James Grundy

Still searching for a logic

The following comments constitute a brief reply to the Minister for the Environment's response to my article published in the February issue of the *New Zealand Law Journal*.

Firstly, I would like to thank the Minister for taking the time to comment on the article. However, I must say I find his response perplexing. His main criticism is that my argument "proceeds from a wholly inaccurate premise": that I have "chosen to interpret s 5 in a way that can't be supported by the plain words of that section". He goes on to say that s 5 "does not implant an ethic that well-being is only achieved when there is an integration of economic, socio-cultural and ecological concerns". This I assume to be the premise he refers to. He supports his contentions by my use of the words "only by ensuring" in place of "while" in my interpretation of s 5.

To begin with, my argument does not proceed from the premise that well-being is only achieved when there is an integration of economic, socio-cultural and ecological concerns. My argument proceeds from a logical interpretation of the wording of s 5 in relation to the other sections in Part II and to other requirements in the Act, particularly the Second and Fourth Schedules. An integrative consideration of economic, socio-cultural and ecological concerns follows from this interpretation and is further supported, as described in my article, by international proclamations on development-environment strategies and national policy statements on the same. In short, s 5 does implant an ethic that well-being is better achieved when there is an integration of economic, socio-cultural and ecological concerns. However, this is not a premise but rather a result of interpretation and analysis.

Even so, the Minister's assertion that this "ethic" is wholly inaccurate is surprising given the Government's endorsement of the *Brundtland Report* and *Agenda 21*, both of which promote the integration of social, economic and environmental policies at local, regional, national and international levels. It is even more perplexing given the emphasis on the integration of social, economic and environmental concerns advocated in the Government's *Environment 2010 Strategy*. For example, the Strategy "promotes [the] integration of environmental, economic and social policies and strategies" (p 3) and lists as its first priority on its management agenda "the integration of environmental, social and economic factors into the mainstream of decision-making in all sectors at all levels" (p 48). If I had proceeded from this premise it remains obscure to me why it would be described by the Minister as wholly inaccurate, given the above statements.

As for the use of the words "only by ensuring" as a substitute for "while" in s 5, I am at a complete loss as to how this determines well-being in a holistic sense or any other sense. In fact, it merely states that the achievement of well-being (whatever this involves) must be consistent with the matters referred to in subparas (a), (b) and (c) of s 5, a position supported by the Minister himself. For example, the Minister in his address states: while "people have to be able to provide for their social, economic and cultural well-being . . . *they must do so in a way that is consistent with all the matters* referred to in s 5(2)(a), (b) and (c)" (p 6). Furthermore, I detect no difference between my use of *only by ensuring* and the Minister's use of *must be secured*. For example, the Minister states: "The definition of sustainable management in relation to a resource makes it clear that there are three matters which *must be secured*. If it can secure them, then the use will be acceptable" (p 7). Replace *only by ensuring* in my definition with *must be secured* and you end up with the same meaning. By his own rationale, the Minister's interpretation of s 5 is also beginning from a wholly inaccurate premise.

In regard to the Minister's aversion to my querying the logic of his interpretation of s 5, my response is simply that the very act of interpretation requires the application of logic and, hence, a disagreement over interpretation must of necessity frequently involve a questioning of logic. The Minister should not be so sensitive to disagreements on this nature.

The Minister criticises my comments regarding the influence of neo-liberal ideology on the formulation of the resource management legislation. The Minister knows full well the influence this ideology had and still has on the legislation. The resource management law reform process was not only a rationalisation of existing, admittedly often overlapping and contradictory, resource legislation, but also a deliberate move to limit the role of statutory planning in resource allocation decision-making. The wider socio-economic objectives of

continued on p 126

Choosing Judges

By D F Dugdale, of Auckland

The Attorney-General has proclaimed a new method of making appointments to judicial offices within his gift. Nominations it seems are to be solicited from such sources as the Ministry of Women's Affairs and organisations representing Maori.

But why stop there? There is one gathers a society of gay and lesbian lawyers. There is the St Thomas More Society, a papist cell which despite being named for an English Chancellor has a membership more Irish and Croatian than recusant. There are the Conveyancers for Christ, whose motto is "In my father's house there are many mansions". Somewhere out there there is bound to be an organisation called Mothers Against Enjoying Yourself which will want to have its say. Then there is the Business Round Table, and the Matamata South Croquet Club, and the New Zealand Federation of Cactus and Succulent Fanciers. The possibilities are endless.

What the Attorney seems to have established is a system identical for all practical purposes to the way in which the honours list is presently chosen, a mixture of tokenism, the influence of pressure groups, and political expediency.

It is said that there is a need for representation on the bench of persons responsive to the viewpoints of all the various sectors of New Zealand society. Well yes, why do we not appoint some financially straitened Judges to ensure that insolvency cases are handled with sensitivity? And in fairness to those charged with or convicted of criminal offences should we not appoint more Judges with psychopathic or anti-social tendencies?

What is of course lost sight of in all this is that a Judge has exacting responsibilities the proper performance of which demands among other qualities legal knowledge and experience and a good mind. It is no more sensible for a New Zealand litigant to have his or her cause determined by a Judge appointed on the urging of the Ministry of Women's Affairs than it would be for a New Zealand traveller to be a passenger on an airliner whose pilot had been selected by the same process. Who would care to be operated on by a surgeon who owed his opportunity to wield his scalpel not to his abilities but to some fuzzy feeling that in fairness to our Treaty partners he should be given a go?

Practising lawyers, taking the view that to do otherwise would harm the institutions of the law, have in the past resolutely refrained from the public criticism of individual judicial appointments, and have preferred instead to soldier on with gritted teeth. "A dog's obeyed in office." It is a tradition of which the current Attorney-General has been a greater beneficiary than even G W R Palmer.

But Mr East needs to understand that this tradition is one that can be stretched to breaking point. Perhaps what we really need is an examination not of how Judges are selected but of how Attorneys-General are chosen. □

continued from p 125

the former legislation were viewed as unnecessary and undesirable interventions in the functioning of the market allocation mechanism and were removed. This is clearly an ideological position.

The influence of neo-liberal ideology on the resource management legislation was specifically discussed by the Deputy Secretary for the Environment at the time, Lindsay Gow, in an address to a Conference in Dunedin in 1991, entitled 'Resource Management Law Reform in the Context of Other Reforms'. He states:

> The major reforms which are represented in the Resource Management Act should not be seen in isolation. They are part of the fundamental and on-going reforms of New Zealand's public sector and economy that was initiated by the Government in 1984. An essential element of these reforms is deregulation . . . the Resource Management Act has been developed in a policy environment where the Government wants to get unnecessary government intervention out of people's lives. The Government saw the wider socio-economic objectives of current legislation, particularly the Town and Country Planning Act, as promoting unnecessary and poorly targeted intervention which impose high costs to society . . . In my view, the Resource Management Act accepts that social and economic and health and safety objectives can be achieved, but it is not necessarily the role of central or local government to plan for them (pp 13, 15, 17).

It is well documented that the structural changes made to the political economy of New Zealand since 1984 are founded on neo-liberal ideology. By Lindsay Gow's admission the resource management law reforms were "part of the fundamental and ongoing reforms of New Zealand's public sector and economy . . . initiated . . . in 1984". They are an integral component of this overall restructuring and influenced by the same ideology. To deny the part played by this ideology is to obscure the fundamental issues that are at stake in the interpretation of this legislation.

Finally, the Minister's reply was disappointing in that he did not address the two fundamental misconceptions I charged him with in his address to the Resource Management Law Association Conference. These were, one – his recognition solely of biophysical or ecological imperatives in subparas (a), (b) or (c) of s 5; and, two – his contention that any inclusion of socio-economic or cultural considerations in (a), (b) or (c) would compromise biophysical or ecological outcomes. This was the foundation of my original analysis of his address to the Conference and constituted the basis for my interpretation of s 5. □

Recent Admissions

Barristers and Solicitors

Aiyar R	Hamilton	3 February 1995	Gilchrist R J	Hamilton	3 February 1995
Allan D J	Hamilton	3 February 1995	Gore J M	Auckland	10 February 1995
Andersen G R	Auckland	10 February 1995	Gregan A M	Hamilton	3 February 1995
Ash H J	Auckland	10 February 1995	Griffin G M A	Auckland	10 February 1995
Barker A R B	Auckland	10 February 1995	Harrison A G	Auckland	10 February 1995
Beattie C S	Auckland	10 February 1995	Hollins M A	Auckland	10 February 1995
Becroft C	Auckland	10 February 1995	Johnstone M J	Auckland	10 February 1995
Bennett D A	Auckland	10 February 1995	Karena-Lennan G	Auckland	10 February 1995
Bernau R A	Auckland	10 February 1995	Kerkin S	Auckland	10 February 1995
Bignell M J	Auckland	10 February 1995	Kidd A L	Hamilton	3 February 1995
Blue D P	Hamilton	3 February 1995	Kitto R M	Auckland	10 February 1995
Brewer K M	Hamilton	3 February 1995	Khambatta K	Auckland	3 March 1995
Brookes M B	Auckland	10 February 1995	Leavy S C	Auckland	10 February 1995
Brown M G W	Auckland	10 February 1995	Lim W L	Auckland	10 February 1995
Bruton V T M	Auckland	10 February 1995	Lotu-i 'iga K T	Auckland	10 February 1995
Bunbury J C	Auckland	10 February 1995	Lowe K E	Auckland	10 February 1995
Casey M E	Auckland	10 February 1995	McCallum E M	Auckland	10 February 1995
Chesterman D G	Auckland	10 February 1995	McGee A G	Auckland	10 February 1995
Clevely A H	Auckland	10 February 1995	McGorman D K	Auckland	10 February 1995
Cook W M	Auckland	10 February 1995	Makgill R A	Auckland	10 February 1995
Cooper K J	Auckland	10 February 1995	Matthew M J	Auckland	10 February 1995
Cutler S A	Auckland	24 February 1995	Matterson R L	Auckland	10 February 1995
Dempster H L	Auckland	10 February 1995	Meikleham J A	Hamilton	3 February 1995
Denny A L	Auckland	10 February 1995	Michael T	Auckland	10 February 1995
Denton A I C	Auckland	10 February 1995	Mitchell D H	Auckland	10 February 1995
Develter M P	Auckland	10 February 1995	Moreau-Hammond N A	Auckland	10 February 1995
Donohue V L	Auckland	10 February 1995	Patel U	Auckland	10 February 1995
Doughty S L	Hamilton	3 February 1995	Pavlovich A J	Auckland	10 February 1995
Dufty P S	Hamilton	3 February 1995	Peirse D L	Auckland	10 February 1995
Dunn G J	Auckland	10 February 1995	Pepper C M	Auckland	10 February 1995
Emery G P	Auckland	10 February 1995	Phillips C K	Auckland	10 February 1995
Farmiloe M F	Auckland	10 February 1995	Pollard M B	Auckland	10 February 1995
Farr M J	Auckland	10 February 1995	Poole D M D	Auckland	10 February 1995
Finlay A M	Auckland	10 February 1995	Rasmussen W O P	Auckland	10 February 1995
Flannery P J	Auckland	10 February 1995	Ritchie S D	Auckland	10 February 1995
Foster R C	Auckland	10 February 1995	Rive V J C	Auckland	10 February 1995
Geange E D	Hamilton	3 February 1995	Robinson N J	Auckland	10 February 1995

The late Tamaoho Waaka Nigel Vercoe

On 15 February 1995 a special sitting of the High Court was held in Rotorua in memory of Tamaoho Waaka Nigel Vercoe who had died suddenly on 3 December 1994. He was 28 years of age and had returned to New Zealand from London where he had been employed by the firm of Stephens Innocent in order to be admitted here. Within a fortnight of his death he was to have been formally admitted as a Barrister and Solicitor of the Supreme Court of New Zealand.

The unusual honour of a special sitting for one who while academically qualified, and with some experience in legal offices, had not been formally admitted, relates to the person that Tama Vercoe was. There was a family connection with the law in that his maternal grandfather was the late Sid Agar a well-known practitioner in Wellington. On his father's side he was the nephew of Bishop Vercoe. The special sitting was held after consultation by the Chief Justice with some senior Judges.

The Hon Justice Anderson, who presided said that Tamaoho Waaka Nigel Vercoe had distinguished himself at High School where he excelled in languages. He won the national essay prize associated with Moananui-a-kiwa Ngarimu, VC. Later, at university, he was admitted to the degrees of Bachelor of Laws, and Bachelor of Arts majoring in political science. He was an accomplished musician. He was an exponent of the classical weaponry skills of Maori.

There was a letter from Stephens Innocent for which firm he worked as a para-legal in London. He also worked for the firm as "outdoor court clerk". Everyone in the firm noticed his special qualities. These included his warmth and tranquillity as a person as well as his intelligence, thoroughness and competence. The firm had already agreed to his returning to work for them as a qualified solicitor. □

Rules of Professional Conduct

By Wayne Thompson, NZCE, BA, LLB, Barrister and Solicitor, of Auckland

The legal profession's rules of professional conduct for barristers and solicitors can be viewed as a form of law-making promulgated by a private group, namely the New Zealand Law Society. As such the rules of professional conduct seem to fit aptly within the rubric of quasi-legislation as coined by R E Megarry: (1944) 60 MLR 125.

This paper will canvass the need for professional rules of conduct and their function, parliamentary responsibility for the rules, the relevance of morality to the rules, the advantages of the professional rules in the form of quasi-legislation, the origin of the rules, problems that can occur with the rules along with the effectiveness of them, the basis of challenging the rules and their enforcement.

Originally, professional rules governing barristers and solicitors were unwritten and passed on by word of mouth. However, the profession's code of conduct ultimately became codified and accordingly gained the cogency that written rules do. The current professional rules of conduct are sanctioned by s 17(2)(d) of the Law Practitioners Act 1982 which states "the Council may make rules regulating in respect of any matters the professional practice, conduct and discipline of practitioners". This section seems to legitimise and provide authority for the legal profession's code after many of the rules had been formulated and handed down from one generation to another. The reference to "professional practice and conduct" is the most specific authority for the Law Society regulating practitioners' professional activities. The previous Act, namely, the Law Practitioners Act 1955 was quite vague in this matter for it stated in s 121(a) that the Law Society could "make rules for . . . the regulation and good government of the Society and the members and affairs thereof". Before giving attention as to why Parliament has chosen to opt for delegated legislation rather than primary legislation or law, consideration will be given to the rationale for need and a professional code of conduct.

The need for professional rules

To understand the need for a lawyer's professional code of conduct, it is necessary to take cognisance of the fact that lawyers play an essential part in our adversarial legal system. Accordingly, the community must have confidence that the lawyers are playing their role in a conscionable and fair manner. There needs to be trust between the community and the legal profession. Lawyers are no different from any other group of human beings for they can be influenced by strong human motivations of self interest in all that they do. A code of conduct is intended to limit the lawyers' range of choices and keep self interest within check. This is not to say that lawyers are bad per se, but rather to acknowledge their human frailties. In fact, a code of professional conduct will not stop a person from being a bad lawyer. There will always be professionals whether they be lawyers or other professionals, who are dishonest, cheats and liars. The professional code of practice does not need to deal with such things as theft, fraud and such for they are dealt with by the general law of the land and will be dealt with by the Courts whether such people are professionals or lay people. A code of conduct is not for bad lawyers but rather for good lawyers to assist them in making moral choices in their professional role.[1] The problem in regard to professional conduct is not the difference between right and wrong, for things that are wrong are often easily identified and can be avoided. Rather, the difficulties for the lawyer often are the difference between one thing which is right and another thing which is similarly right,[2] thus creating a professional dilemma for the lawyer. An example would be the general moral requirement for the lawyers in the Lake Pleasant bodies case[3] to provide information to the parents of the slaughtered girls while on the other hand, retaining such information confidential because it was important to the client lawyer relationship. The code provided a basis for the lawyer taking a certain course of action even though personally undesirable and not consistent with general morality. Lawyers are therefore able to justify their actions as the professional and ethically correct thing required of them in various situations.

At this time in legal history when both common law or statutes cover many conceivable wrongs between people living together in society, one asks why it is necessary for specific rules to be imposed upon lawyers. Legislation such as the Fair Trading Act, the Consumer Guarantees Act, the Commerce Act and a myriad of other laws protect the public along with the common law rights in tort and such. Why is it then that the public are given greater and additional protection than the ordinary law provides when it comes to the legal profession. One answer and perhaps the classical reason is that the professional rules or code are intended to define the duties and obligations of the lawyer to assist him or her acting ethically. The lawyer's rights when acting for a client are not his or her own but are derivative rights in that he or she is protecting the client's rights. Accordingly, the purpose of a code of professional rules is to provide rules of conduct for the lawyer so that the public is assured the lawyer will aim to fulfil his or her professional role of protecting the client's rights. The public needs to be confident that the lawyer will act in a certain way and not need to be worried about what the lawyer may

do. The public can theoretically go to any lawyer and expect similar conduct from one lawyer to another. The code is a public statement of what is expected of lawyers. However, one of the problems with the lawyers' professional code of conduct is that its rules actually create dilemmas and the code fails to identify the priority to be attached to certain rules over and above others when they clash with one another.

The adversarial system requires the lawyer to assist society in meeting its objectives of ascertaining the fact of a given situation. Accordingly, the rules of professional conduct or the code is instrumental in facilitating the operation of the law within society. Certain norms of behaviour are required of lawyers if they are to play their part in reaching these objectives and it is such norms that are set out in the professional code of conduct. As mentioned above, such norms of conduct were originally unrecorded and oral traditions. They were passed on verbally from one lawyer to another. In earlier times, the law profession was small and the controlling influence of one's reputation amongst colleagues and the public in a smaller local profession was strong. Peer pressure was a good regulator of behaviour. Training was done "on the job" and the ethos of the profession was absorbed by osmosis without the conscious promulgation of written rules. During the 20th century professional training by university educators and the impact of the intimacy of learning professional conduct in a small community was lost by the larger legal profession that practitioners now enter into. As a result the rules of professional conduct were reduced to a written format. The written rules of conduct represent unverbalised norms handed down from one professional generation to another. The rules of professional conduct identify what has been considered to be professionally correct behaviour.

The lawyer client relationship can be seen as something different from a normal transaction or business relationship. This relationship is special and it has generally been considered that the ordinary rules of business are not sufficient to govern this situation. The professional rules are more than mere window dressing although of course the legal profession itself needs to be able to know that it has the confidence and respect of the public and as such, a code of professional conduct can enhance the image of the profession.

The government's view of self regulation by the legal profession and other professions has moved from passive indifference to modest acknowledgement by the authorisation of formal rule making by the profession with s 17(2)(d) of the Law Practitioners Act 1982. However, government involvement in the legal profession has continued to be quite remote. One is prompted to ask whether this should continue? As the situation currently stands, the Law Practitioners Act 1982 does not in any way provide for accountability of the legal profession for the professional rules of conduct prepared by it. This raises serious issues for Parliament for it has put the results of particular law making, in this place, professional rules of conduct beyond reach. As Gabriele Ganz has said this amounts to a "form of back door legislation which has not been submitted to detailed line-by-line scrutiny as an Act of parliament would be" (in "Quasi-Legislation: Recent Developments in Secondary Legislation").

A complaint that can be levelled at s 17(2)(d) of the Law Practitioners Act which provides statutory authority for the law profession's rules of professional conduct, is that it is open ended and non-specific. It gives the legal profession carte blanche right and scope to make rules or legislate as they choose without control. The way the statutory provision is drafted has a consequential effect upon judicial review of the use of the section. This will be commented upon later in this paper. An important concern here is the accountability of government for the rules of professional conduct that are promulgated by the New Zealand Law Society sanctioned by s 17 of the Law Practitioners Act.

Advantages of quasi-legislation

Traditionally, a significant function of a professional code of conduct was to maintain autonomy and avoid government regulation of the profession. This idea was prevalent before the recognition and authority given by the statutes. Professional self-governance was intended to remove the nasty prospect of government interference. Government interference was seen to have the likely effect of diminishing the power and prestige of the profession, and a violation of what was considered to be the legitimate freedom and rights of a profession to determine its own form of behaviour in society. It was believed that government officials were unrealistic and did not have the necessary expertise or knowledge to regulate professional activity. In addition, it was considered inappropriate to allow government to regulate a profession, particularly the legal profession because this could undermine the adversarial system which requires the legal profession to be independent of state control. On the face of it these reasons are appealing, but are they really valid? I would venture to suggest that government involvement in regulating a profession such as the legal profession, does not automatically undermine public confidence in the profession as was formerly believed. Rather it can enhance the public perception of the profession by indicating that there are independent checks upon the profession's activities. There is still a common belief that the legal profession is "an old boys' club" and that lawyers look after lawyers. This perception and complaint may have been well founded in the earlier years of the legal profession but there is now an attempt to deal with this and ensure that there is no favouritism. However, the way the present code is structured and implemented can only but continue to perpetuate this public concern and belief and there continue to be situations of justifiable complaint with regard to the operation of the rules of professional conduct.

The question arises here whether the legal profession should be able to regulate its members by drafting its own rules. In answer, it can be said that there are some compelling reasons and advantages in permitting the form of quasi-legislation that exists in the rules of professional conduct. The general grounds put forward to support this are that firstly, it permits a great degree of flexibility and that the rules can be easily and quickly adapted as is necessary to regulate professional behaviour. Secondly, the use of quasi-legislation enables non-technical language to be used, so as to be easily comprehensible and applied by those to whom it is directed,

namely a legal profession. Thirdly, another justification for quasi-legislation is that it can draw upon the expertise of non-government parties in the drafting of the rules. Although these reasons are well founded and realistic, they are not an overwhelmingly cogent basis for the continued quasi-legislative basis of the professional code of conduct. For instance, the bureaucratic structure of the Law Society results in some inertia and delays as in other large organisations and there is no more flexibility than that offered by having a professional code contained within regulations amended from time to time. Similarly, non-technical terms and language can easily be used in regulation. However, such is not of overriding concern where the persons to whom the rules are directed are lawyers whose primary ability is to understand rules and their application. In addition, the use of non-governmental expertise is something that now happens with consultation between government and interested parties and so this basis for quasi-legislation is no longer significant.

Accountability of Parliament

Regardless of the basis and reasons for having a code of professional conduct in the form of quasi-legislation, the question remains as to the accountability of Parliament for rules governing the legal profession. There exists a glaring deficiency as to the extent that the enabling statute the Law Practitioners Act governs the discretion provided for in drafting of professional codes of conduct under s 17. If it be accepted that the professions such as the legal profession retain the ability to draft their own rules and retain self regulation, the government has a responsibility in overseeing the matter. Accordingly, there should be inserted in the Law Practitioners Act some type of device for controlling the professional code promulgated by the legal profession. This could be done by the requirement that the code be referred back for ministerial approval by say the Minister of Justice or either submitted to the Commerce Commission or other such statutory body for their approval or disapproval. Following approval, the final draft of the code could be laid before Parliament so as to obtain the force of law. This may well appear quite radical and I suspect not very appealing to most lawyers. Where a proposed code was to be sanctioned by say the Commerce Commission then procedural guidelines could be specified requiring the commission to consider it within a specified period of time, say 90 days, after which they would be precluded from requiring amendments and the proposed draft would have to be accepted in its submitted form. Various types of guidelines and procedures could be put in place to ensure a code was considered and approved without unreasonable time delays or interruptions. This approach would assist in the code obtaining greater legitimacy than it otherwise has.

The discretionary power given to the legal profession by s 17 of the Law Practitioners Act should be supervised. Although it can be said that Parliament or Cabinet must delegate its rule-making powers to provide for flexibility and quick changes to the rules, this does not necessarily mean that there should be a total derogation of Parliament's powers. Of course Parliament cannot always spend the time needed on various minor matters tinkering with rules and the like. This is especially apposite with the current approach by Parliament of adopting an open textured approach in legislation leaving it to those "at the coal face" to draft the actual rules. Although this may be the most expedient way for Parliament to deal with the vast legislative matters it must contend with, Parliament should not lose sight of the end results.

The origin of the Professional Rules

The lawyers' code of rules of professional conduct has its genesis and development within the legal profession. The rules that have governed the legal profession were formulated by committees appointed by the Council for the New Zealand Law Society. The committees have to the writer's knowledge comprised only legal practitioners, although there has been an effort to ensure a balanced cross section of the profession represented upon the committee. Despite this effort it cannot escape comment that the committee structure has been deficient. To call only upon practitioners to be involved in the drafting of the code can only be viewed as myopic and questionable. Some critics would say this exemplifies the closed shop approach that has prevailed in the legal profession. Supporters of the idea of involving only legal practitioners in the drafting of their rules would argue that it is the practitioners themselves who have the expertise and knowledge of problems relating to ethics in their profession and that the lay person is ill-equipped and ill-informed to confront such weighty matters. Although this may have been true 300 years ago, this is certainly not true in today's society for there are many qualified and capable persons outside of the profession, who in the writer's view, should be involved and called upon in the drafting of professional rules. It is quite possible that many of the current rules of professional conduct would be found by the lay public to be unhelpful, unnecessary and even unwanted. For instance, take the rule that deals with the question of conflicts of interest. The current professional rule (1.04) permits a legal practitioner to act simultaneously for both parties in a transaction in certain circumstances. The writer's view is that this should be prohibited as set out in his earlier article ("Conflict of Interest" [1994] NZLJ 64 by Wayne Thompson). The writer believes this would be supported if for instance, the captains of industry were to be asked whether in principle they were happy that their lawyer acted simultaneously for themselves and the opposition in an important commercial transaction. It is the writer's expectation that the answer would have to be no. However when the current code was formulated it is most unlikely that the lay public had an opportunity to comment or be involved in its preparation.

Consultation

It is the writer's understanding that the drafting of the rules entailed very little, if anything, in the way of consultation between the ethics committee preparing the code and the community. This is an unsatisfactory approach in a democratic society. Consultation should be viewed as an important procedure in the finalising of rule-making and is no less relevant in the case of delegated or quasi-legislation and can arguably be said to be more

relevant. Consultation allows interested parties an opportunity to have an impact upon the proposed rules and the rule-making process. There would seem to be a deficiency in the Law Practitioners Act in failing to require consultation with interested parties. The failure of the legislation to confer rights of consultation on interested parties inhibits public control of the rule-making procedure.

Maybe the failure to provide for consultation can be accepted and understood in view of the fact that the code or rules of professional conduct have originated from self regulation of the legal profession and the statutory empowering or enabling of them has only arrived as a post authorisation of the rules.

If the legal profession is to have the best set of rules possible and ones that meet public approval and inspire confidence in the integrity of the legal profession, then consultation should take on an important role in the formulating of rules for the legal profession. Of course, this could provide an avenue for unnecessary challenge and attack on the legal profession. However, this can be minimised by the legislation in clearly designating the range of parties who must be consulted, the time framework in which consultation must take place before approval of the rules, the actual steps that must be taken to consult interested parties, the type of information to be conveyed to interested parties, the stages at which interested parties should be contacted and so on.

Lawyers could well benefit from the input of other disciplines when drafting their professional code of conduct. For instance, the discipline of philosophy could have something to offer and assist the committee drafting professional rules by assisting in asking the right questions and in working through the effects of proposed rules of conduct. Of course, philosophers do not have any particular monopoly on practical ethics but they do bring an educated independent approach with special skills in moral philosophy that could well assist the legal profession in working through various ethical issues as contained within the professional code. For the lawyer's moral universe is quite complex and it can only benefit the legal profession to draw upon the intellectual skills of other disciplines such as sociologists who are able to collect empirical data necessary to determine the problem areas in legal practice.

The nature of professional rules and morality

Turning now to the actual rules of conduct, one of the first questions that arises is what should the rules cover.

The rules of professional conduct are intended to identify and lay out what is considered to be professionally correct behaviour. However, a code of conduct does not and cannot function as a moral handbook for the guidance of lawyers. If this was so, then professional dilemmas would be left to the personal choice of the legal practitioner. For as Robert Ewing has stated "nobody can definitively over-rule me on moral matters as the Courts can on legal matters".[4] The professional code of conduct does not regulate the personal values of the professional but instead indicates what is determined to be professionally correct behaviour by reference to the benefits that accrue to the legal system and ultimately to society. The professional code is therefore intended to ensure the fair and equitable administration of the laws of the land. As such, the professional code of conduct provides instruction and information for the guidance of lawyers and so is of normative value. If the code was to be anything other than this, then a legal practitioner would be permitted to view the professional code or rules of ethics as moral rules rather than legal rules, then dilemmas occurring for the practitioner would result in the practitioner having a discretion as to how to solve the dilemma with the result that the course of conduct may be undesirable. A lawyer's rights and obligations derive from the client and to arrogate one's personal moral judgment as a lawyer, is a conceptual anathema. The code of professional rules functions as positive law delineating legal rules binding upon the legal profession.

Having ascertained that the professional rules of conduct are not and cannot be moral propositions, attention will be now turned to discuss the general nature of the professional rules of conduct. The rules comprise a list of provisions which are prescriptive. They are intended as a minimum standard and boundaries within which legal practitioners can operate. They are more than mere standards to be aspired to by a lawyer. They represent a binding obligation and are enforceable against practitioners who fail to observe them. In addition to the various provisions in the rules of professional conduct is a commentary following each provision delineating various aspects of the provision. The value of the commentaries must be questioned. Are they there to amplify and expand the rule, in which case why was the rule not drafted to include such points or is the commentary there to elaborate upon difficulties or inadequacy in the drafting of the rule. In either case, what is the legal effect of the commentary, does it act in the form of marginal notes that earlier existed in parliamentary legislative drafting. Although the commentary is not intended to have legal force, in fact it may end up having such as practitioners are obliged to fulfil its recommendations if they are to meet the terms of the actual rule itself.

Problems with the professional rules

There are a number of problems with the rules of professional conduct. One of these is the fact that the rules of professional conduct is not a definitive code in itself. Although, the legal profession has used its mandate under s 17 of the Law Practitioners Act to provide for a code of professional practising conduct, this code is not definitive. It is accordingly possible to fall short of professional standards and be prosecuted by the New Zealand Law Society even though there had been no rule existing at the time proscribing the behaviour. Mr Ross Holmes' solicitor put it nicely in a recent article "How Lawyers Can Execute Lawyers" when he said

> the difficulty for lawyers is that at the beginning of the rules of professional conduct is the statement that the code is not designed to be an exhaustive code, and in effect that you take your life in your own hands in determining whether what you do is or is not unprofessional. (*New Zealand Herald*, 4 April 1994, Section 1 p 8.)

Mr Holmes had the difficulty in that he along with another New Zealand law firm offered gifts to clients and real estate agents in the form of promotional advertising and after a

series of complaints to the Law Society about his activity was forced to withdraw the promotions as it was unclear whether such actions contravened the rules of professional conduct even though the rules did not specifically deal with the situation.

This difficulty experienced by Mr Holmes highlights a fundamental concern with the delegation of discretionary power given to the New Zealand Law Society by s 17 of the Law Practitioners Act. The lack of certainty with the rules of professional conduct can lead to an arbitrariness and an abuse of the discretion. There are many interminable debates about the limits of discretionary power in modern governments. For the likes of lawyers such as Mr Holmes, he clearly had a valid concern that the institutional power of the New Zealand Law Society might be used to penalise him for the breach of a non-existent rule on the basis that the professional rules of conduct was not solely confined to the written book published in January 1993. As it transpired the New Zealand Law Society has decided not to prosecute Mr Holmes but the matter has raised important questions about the nature of the rules of professional conduct. Maybe it is time for the discretionary power conferred upon the legal profession by s 17 to be reconsidered.

Another difficulty with the rules of professional conduct is their failure to determine the priority of rules when they in fact conflict with each other. One example, in the current rules of professional conduct second edition, is the apparent conflict between the obligation of solicitors to respect the confidentiality of their client's affairs (Rule 1.08) and the need for a practitioner who acts for more than one party in a transaction to obtain the informed consent of both parties (Rule 1.04) and the obligation of full disclosure by the practitioner of all material facts that would assist his or her client (Rule 1.09). The application of these rules appear to compete with each other and it must be a herculean and judicious practitioner who can balance these competing obligations and be ethically pure. The nature of the competing rules leaves it up to the judgment of the practitioner to decide how to apply them and on what basis. Such discretion is to be avoided as earlier discussed. If the code of professional conduct was to prohibit a practitioner acting for both parties in a transaction then there would be no likelihood of this situation arising for there would be only one party to whom the practitioner owed his or her allegiance. The writer again raises the issue that if members of the public were involved in the drafting of the code of professional rules, would they allow such a situation to arise. In the writer's view, it is most unlikely once they appreciate the damage that could occur to them as clients.

Another problem with the code of professional conduct is its rather lengthy nature and details. It is quite clear that each time the legal profession faces a normal ethical issue, it drafts a new rule and inserts this in the code of professional conduct to cover the matter. Such examples in recent days would be the rules regarding advertising of one's professional services. It is commonly believed that a new rule is a panacea to the perceived problem. However, a burgeoning code can become counter productive so that busy practitioners either omit, refuse and fail to familiarise themselves with the code. As a result they do not know their provisions or observe them. The choice of rules is important in ensuring observation by the party to whom they are addressed, being lawyers. In an interesting article written by Robert Baldwin entitled "Why Rules Don't Work" (1990) 53 MLR 321 he states that "rules have to be in a form that corresponds to the firm's capacity to absorb them" (at 325). Baldwin identifies different types of regulatees to whom the rules are addressed, these ranging from the well-intentioned and well-informed, to the ill-intentioned and ill-informed through to the problematic regulatees. His conclusion is that the type of rules adopted are important to ensure their observance by these different types of regulatees. It seems that in this regard the lengthy and detailed nature of professional conduct that currently exists could easily result in the code being observed more in the breach than otherwise. It is the writer's view that a pruning of superfluous and redundant rules along with identifying the objective for the rules will be more effective in ensuring compliance.

Many of the current rules are unnecessary. For instance, Rule 7.03 states that a practitioner who instructs another person such as a valuer, accountant or so forth, is responsible for the payment of their fee regardless of whether the practitioner has been reimbursed or put in funds by their client. Is this rule really necessary, given that the party who has been instructed has the normal rights of recourse under the law of contract and debt recovery? Why should such persons be entitled to any extra rights beyond what the present civil law gives them? What would be the effect of such a party lodging a formal complaint and the District Disciplinary Tribunal under s 106(4)(e), awarding compensation to the third party who then proceeds to bring an action via a Court action. Does this not smack slightly of double jeopardy which is outlawed under s 26 of the New Zealand Bill of Rights 1990? A most recent example of this, is that of an North Shore lawyer Mr Alexander Witten-Hannah who was ordered by the High Court to pay his ex-lover the sum of $135,000 in damages in regard to a breach of trust which occurred between the lawyer and his client/lover. Following the ex-client's success in the civil claim, she subsequently filed a complaint with the Auckland District Law Society in regard to Mr Witten-Hannah's treatment of her with a view that he be prosecuted under the code of professional rules. Whilst s 106(4)(e) of the Law Practitioners Act provides for compensation to any person who has suffered a loss by any act or omission of a practitioner is a discretionary power conferred upon the district disciplinary tribunal, there is a potential danger here of double jeopardy. Also the issue arises whether the Law Society should be reconsidering the matter after it has been considered in depth by the Auckland High Court. It could be argued that justice has already been served and Mr Witten-Hannah who is an officer of the Court has been dealt with and censured and accordingly any further resurrection of the matter would be unjust.[5]

One is compelled to consider whether many of the rules are outdated and a relic of the period when professional rules were unwritten. For instance, Rule 7.01 is more of an aspirational proposition

which probably has no effect and is seldom complained about and enforced. How do you determine an acceptable level of courtesy and fairness between practitioners for there will invariably be differences depending upon the practitioners' cultural background and upbringing? Recently the writer commented to a senior fellow practitioner about the lack of professional courtesy exhibited by a third practitioner over certain proceedings being brought in the District Court. The fellow practitioner's response was "forget about professional courtesy that went out thirty years ago". In the writer's view, Rule 7.01 along with many other could be safely eliminated from the code. The effect of removing many of these unnecessary rules will be to condense the code into the most salient issues that need to be addressed by such a code. Why continue with outdated rules that are generally ignored. This can only bring all the professional rules into disrespect.

There will always be indeterminacy surrounding rules, however, it is essential for their effectiveness that this be reduced or eliminated as far as possible. It seems that the drafters of the professional code have taken a "broad brush" approach in devising rules to cover legal practice. However, this can be counter-productive and cause the rules to be ignored. It is the writer's view that the code must contain certain essential features that are necessary in the adversarial system that we operate under. These essential features must address the matters of loyalty to the client, candour to the tribunal and fairness to the opposing party.[6] It can be argued that these elements do not originate from some deontological basis but are minimum requirements that are instrumentally required for an adversarial system to function well. It seems to the writer that an ethics committee in considering a code must push past matters of professional behaviour that are trivial towards the real essence of professional conduct in devising a set of rules for such. Otherwise, the result is a code of professional conduct that becomes increasingly unwieldy and accordingly, taken little notice of by the regulatees to whom it is aimed.

Effectiveness of the professional rules

The discussion will now consider the question of effectiveness of the code. Before proceeding to look specifically at the New Zealand Law Society's code of professional conduct, the writer will generally discuss principles that relate to this matter.

In order for a code to be effective the rules must have the force and effect of law so that their observation is mandatory. Rules without sanctions are merely advice that can be ignored if it does not suit the professional member. Accordingly, for a code of conduct to be effective there must be the threat of discipline for violation of the rules. In order for a code to be effective it is important that it must be taken seriously and that it is not just a mere peripheral thing comprising "window dressing" for the profession. A code cannot be educational or aspirational in nature for it is then likely to be ignored. For then the codes will be treated as a matter of personal choice by lawyers and complied with or overlooked when it suits. Accordingly, a code should be compulsory to ensure consistency of professional conduct. The code of conduct will be taken seriously if it is enforced and penalties meted out for contravention of it.

The effectiveness of the code will be determined by the nature of the provisions. Thus, it is important that the rules be directed specifically to the behaviour that they intend to affect. The rules need to take cognisance of the different roles that lawyers play, advocate, negotiator, mediator, counsellor, trustee and so on. The present rules do not do this. It was noted recently that where a solicitor acted in a dual capacity of a solicitor and trustee/executor in two estates and a conflict of interest arose causing loss to one of the estates the District Law Society concerned refused to consider the matter arguing that trustee/executor matters were outside the professional rules even though the solicitor had acted as solicitor in both estates. Also, the rules must identify the various situations in which legal advice is given, such as by a firm or group of lawyers in addition to the individual practitioner. It is noted that currently the New Zealand Law Society's code of conduct generally fails to deal with these matters.

A code of professional rules will not be effective if it requires its members to strive towards the unobtainable. In general law, it is accepted that in order for people to be heroes, charitable, forgiving, loving and so on, is to request the impossible, most people are unable to meet such standards. To impose such high aspirations would be counterproductive, for the inability to attain this high moral ground would result in cynicism, disillusionment and hypocrisy. The professional ethics contained within a code must be practical working ethics. General ethics recognises this distinction by identifying two types of actions. The first is "obligatory" which is the sort of thing that an ordinary but moral person could be counted on to perform a good percentage of the time in the circumstances. The other kind of action is the "superogatory" action which is that of the sort that only saints or heroes achieve. An example of a superogatory action is the risking of one's life to save a stranger. The general law does not impose upon the public the requirement to jump into a swift flowing river to save a stranger even though it was within their capabilities. Why should a professional code of conduct require more of a practitioner than is ordinarily expected of other members of the community.

A code of ethics must be of the obligatory type that the professional members can perform without being of a heroic nature. Thus an effective code of conduct is not of an idealistic nature but rather practical working ethics being standards of minimum performance.

To determine the effectiveness of the code of professional rules, the writer requested empirical data from the District Law Societies to cover such matters as the origin of complaints and the relationship between the breach of various rules. Unfortunately, it was impossible to obtain any such data except from one District Law Society and one of the smallest who quite readily provided the data requested. Whether this unavailability of data was as a result of it not being available or an unwillingness of the District Law Societies to impart such information or for both reasons, is unclear. However, one conclusion that can tentatively be drawn is that there was a lack of openness about the actual operation of the rules which in an age of open government does raise some concern. The writer as a member of the New Zealand Law Society would have anticipated a reasonable degree of assistance in

obtaining data in this area. If the law profession is to maintain credibility not only with its own members but with the public, then it would have been appropriate to provide empirical data or assistance.

An issue that arises is upon what basis and data are professional rules drafted and what information is taken into account when reconsidering them or adding further rules. This is important in the matter of rulemaking costs. There are two likely areas where this would occur. The first being the costs of collecting and analysing information about a rule's likely effect and secondly, the cost of securing compliance once the rule is in place. If the initial groundwork is thorough and proper and adequate information collected, then the resultant rules are likely to be more adequately focused and targeted at the problem areas. This will avoid superfluous and redundant rules. Enforcement costs are more likely to be reduced for it would be expected that with fewer but more precise rules observance by the regulatees would be higher. It is well accepted that in reality many forms of misconduct forbidden by the code, largely go unpunished. The reasons proffered for this have been many. Briefly, it appears that these reasons are firstly, the standards are enforced by lawyers who themselves will be subject to the very same treatment they deal out to others. Secondly, the sanction of disbarrment or suspension is drastic and generally not used except in extreme cases for it strips the professional member of the ability to make a living using the training he or she has. Thirdly, often the rules allegedly infringed are trivial rules that the legal profession does not intend to enforce at any stage. All of these reasons bring a code of professional conduct into disrepute and one is forced to ask once again, whether some of the rules are misdirected and unnecessary. One answer to this problem is to place discipline into the hands of non-lawyers and to provide for a range of sanctions depending on the severity of the misconduct. Of course, this would be an unacceptable option to the legal profession but there are some important issues existing in this area that do need to be addressed.

A matter relating to the use of empirical data in rule drafting is that of parliamentary guidance. What parliamentary guidance is given in the preparation of the professional rules? The answer is quite short, none. As mentioned earlier, Parliament has given the Council for the New Zealand Law Society the carte blanche power to prescribe whatever rules it considers necessary in regard to practice, conduct and discipline of practitioners. There is no indication of the type of matters to be covered or sanctions imposed. Although, the current tendency in Parliament is to pass open ended legislation, this often goes hand in hand with direction of the legislature in the form of principles and objectives within the statute. In regard to the legal profession's code of conduct, the Law Practitioners Act fails to do this. Accordingly it is difficult in this situation for implementers or interpreters of the Act to distil the mind of Parliament in regard to the regulating of the legal profession as authorised in s 17 of the Law Practitioners Act.

Validity of the professional rules

A question that therefore arises from the above is that of the validity of professional rules made by the New Zealand Law Society. There always remains a concern that delegated rules have been made in excess of powers conferred or used in a way that violates the original intention of the enabling legislation. The enabling provision in the Law Practitioners Act, namely s 17 provides a wide brief to the New Zealand Law Society without restrictions or guidance. The professional rules are open to challenge under the traditional avenues of judicial review. It is unclear at what stage a Court would make a determination on a professional rule brought to its attention for consideration. However it is unlikely that a Court would overturn a rule in its pre-enactment form, for a Court would generally be slow to interfere in a body's exercise of this discretionary power. The principal avenues available to challenge the validity of delegated legislation are bad faith, improper purpose, unreasonableness and ultra vires. The Courts start from the general proposition that the delegated legislation is valid and it is then up to the challenger to satisfy the Court otherwise. It appears that this will be a difficult task for the discretionary power conferred upon the New Zealand Law Society under s 17 without restriction. Take for example Rule 3.01 of the Code of Professional Conduct which states that a practitioner should charge a client no more than a fee which is fair and reasonable for the work done. Supposing a practitioner accepted the free market principle and was a fan of the economics of the Chicago school of thought and decided to challenge Rule 3.01, would the practitioner succeed in having Rule 3.01 removed as invalid? The answer is probably not, for it would be difficult to establish and prove any of the grounds necessary to succeed under judicial review. There are many examples of the difficulty of challenging quasi-legislation in the area of codes of professional conduct. A well known example of the difficulty of challenging quasi-legislation is the case of *British Oxygen v Board of Trade* (1971) AC 610. In this case, the board made it a rule under statutory discretion that investment grants would be paid for items costing less than £25. This was challenged and it was decided that the enabling legislation conferred a wide discretion on payment of the grant and accordingly the laws made by the board were a proper use of its powers.

The difficulty of challenging the rules of professional conduct can obviously have an important consequence for those affected for they may be forced to comply with a rule that is unreasonable or unnecessary and once again bring all the rules into disrepute.

Also the rules can take on a status far greater than what was intended. An example of this is that of *Parry-Jones v Law Society* (1967) 1Ch 1 in which a solicitor attempted to challenge the Law Society's solicitor accounts rules providing them with access to his accounts. He argued that the rules were repugnant to the general requirements of confidentiality and privilege existing between a client and solicitor. The Court rejected this and stated that the rules were validly made and importantly, from our point, over-rode any privilege or confidence existing between the solicitor and client. This situation is of concern for the effect of quasi-legislation can have an important impact upon legal matters yet without proper control and accountability.

Enforcement

The final area to be considered is that of enforcement and the policing

of the code. Although it was impossible to obtain empirical data from the law societies, it is generally perceived that the reality of the situation is that many forms of misconduct forbidden by the code go largely unpunished. As earlier mentioned, the reasons for this are many: such as a tendency towards leniency because of the fact that the lawyers enforcing the standards may be subject to the very same treatment they deal out to others. Another reason may be inadequate treatment of the matter by the District Law Society, or inadequate investigation or even questionable conclusions and decisions by the Law Society regarding the matter. Although the writer is not able to substantiate these points with empirical data, these comments are supported by the general dissatisfaction the public has with the Law Society's handling of matters pertaining to professional conduct. The public's general comments generally convey the idea that lawyers look after their own. This matter is of concern for the conferment upon the Law Societies of the power to regulate professional conduct, allow it to function as both rule-maker, enforcer and judge and there is no real attempt to separate out these functions.

Under the present system, as outlined in the Law Practitioners Act 1982, if the District Law Society decides to take no action regarding a complaint, that generally is the end of the matter. The right of the complainant to raise the matter with the lay observer does nothing to act as a safeguard for the lay observer does not retry the matter but merely reconsiders the situation and lodges a report with the District Law Society for its consideration. This procedure does not act as an appeal from the decision of the District Law Society and accordingly, the discretion residing in the District Law Society to try complaints is unfettered resulting in a concern that it can be misused or used incompetently. There is no guarantee that District Law Societies' decisions will be consistent and that they will be even handed in dealing with breach of professional rules. The changes proposed by the New Zealand Law Society as outlined in a discussion paper by G Ruck entitled "Discipline within the Profession", 1 July 1993, outlines a proposed restructured approach to discipline within the legal profession. This revised approach goes some way to resolve the deficiencies under the present regime. The proposal is to have set up a lawyers' complaint board which will also establish a lawyers' complaint office. This will be the responsibility of the New Zealand Law Society and will deal with complaints relating to practitioners' conduct. The other part of the scheme will comprise matters relating to complaints regarding standards and this will be dealt with by district standard committees.

This proposed approach overcomes one deficiency identified which was the lack of reviewability where a complaint was dismissed or no action was to be taken at the district level. Under the proposed new regime it is intended the lay observer perform a more important task of actually reviewing any decision that the complainant felt to be unreasonable and thereby requiring it to be reconsidered. The discussion proposes that the lay observer be "a very special sort of person" and suggested a retired Judge or somebody of similar status. This proposal appears eminently worthwhile and will go a long way to relieving the suspicions of the public regarding the complaints procedure. Also another worthwhile proposal set forth in the discussion paper, is that the District Standards Committee comprise lay persons as well as legal practitioners. At least one of whom must be present to constitute a quorum. Once again, this type of approach can help remove the type of criticism that lawyers stand in judgment of their own and look after each other. The writer does not intend to comment any further upon the enforcement procedure or policing under the present code of professional rules and the disciplinary provisions in the Law Practitioners Act, nor to analyse further the proposed reforms. This is not to say that the above comments are all that can be said, for this is a wide subject and one that could be dealt with exclusively as a paper of its own. The purpose of raising this here was to highlight some of the difficulties under the present system. It should be added that although the author finds positive aspects to the proposed reforms this is not an endorsement of them in full nor a confirmation that they will resolve the profession's difficulties.

Conclusion

Although this paper has been wide ranging, it is hoped that it has been shown or at least indicated that the rules of professional conduct and the empowering legislation delegating this matter to the legal profession create serious matters of concern. Should the rules of professional conduct be written and enforced by the legal profession itself or should there be some public representation in this process along with parliamentary intervention in the way of approval of the professional rules. Although there are advantages in the legal profession drafting its own rules, outside participation through consultation and controls has merit. In an age of baby boomers who desire participation in matters that affect them it is submitted that greater public involvement in regulating the legal profession is necessary. Also it is clear the rules of professional conduct will gain more credibility where the enforcement mechanisms are free from distortion by the profession.

It was seen that the basic ingredients that determine the effectiveness of rules of professional conduct are the way the rules are created and the ways that they are enforced. It appears that the legal profession has a lot more work to do in order to obtain more effective and credible professional rules.

In summary it can be said that the drafting of rules for professional conduct is one of the more difficult of legislative tasks required of rulemakers and there are no short cuts to obtaining effective rules. □

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1 "Wanted a New Code of Professional Responsibility" (1977) ABAJ 639 by R Patterson.

2 Ibid, 643.

3 *People v Belge* 50 41 NY2nd 60, 359 NE2nd 377, 390 NYS2nd 867 (1976). For a discussion of this case see 25 *Buffalo L Rev* 211 (1975) "Legal Ethics: Confidentiality and the Case of Robert Garrow's Lawyers".

4 "Personal Morality and Professional Ethics. The Lawyer's Duty of Zeal" by Robert Ewen, unpublished paper, University of Western Australia.

5 *Joeselyn N Davis v Alexander JH Witten-Hannah* June 1994 Auckland High Court No 1389/94 which is reported in the *New Zealand Herald* 14 June 1994 and 18 June 1994.

6 These three basic duties are discussed and outlined by R Patterson in "Legal ethics and the Lawyer's duty of Loyalty" 29 (1980) *Emory Law Journal* 909.

The Law Society and the soundbite

By Tony Holland, formerly President of The Law Society (England). Reprinted from the New Law Journal, *10 February 1995.*

The trouble with growing old is that one increasingly becomes out of touch with the needs of others, particularly the young. Indeed, I can well remember, many years ago, wondering why age seemed to be a prerequisite to everything and yet it appeared to understand nothing. Now that I have reached the age where I am qualified to answer, I am able to say that age does not bestow wisdom, or at least not in my case. We do, however, all learn from our experiences. . . .

These days those who are under 30, which must represent a large segment of the profession, have a quite different approach to the question of communication, the current *bête noire* of the Law Society. Those under 30 tend to rely upon television as the means of communication, if not the video, and certainly have less interest in reading heavy newspapers and academic journals. . . .

The essence of good communication is simplicity, consistency and continuity. On all these counts at the moment the Law Society loses out. Not through lack of good intentions, but through a lack of understanding. Parachuting in and out of difficult situations is not really a permanent solution in this area. Indeed, I am not sure that there is a "permanent" solution, such is the pace of change in attitudes.

I am not one of those who believes that hurling insults at those who govern us is the way forward, if only because I am one of those doing the governing. I do believe everyone has good intentions, the difficulty is that sometimes they are misunderstood. A solution, however, has to be found to meet the demands of those who are being governed so that they understand exactly what the issues are and in simple terms.

"Soundbites" are essential. Any semi-competent politician will tell you that if you try to explain the complexity of modern issues to the average electorate, no matter how intelligent they may be, there is little hope of an understanding audience. The soundbite, the visual, these are the order of the day – particularly for the young. That may be depressing, it may be wrong, it is certainly unfair and pretty unsatisfactory, but it is reality. What does that mean for Law Society communications?

It means for example, that the *Gazette* probably is no longer the right organ to use for communicating a constant message if the Society wishes to get an informed response. While the *Gazette* may be read by those who have time to do it, fewer than ever seem to be able to find the time. They are more likely to be readers of the tabloid press than any other publication. Yes, I know theoretically we read *The Times* but the fact is that in a hurry most will read the tabloid press first. If that is the case it means we have to communicate in terms of *The Sun*. The kind of headline that reads "Gotcha" says more in one word than the *Gazette* can say in one page. This may be unattractive but again it is reality. . . .

I do feel that there has to be a revolution in communicating with the profession. That revolution has to appreciate the fact that time is exceedingly precious, that issues have to be simplified and the language used must be that of the soundbite rather than be scientific or technically correct. The syntax-educated person of yesterday is not representative of today's average young lawyer.

I do not know what it would cost to launch the equivalent to *The Sun* each week to the harried members of our profession, but whatever it costs I suspect it would be money well spent. The older generation would hate it. If they do, it would mean that we have got it right. The question of separate representation for borrower and lender for example, could be explained in a couple of hundred words, with the main thrust of the argument being that the present system has reached the end of the road. Again, the result of the pace of change. That message, consistently explained in brief terms, is probably far more likely to have an impact upon the thinking of the profession than the learned articles which I am in the habit of writing (without the word "learned" necessarily being attached to them), or alternatively long and detailed letters from the President outlining current Council policies.

All this, of course, is hideously unfair to those who seek to govern the profession, and indeed to those who work at the Law Society on our behalf. Life, however, generally is not fair, and on this particular issue the sooner that is realised, the better for all concerned. We have somehow to attract the profession's interest so that all listen, understand and then follow the lead that we seek to give. Time is running out as a further unattractive feature of modern society is a complete lack of patience. That particular failing, however, is nothing new, particularly in my case! □

Note

In the heading to the article "CER at the crossroads: Business law harmonisation" published at [1995] NZLJ 47, the author, Clive Elliott, was described as a Barrister. Mr Elliott is more correctly designated as "Patent Attorney, Barrister and Solicitor, and Partner of Baldwin, Son & Carey".