THE NEW ZEALAND
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COMMUNITY JUSTICE?

In 1829 Sir Robert Peel introduced a Bill to the House of Commons to abolish the lay magistracy and create stipendiary magistrates in their place. This was vigorously resisted by the squirearchy and has been resisted since by the political parties for whom the local Bench is a convenient dumping ground for superannuated local party stalwarts.

This century has seen the steady spread of stipendiary magistrates in Britain and in the *New Law Journal* of 9 May 1997, the editorial calls for the replacement of more lay magistrates with stipendiaries. In fact one could hazard the guess that the only supporters of the lay magistracy in England are current JPs and people who either see themselves as JPs or have the opportunity to nominate JPs.

So it is with a sense of bafflement that one finds oneself commenting on a proposal to introduce "community magistrates" in New Zealand. There seem to be two levels of argument in favour of this proposal. One is pragmatic and the other philosophical.

The pragmatic argument seems to be that lay magistrates provide a cost-effective way of dealing with the mass of very minor cases in the District Court up to and including contested traffic cases. If this is the argument, then some serious analysis is required and obviously has not been done. Does anyone seriously suggest that lay magistrates will deal with contested traffic cases as expeditiously as District Court Judges? The answer has to be "no". If lay magistrates take just twice as long as DCJs to deal with each case, then we will have to provide two courtrooms, two sets of support staff and so on where one used to do.

On the basis of experience in England, twice as long is a generous under-estimate. Lay magistrates and an unrepresented defendant make an especially tiresome combination which can cause the most elementary contested case, failing to stop at a stop sign, say, to take half a day. It also does not take defence counsel long to realise that a client's disqualification from driving can be postponed for long periods by a very simple tactic. All you have to do is drive the case over the half day. At least one of the magistrates will only be sitting for the half day. When one o' clock arrives, out come the diaries and it is established that the next time that Bench can sit together is in about four months time.

The next cost of the system is the cost of appeals to correct bizarre decisions made by magistrates. Examples from the *Times Law Reports* include a decision by magistrates to throw out evidence of a test purchase on a charge of selling liquor outside the permitted hours because the purchaser did not announce that he was a police officer before making the purchase and a decision that police officers were not "persons" for the purposes of the Public Order Act. It is also abundantly clear from the reported cases that the magistracy would have destroyed the drink-drive legislation by their decisions on what constituted "special reasons" for not disqualifying.

And it must be stressed over and over again, that in Britain lay magistrates are supported by a legally qualified Clerk. The latest proposal from the Clerks' Association, aimed at stemming the tide of ultra vires, improper and crazy sentencing decisions by lay magistrates, is that they, the Clerks, should sit with the magistrates when they discuss sentence. The Editor of *The New Law Journal* quite properly responds that the correct course is to appoint more Stipendiaries.

In New Zealand, anecdotes abound of JPs dismissing charges of threats to kill because there was no violence, only a threat and so forth. So, it is said, community magistrates will be properly selected and trained. At this point one feels that all grip on reality is being lost. Who are these people going to be? Who can afford the opportunity costs of sitting as magistrates? The answer in New Zealand is the same as it is in Britain: superannuitants, rentiers, middle-class married women and a few unusual kinds of employees who can control their hours of work, such as academics. It is no good talking about identifiable cases of public spirited self-employed people who give up their time to be magistrates. There are always some such, but the vast bulk will have to come from the classes identified above. Almost no one with children and almost no one with a mortgage can afford the time for such activities, so we are left with the usual crowd who dominate participative structures.

This point is also ignored by those who adopt a more philosophical approach. The argument is exemplified by Bernard Brown at [1996] *NZ Law Review* 120 where he urges a conception of "justice" which owes more to the period advisedly known as the Dark Ages than to the classical period which preceded it or the Enlightenment which eventually followed. Such a conception of justice was also hinted at by the Minister for Justice when he suggested on television that it might be an advantage that the magistrate knew the defendant personally.

The independence of the lay magistracy from improper pressure is just about sustainable in socially stratified and densely populated Britain. We saw last year during the trouble caused by the teachers' unions over bulk-funding that ordinary New Zealanders serving in unpaid positions cannot be expected to stand up to the kinds of pressures easily exerted upon them in such small communities. District Court Judges have their names and addresses on a confidential version of the electoral roll. That one fact should be enough to make us realise that a lay magistracy dealing with serious cases is not a well thought out proposal. ❑

s 94 LAW PRACTITIONERS ACT

John Wild QC

reviews the Court of Appeal's definition of the limits of this Draconian power

THE USE OF s 94

The High Court's power under s 94 Law Practitioners Act 1982 summarily to suspend a practitioner from practice is intended to enable the Court to regulate practitioners' conduct in relation to litigation and their status and responsibilities as officers of the Court. It might also be appropriate "for the rare or unusual cases when, for one reason or another, the Profession's disciplinary procedure is inappropriate or unsuitable". It is not to be invoked in ordinary cases of professional misconduct, certainly not where there are no circumstances arguing for urgent disciplinary action. So held the Court of Appeal in its judgment delivered on 3 June 1997 in *B v Canterbury District Law Society* CA79/97 (Henry, Thomas and Blanchard JJ).

In its judgment the Court of Appeal summarised the profession's disciplinary procedure contained in ss 101-119 of Part VII of the Law Practitioners Act, noting that the procedure is comprehensive. The Court then considered ss 92-94 Law Practitioners Act, which preserve the High Court's historical jurisdiction over law practitioners. The Court reconciled ss 93-94 and 101-119 of the Act in the following way:

> The jurisdiction of the Courts and the profession's disciplinary procedure cohabit Part VII of the Act without any explicit indication as to when resort should be had to one rather than the other. But the scheme of the Act is clear enough. Responsibility for investigating complaints and prosecuting practitioners is imposed on District Councils (or District complaints committees) and responsibility to determine any resulting charges is vested in the District Disciplinary Tribunals and the New Zealand Law Practitioners Disciplinary Tribunal. Parliament plainly contemplated that this procedure would be the primary procedure for dealing with professional misconduct or negligence or incompetence within the profession. Moreover, the District Disciplinary Tribunals and New Zealand Law Practitioners Disciplinary Tribunal are specialist Tribunals. Apart from the lay members appointed by the Governor General on the recommendation of the Minister of Justice, they are mainly comprised of members of the profession. In the course of carrying out their function the Tribunals necessarily acquire considerable experience and expertise in dealing with disciplinary matters within the profession. They are able to apply appropriate standards, establish suitable criteria, and obtain consistency in their decisions.

THE FACTS OF THE CASE

B had been found guilty by the New Zealand Law Practitioners Disciplinary Tribunal in October 1996 of 11 charges of negligence or incompetence in his professional capacity. He was censured, fined and ordered to pay substantial costs. Then, for three months from December 1996, B overdrew his trust account and used the funds for his own benefit. Covering cheques from two companies with which B was connected were dishonoured, in one case three times.

APPLICATION TO THE HIGH COURT

The Society applied to the High Court in Christchurch under s 94 of the Act for B's summary suspension from practice. The High Court Judge took an exceedingly dim view of B's conduct, particularly as it had occurred so soon after B had been disciplined. The Judge suspended B from practice, effective immediately. He also ordered him to pay costs to the Society. The Judge also suppressed B's name. In doing so, he stressed that the suppression was not in B's own interests, but to facilitate the tidying up and sale of B's practice, and to protect the interests of clients of the practice and the staff employed in it. At the time of the High Court hearing, the Society had not laid charges or commenced the disciplinary procedure under s 101.

B'S APPEAL

B appealed. Contrary to B's submission, the Court of Appeal held that the High Court had possessed summary jurisdiction under s 94, but that this was not an appropriate case for the High Court to exercise that jurisdiction. The Court held:

> The substantial affidavits filed in support of the application do not disclose any reason for urgency or, indeed, any reason, apart from the seriousness of the charges themselves, which indicate why an interim order suspending B from practice pending the hearing of the charges was required. We cannot perceive any sound reason why the Council could not have proceeded under the profession's disciplinary procedure.

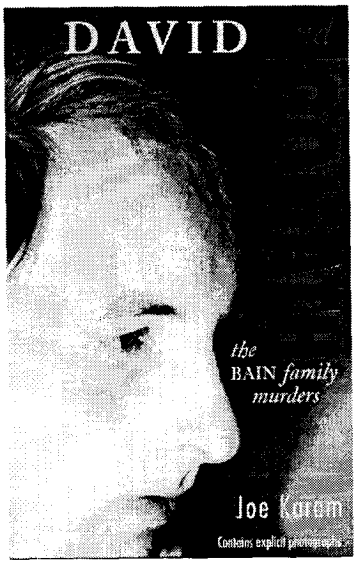
The Court, however, was sympathetic to the Society's explanation that it had proceeded under s 94 because an interim suspension order under s 115 cannot be made quickly – it cannot be made until the practitioner has been given particulars of the complaint, an opportunity to answer, and before charges are laid: *Wihapi v Hamilton District Law Society* 9 April 1992, Barker, Henry and Smellie JJ, HC Auckland, M2003/90. After traversing the various arguments for and against s 115 prevailing over s 101(3)(a), the Court concluded:

> An amendment to the Act is therefore required to remove the apparent conflict between s 101(3)(a) and s 115. The power for the Tribunal in cases of urgency to make an ex parte order for the interim suspension of a practitioner against who a charge has been made pending the charge being heard and disposed of where that course is in the public interest should be re-established without the necessity first to comply with the requirements of s 101(3)(a). ❑

BOOK REVIEWS

DAVID AND GOLIATH

The Bain family murders
by Joe Karam
Reed Books



Early on 20 June 1994 five members of the Bain family, including the father Robin, died at their home of gunshot wounds. David Bain, the surviving family member, called emergency services, and police began a murder/suicide investigation. Within four days, however, police charged David Bain with the murders. He was convicted and was sentenced to life imprisonment with a minimum non-parole period of 16 years. He maintains his innocence.

Joe Karam, former All Black and now successful businessman, became interested in Bain's cause after reading in a newspaper that his supporters were launching an appeal to raise funds for an appeal to the Privy Council. He describes his interest as having become a passion, and has made a number of appearances in the media to espouse David Bain's cause. He emerges from this account of his investigations as a man of purpose prepared to devote a considerable amount of his time and resources to representing the interests of someone he believes to have been treated unfairly by the criminal justice system.

David and Goliath is unashamedly presented from a defence perspective. Despite Karam's expressed intention not to "castigate, criticise or blame individuals", he describes himself as unable to find a suitable turn of phrase to summarise the discrepancies, omissions, deficiencies, and untruths in the Crown case against Bain. Police are attributed with predetermination and shoddy investigative work, and shades of Arthur Allan Thomas are evoked with a veiled suggestion of planted evidence. Karam almost invites a retrial through defamation proceedings. Bain's defence team is described as entirely inadequate and the trial Judge, Williamson J, does not escape criticism for his analysis of the prosecution case in the summing up. The book is a compelling speech for the defence, Karam's contribution to the adversary system which he believes failed David Bain. In approaching his subject in this way, Karam ignores that the adversary system relies upon both sides of the case being put fully and fairly.

Regrettably, Karam's failure to put the merits of the prosecution case diminishes the force of his arguments. The defence theory at trial was that the gunman was Robin Bain, who shot and killed the others while David was out delivering newspapers, and then turned the gun on himself. The difficulty with such a defence is encapsulated in the opening sentence of the summing up. Williamson J asked the jury "Who did it?, David Bain?, Robin Bain?" As Lindy Chamberlain found, a positive defence that another has committed the crime has the effect of placing an onus on the accused. Although Williamson J immediately reminded the jury of the burden and standard of proof, it is not difficult to accept that in its deliberations the jury would have been considering not whether David Bain was proved beyond reasonable doubt to have committed the crime, but whether it was more likely that he was the killer than his father. The task of satisfying that implied onus was made difficult, Karam suggests, by a combination of police incompetence, suppression of evidence, and defence inadequacies. He omits to analyse whether the strength of the Crown case also played some part.

Karam's exertions have raised some interesting points. The evidence of the family computer, which carried a message undoubtedly left by the killer, is one. According to witnesses, David Bain returned from his paper round at about 6.45 am. When the computer was examined, the police expert was able to ascertain that it had been turned on a specific length of time prior to the examination. This time was originally thought to be 6.44 am, but the police soon discovered that the watch of the officer who assisted with the timing was inaccurate, and that the actual time was probably 6.42 am. The prosecution nevertheless presented the time at trial as 6.44 am, evidence which Karam says was known to be false. The defence was in possession of police job sheets recording the discrepancy, but apparently ignored or overlooked its significance. The time of 6.42 am has apparently now been confirmed by examination of the computer. David Bain could not therefore have turned the computer on, says Karam. Eliminate the impossible, said Sherlock Holmes, and whatever remains, however unlikely, is the truth. Compelling, provided the times are absolutely accurate.

Karam's analysis of the prosecution case is perfunctory other than in the particular areas that he chooses to examine. The Crown relied heavily on inconsistencies in the accounts which Bain gave to police and to the jury. The author's explanation for these inconsistencies is less than convincing, and it is difficult to avoid the feeling that David Bain, an apparently restrained young man, has been less than frank with his mentor. He certainly contributed little to this book. Much of the discussion of Robin's incestuous relationship with his daughter Laniet is based on the author's speculation supported by ex-post facto disclosures by others who were spoken to neither by police nor defence prior to the trial. Nevertheless, when no substantial motive has been attributed to David Bain, it would be unfair to Karam's cause to demand a high level of proof of motive for the father.

The book is at its strongest not when it seeks to inculpate Robin Bain, but when it sets out to take the role of defence counsel and to undermine the prosecution case, although it is arguable whether the Crown case is undermined or simply side-stepped. Whether the jury would have reached a different conclusion on the analysis expounded in this book is unanswerable, but Karam compellingly argues that it could have acquitted.

The structure and presentation of this book show that it was written and published with passion and in haste. Nonetheless, it is a fascinating account, as much for its insights into its author as his subject. At the time of publication, a legal team headed by Colin Withnall QC was preparing a submission to the Governor-General, applying for a pardon for David Bain. This will be supported by evidence from the experts whose absence from the defence case at the trial is so deplored by Karam. The outcome will make an interesting final chapter to any future edition of this book.

Ross Burns

A CALENDAR OF KILLING

By James Morton

Little, Brown & Co

There have been many popular anthologies of murder cases, and anyone embarking on such a compilation will be faced with the problem of selecting cases to be included. Mr Morton (the editor of the *New Law Journal*) has met this in a novel way, which at least maximises the number of killings that can be sensibly examined in a single volume. The book consists of accounts of 366 killings committed this century, each one having been (apparently) committed on a different day of the year. No explanation is offered for this method of selection, but the result is a collection of little stories, some well-known but many obscure, covering most types of murder. Domestic killings arising from anger, jealousy or personal inadequacy are mixed with sexual and serial murders, and professional "hits"; murders motivated by revenge, money or convenience with those seemingly explicable only by mental disorder. Some remain unsolved, and a few of the solutions remain controversial.

The book has no scholarly pretensions, but it is the product of considerable research, and Mr Morton writes with economy and without bombast, and occasionally lightens the subject matter with a gently sardonic touch. The language of obituary is used in describing one American gangster as "a prominent enforcer, rapist and murderer". (p 185)

The content cannot usefully be summarised, and different aspects of the eclectic selection will make an impression on different readers. I will mention two that struck me.

First, the range of cases from throughout this century invites comparison of the varying speed of dispatch of cases (and persons). In England in 1900 just five weeks might elapse between murder and hanging (p 265) and even in 1920 it could be less than three months (p 165), although by the 1940s this had crept to between four and six months. (pp 26, 191) Of course, such things take much longer in the States, even when neither innocence nor redemption seem possible. In 1989 and 1994 Bundy and Gacy were executed some ten and 14 years after their trials. (pp 46, 468)

Secondly, a few of the cases illustrate the potential for crime to generate civil litigation. The Scots have their version of OJ, where after the prosecution resulted in a verdict of Not Proven family members successfully sued the accused for a daughter's killing. (pp 207-209) In England, although a mentally disordered offender might sue the Health Authority for contributing to his troubles by releasing him, the victim's family is left to an action against the offender, they being beyond the scope of the Health Authority's duty of care. (p 475) Counsel are in a more promising position. While they may not be sued for negligence in the conduct of the trial, they may succeed in an action against those bold enough to accuse them of such negligence. (p 183)

For the New Zealand reader, there is the practically obligatory inclusion of the Hume/Parker case (the account being marred by the wrong woman being named as a novelist (p 240)); and we learn that we apparently have the honour of providing England's first "female hit man", whose fee, sadly, "was to be spent to fulfil her dream of buying a mobile home". (pp 197-198) Inevitably the entries are so brief that one is sometimes left wanting more information. For example, why, in 1948, did the then Colonel Bernard Fergusson refuse to give evidence of a conversation he had had with an accused army officer? (p 168)

It is an irritating feature of the book that it has no index. Nevertheless, it contains many gruesome but intriguing vignettes, told with some style and a full understanding of the legal process.

Gerald Orchard

GARROW & CASEY'S PRINCIPLES OF THE LAW OF EVIDENCE

(Eighth Edition, 1996)

Butterworths

The back cover of this long overdue update of our most accessible evidence text, last edited in 1983 by McGechan, repeats the modest claim of the earlier work that it is for the busy law practitioner or police prosecutor and for the student. One could add "busy" Judges, recognising that "busy" is used in a special sense. Such people will be pleased with the brevity of this work: 193 pages of text, 83 pages of legislation, 25 pages of index, and its focus on primary and secondary law (from Parliament and Courts). Indeed, this book is a useful entry point for anyone who wants to get a feeling for the overall shape of the subject. The cost of brevity here is the lack of cross-reference to other texts and legal writings, although occasional reference is made to *Cross*.

It is curious that Butterworths has given purchasers the choice between this and *Cross on Evidence* (5th NZ ed) which in its bound version comes at a comparable price. The next step would seem to be to produce *Garrow & Casey* as a loose-leaf text so it can be kept up to date. Furthermore, both deserve to be published electronically. It may be that *Garrow & Casey*'s approach is restrained in anticipation of codification of the law of evidence. If so, that would be further reason to publish it in a flexible format.

Inevitably much will be omitted in a brief treatment of this subject, especially in relation to new topics where, as here, the form of the earlier editions is preserved. For example there is no mention of the standard of proof of admissibility (except in relation to the voluntariness of confessions, para 8.10). Nor is there reference to the dicta suggesting a readiness to change the evidential consequences of breaches of the Bill of Rights Act (*R v Grayson* CA255/96, 28 November 1996 just

falls outside the date as at which the law is stated 1 October 1996 although the preface is dated November 1996). The discussion of s 11 of the Evidence Act 1908 would have been enhanced by reference to *R v Manapouri* [1995] 2 NZLR 407 CA which is not cited; and on the topic of bias *R v Davis* [1980] 1 NZLR 259 CA deserves mention (it is cited elsewhere on another point). Some topics, interesting and problematic, are dealt with summarily: eg lies (para 29.17) and inferences (para 1.2), which both receive nine lines.

Garrow & Casey is a handy text for those who enter the courtroom not knowing what evidential issues may arise; it has a useful index with room for readers to insert their own entries for example, Silence, see Comment - and it provides many ready answers, but for pre-trial preparation one would look to *Cross*, and, in criminal law, to *Adams* (ed Robertson) before turning on the computer.

Don Mathias

ENVIRONMENTAL LAW A GUIDE TO CONCEPTS

by Bruce Pardy
Butterworths, 1996
$135.00

A book should always be judged against what it is that the author sets out to achieve. Mr Pardy's stated aim is to:

> ... provide the first word but not the last word on the most important concepts in the field of environmental law in Canada and New Zealand. ... It describes concepts and competing theories. It provides a means to achieve a view of the big picture and a context for the details.

The format chosen by the author to achieve these aims is admirably clear and helpful. He devotes two facing pages to define and describe each of the concepts, or terms with which he deals. On the opposing page he summarises the more important elements in a chart form. The whole reference is cross indexed in a useful way. Each of the entries is listed in alphabetical order.

The book is therefore easy to use and the information readily accessible.

As to the content it is catholic in choice. Indeed it is difficult to discern any common thread which might explain the reason for including some of the entries. They appear to fall into a number of disparate categories.

Thus there are those which seem to refer to common everyday concepts such as "best available technology", "blanket prohibition" or "carrying capacity". These notions can be applied to a wide range of human activity and they are not in any way special to environmental law, or indeed any sort of law.

Then there are those which are descriptive of well-known legal concepts which one would expect to find in any legal primer such as: "Cause of action", "burden and standard of proof", "damage", "negligence", and "trespass to land".

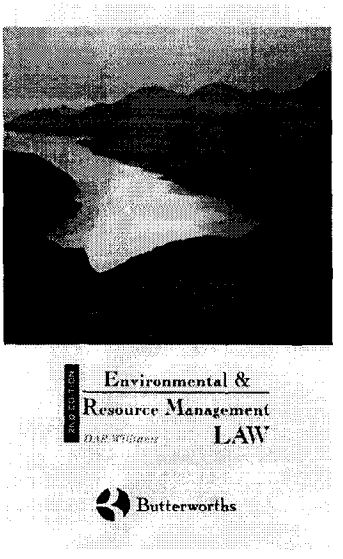
Some are simply words in general use (or misuse) such as "synergy", "persistence", "resilience" or "restoration". Some are words which have precise connotations in other disciplines such as "depreciation" does in accounting. Some are coined slang phrases or buzz words such as: "Due diligence", "cradle to grave regulation", "end of pipe standards", "environmental bottom line".

I can only imagine that in the author's experience of environmental law and practice both in Canada and New Zealand he has come across each of the terms used in the manner he has defined them sufficiently often to warrant inclusion in a book such as this. Certainly it seems from the footnotes that there is at least some academic writing which supports the inclusion of each of the terms. The fact that, having sat in a number of Environment Court cases in the past ten years I have encountered few if any of these specialist terms used in the way they are described in this book, does not mean that we do not have this treat to look forward to. No doubt Judges, lawyers and environment Court practitioners of all descriptions will soon be larding their judgments, submissions, and evidence with references to "Ecofeminism", "ecological chaos" "intergenerational equity", and "non-equilibrium". When they do they will find Mr Pardy's handbook to be of great practical value in ensuring that they are using the particular term in the approved fashion.

Mr Pardy is to be congratulated on anticipating this linguistic renaissance in New Zealand environmental law and practice, and for giving us the means of embracing it without embarrassing bloopers. Quite what Fowler would have made of much of the English usage which apparently awaits is a matter only for reactionary speculation.

Whether the author's claim that this book provides "the first word, but not the last word on the most important concepts in the field of environment law in Canada and New Zealand" is, I think open to question. That said however I am sure some practitioners will find the book useful.

Judge A A P Willy

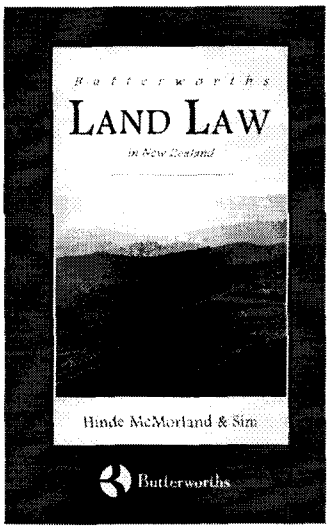


ENVIRONMENTAL AND RESOURCE MANAGEMENT LAW

Second edition
Edited by D A R Williams
Butterworths 1997

There are at least two reasons to be enthusiastic about this book. The first is that we have been without a reference text on environmental law for far too long. When I arrived in New Zealand in 1993 to teach environmental law at Victoria, one of my first tasks was to investigate the intricacies of the RMA. The first step, I thought, was to read the leading New Zealand environmental law textbook. I soon discovered that there was no such thing. Books that did exist were either well out of date, having been written prior to the RMA, or were not traditional legal texts. It is now almost six years since the Act was passed, and a good reference book has finally arrived. Technically, this is the second edition of David Williams' 1980 publication, but it reflects such substantial change in the legal landscape that it could be considered an entirely new work.

The other reason to admire this book is that it works: it is wide in scope,



well organised, and accessible. In the field of environmental law, that is no mean feat. Environmental law is a bit like an ecosystem: both are complex systems that contain an enormous amount of unorganised information. Each element of the system relates to all the others in some way, and there are no straight lines. Environmental law, unlike tort, contract or corporate law, is not a proper legal category. Instead, it consists of a diverse collection of rules, principles and concepts from other areas of law and is influenced by ideas from science, economics and other disciplines.

The subject resists compartmentalisation and definitive description. For these reasons and others, writing an environmental law text is a peculiarly difficult task. There are numerous texts in the English speaking world that are full of information that fail to make the subject clear. In comparison, *Environmental and Resource Management Law* is user-friendly and effective.

Williams' text consists of 14 chapters, written by various authors, that can be divided into two main categories: chapters that describe generally applicable legal material (introduction, sources and institutions of environmental law, the RMA, environmental assessment, environmental litigation and dispute resolution, and statutory remedies); and chapters that deal with particular environmental subjects (land use and subdivision, forests, mining, water law, marine pollution, air pollution, pesticides and other hazardous substances, and noise). The book is set out in paragraphs much like the *Laws of New Zealand* – each paragraph is numbered, and footnotes follow the paragraph rather than appearing at the bottom of the page. This organisation works well in most sections, which contain clear and succinct statements of law. Occasionally it produces choppy reading. Some material appears not to have been written with paragraph by paragraph structure in mind, but to have been composed in essay style, incorporating discussion not easily divided into distinct pieces.

For some readers, portions of the material could be classified as natural resources law rather than resource management or environmental law. For example, the chapter on mining concentrates on the acquisition, transfer and exercise of rights in mining resources rather than on their environmental management. It is true that the line between the two areas is not easily drawn, but the decision to include a chapter on the property law aspects of mining and exclude any discussion of fisheries law is puzzling. The book is unabashedly focused on description of particular statutory provisions, and thus can be forgiven for its limited examination of underlying concepts and principles.

Environmental and Resource Management Law will be an essential reference tool in the practice of resource management and environmental law.

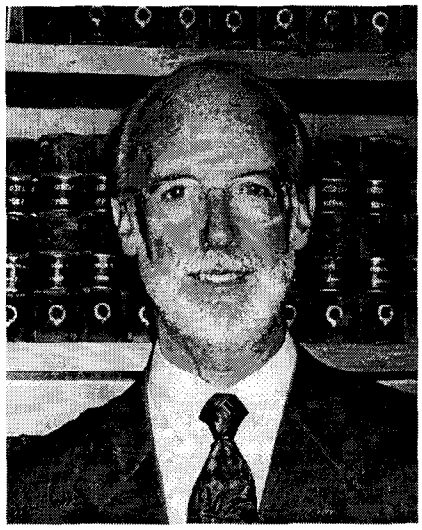
Bruce Pardy

BUTTERWORTHS LAND LAW IN NEW ZEALAND

by Hinde and McMorland with Campbell and Grinlinton

Butterworths

All academics and practitioners associated with land law in New Zealand will be familiar with the two-volume edition of Hinde, McMorland and Sim *Land Law* 1978-1979, in addition to the abridged version titled *Introduction to Land Law*, published in 1986, which firmly established itself as a textbook for students of land law. The long awaited new edition, retitled *Butterworths Land Law in New Zealand*, brings up to date the original two-volume edition. However, whilst much of the earlier material has been retained, substantially more has been achieved by the authors than simply bringing the original material up to date. As well as new statute and case law being included throughout, a substantial amount of new material has been added to take account of significant developments in this area of the law which have occurred during the last decade.



Don McMorland

In the preface the authors' state their aim as to set out the land law of New Zealand in a form which will be both useful to practitioners and helpful to students. What makes this book of particular value to both practitioners and students is its breadth and depth of coverage, impressive even in a book of this size, and the clarity with which the material is presented.

The opening chapter considers the background to land law with the doctrines of tenure and estates, together with equitable estates and interests. Chapter 2 contains a lengthy examination (245 pages) of title to land. The largest chapter, this has been significantly expanded to take account of recent developments and includes useful coverage of caveats and cross-leases.

Freehold estates and future interests are considered in Chapters 3 and 4 respectively. Chapter 5, which is the subject of leasehold estates, has been extensively revised to take into account changes in the law including the issue of the "contractualisation" of leases, with an analysis being made of the relevant case law. A new section on residential tenancies is also provided. Easements and profits are discussed in Chapter 6, with licences being the subject of Chapter 7. Chapter 8 has also been extensively revised and traverses the subject of land as security, canvassing the principles applicable to injunctions as a restraint on the exercise of the mortgagee's power of sale.

The remaining chapters deal with the holding of and transfer of interests in land and covenants affecting freehold land. The book concludes with a chapter which examines the extent of the landholder's rights. As was the case with *Land Law*, Crown land, Maori land and the subject of "the social con-

trol of land" are not dealt with by the text.

Excluding its extensive tables and index, at 935 pages, this is a lengthy text for which the research has been extensive and thorough. Copious footnotes are given after each numbered paragraph and for readers seeking further detail and wishing to refer to the original two-volume work, the text conveniently provides bold-type cross references at the end of each paragraph.

This is a book which can be strongly recommended to anyone involved with the practice, teaching or study of land law.

Julia Pedley

GUIDE TO NEW ZEALAND LAND LAW

by Alston, Bennion, Slatter, Thomas and Toomey

Brooker's

The stated aim of this book is to provide an introductory text which is both comprehensive and user-friendly. Essentially this book is what it purports to be, that is, an introduction to current New Zealand land law. All the topics which one would expect to find in a land law text are present and structured over twelve chapters.

The first chapter is largely introductory, dealing with a definition of land, and the doctrines of tenure and estates. The Land Transfer System is the subject of Chapter 2, which focuses on indefeasibility and its exceptions, landlocked land, compensation for loss or damage, transmissions, trusts, powers of attorney and prescriptive title. Caveats are discussed in a separate chapter.

Of considerable interest is the chapter on Maori land, which provides the reader with a brief introduction to Maori customary law relating to land, together with an outline of the elements of Maori land law under the *Te Ture Whenua Maori Act 1993*. Chapter 5 addresses co-ownership, followed by a short chapter on licences. The chapter on leases emphasises the rights and obligations of the parties in addition to a consideration of transactions with leases. This chapter also contains a section on residential tenancies, again with an emphasis placed on the rights and duties of the parties. A comprehensible explanation of the law relating to mortgages is provided in Chapter 8.

It is arguable that the subject of covenants affecting freehold land would merit a separate chapter, however the authors have chosen here to deal with easements, profits and covenants in one chapter. A separate chapter is however given over to a discussion of cross-leases and the topic of unit titles is similarly treated.

The concluding chapter on contracts of sale will be of particular value to readers wishing to acquire more than a basic overview of the topic and will provide them with a starting point for problem resolution in specific areas of difficulty.

Throughout the text a wealth of case law is referred to and cited and numerous references to relevant statutes are made. Clearly, there are more comprehensive texts on land law but this text is not intended to be a definitive treatise. It is primarily directed at students and those seeking a working knowledge of land law and its requirements.

As stated in the foreword by Richard Sutton: "The book is a starting point towards mastering the principles and policies, the light and the shade, the clear rules and the areas of uncertainty which abound in this complex and fascinating subject. Viewed in that light, it will be a useful companion for those who wish to explore the law of property by studying its legal sources."

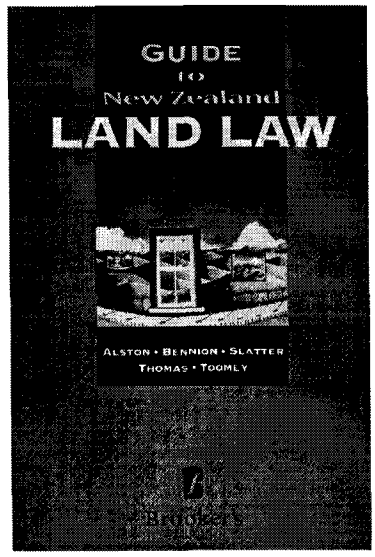
This book is likely to be welcomed by students of land law and those seeking a concise account of the main principles of the subject.

Julia Pedley

CAVEATS

by Stephen Colbran and Sheryl Jackson

FT law and tax



Occasionally a text is published which should be read by everybody who is associated with the transfer of land, and mortgages and securities. *Caveats* is one such book. The book is a detailed and comprehensive account of the law relating to caveats within the Australian and New Zealand jurisdictions.

Excluding its tables and appendix, the book comprises twelve chapters spanning some 572 pages. Chapter 1, by way of introduction, examines the nature and definition of a caveat under the Torrens system and discusses recent proposals for law reform. Types of caveats are considered in the second chapter with the authors discussing fifteen categories of caveats against dealings with land. Caveats entered by the Registrar and issues relating to the lodgment and effect of caveats are dealt with in Chapters 3 and 4 respectively. It is here that the important practical effect of a caveat against dealings, including its effect upon conveyancing transactions is discussed.

Of particular value to practitioners is the attention given in Chapter 5 to the extent of caveatable interests in which the authors, while observing that there is no special estate or interest in land known as a "caveatable interest", consider in some detail the extensive occasions and circumstances which may or may not give rise to a caveatable interest. Throughout the following two chapters the authors guide the reader through such important practical issues relating to the legal requirements as the form and contents of caveats, together with the effect of failure to comply with the same, including solicitors' liability. Matters relating to voluntary withdrawal, including the manner, timing and effect, and partial withdrawal of caveats are considered here.

Chapter 8 examines in detail the procedure whereby a person affected by a caveat against a primary application or against dealings may apply to the Court for removal of the caveat. Equally detailed analysis is given to the lapse and extension of caveats in Chapter 9, which considers means of preventing lapse, the effect of lapse, lapsing provisions in the legislation and matters associated with applications for orders to extend caveats.

The remaining three chapters of the book are given over to a consideration of successive caveats and issues concerning priorities, and conclude with a

discussion of the law relating to entitlement to compensation for damage which has been sustained due to the incorrect lodgment of a caveat.

The comparisons and contrasts between the Australian and New Zealand jurisdictions in relation to caveats which are made throughout the text are enlightening and are one of the most interesting aspects of the book.

All the material considered in this text is dealt with meticulously by the authors who have trawled the case law to identify close to 1000 cases, reported and unreported, relating to caveats decided in Australia and New Zealand. In addition to extensive footnoting, the appendices contain all current legislation, rules and forms relating to caveats.

The result is a text which gives a detailed explanation of and practical guidance on all aspects of caveats, proving to be an essential reference for anyone involved with the legalities of caveats in Australia and New Zealand. Whilst it may be less appropriate for students, (other than for reference), this book will be indispensable to practitioners.

Julia Pedley

TRUSTEE INVESTMENT: THE PRUDENT PERSON APPROACH

By Russell Davis and George Shaw

Butterworths

This book by two authors obviously very experienced in the trustee industry makes invaluable reading for anyone who deals with investments on behalf of trusts and who offers investment advice to trustees.

The authors trace the evolution of trusts from English law through to the modern day understanding of the Prudent Person Rule. The transition from a "permitted legal list" of suitable investments for trusts to today's standards of prudent investment and the obligations of trustees in the light of the reform of trustee laws in both Australia and New Zealand are clearly stated and explained. References are made to recent specific cases in the United Kingdom and New Zealand where the Courts have found trustees to be in breach of duties of prudence by:

(i) Lack of diversification of investments;

(ii) Failure to invest in equities;

(iii) Failure to carry out regular reviews of investments;

(iv) Favouring income beneficiaries at the expense of the capital beneficiaries.

The Trustee Amendment Act 1988 (NZ) and the legislation introduced in South Australia in July 1995 are both carefully explained and compared clause by clause. The authors take great care to point out that the circumstances of the trust and beneficiaries will highlight the weightings which will need to be given to factors such as:

- Diversification
- Taxation issues
- Maintenance of capital value
- Regular reviews

The authors highlight actions which can be considered as a breach of trust and point out that trustees cannot contract out of the need to act prudently. However, there are several ways of avoiding the implications of legislation.

The duties of trustees regarding conversion of assets into another form of investment depend upon the wording of the trust deed eg if specific assets are to be retained.

The four elements of investment risk, market risk, financial risk, liquidity risk and information risk, are all carefully explained.

Specific directions in the trust deed such as types of investment, and maximum periods for which money can remain uninvested should be understood by trustees as well as directions from co-trustees, settlors and advisory trustees and protectors. Trustees should act independently and not follow directions blindly.

An excellent survey is given in Chapter 6 of the investment process for trusts including the consideration of advice from brokers and financial planners. A model portfolio approach is illustrated and a sample asset allocation given for three different risk categories.

Different types of investment available and their suitability for trusts are dealt with at length. Consideration is given to disclosure and insider trading and their implications for trustees. The importance of the retention of records of investment decisions and of regular monitoring and review of investments are stressed. The appointment of suitable investment managers and custodians is highlighted in Chapters 7 and 8.

Denyse Macindoe KPMG

All in all, I urge all involved with advising trustees or dealing with trust investments to read this book.

Denyse Macindoe

TRENDS IN CONTEMPORARY TRUST LAW

Edited by A J Oakley

Clarendon Press, Oxford - 1996

Anxious crusading nobles and the managers of superannuation funds are separated by more than time but members of both groups have used the trust concept. Perhaps its most fascinating aspect is this ability to link and serve apparently disparate objectives and societies.

Its breadth and importance is recognised in this series of essays resulting from the first conference on trust law to be held in the United Kingdom. The essays are authored by leading equity lawyers (practising and academic) and present an excellent overview of current trends in this dynamic area of law.

Essays include "Moulding the Content of Fiduciary Duties", "Trust Law for the 21st Century", "Equity's Reaction to Modern Domestic Relationships" and "Taxing the Constructive Trustee: Should a Revenue Statute address itself to Fictions?"

Paul Matthews' opening essay - "The New Trust: Obligations Without Rights?" provides an interesting commentary on the development of the non-charitable purpose trust in various jurisdictions and draws attention to the statutory requirements imposed on the creation of those trusts by recent legislation in those countries. He also raises

his head from a close examination of the tactics inherent in formation and use of such trusts to consider the strategies that underlie them.

The essay on "Self-Dealing Trustees" contains a comprehensive and clear exposition of two fundamentally different rules namely, the self-dealing rule preventing trustees from acquiring trust assets and the fair dealing rule which severely circumscribes the trustee's ability to acquire the beneficial interest in the trust. It is worthwhile reading this "against" Oakleys' "The Liberalising Nature of Remedies for Breach of Trust".

In "Moulding the Content of Fiduciary Duties" R P Austin discusses a judicial trend which identifies fiduciary duties in preference to fiduciary relationships and indicates that this may ultimately have an impact even on that paradigm of the fiduciary relationship the express trust. He suggests that once the conflict and no-profit rules are adhered to then perhaps any other action by a trustee can be judged by the same standard of reasonable care used in the law of negligence.

David Hayton's essay on the "Irreducible Core Content of Trusteeship" is a timely reminder that despite the inherent flexibility of the trust, there are limits beyond which one cannot go in modifying it. He identifies three crucial "non-negotiable" beneficiary rights: to information relating to the management of the trust, to inspect trust documents; and to sue the trustee for fraud or reckless conduct. From the solicitor-trustee's viewpoint there is food for thought in his comment that such a person is likely to owe a fiduciary obligation to the intending settlor when the trust deed is drafted and this will need to be dealt with by provision of independent advice, or the settlor's informed consent to waive such advice. I suspect that this is not as yet a common procedure here.

The lightning evolution of the protector concept, particularly in relation to off-shore trusts, forms the basis of Professor Waters' article "The Protector: New Wine in Old Bottles?" He sets the scene by describing the philosophical basis for two conflicting viewpoints relating to the protector concept. The first is that the office is effectively a fiduciary one, the second is that it is wholly defined by the terms in which it is created and need carry no fiduciary obligations. From there he traces in broad terms the origins of the dispositive and administrative obligations and powers conferred and imposed in relation to trusts, identifying their origins and purposes. The essay draws together the strands of many developments in numerous jurisdictions in relation to an office whose existence and function, for various reasons, are often not fully acknowledged.

Professor Charles Rickett brings a New Zealand perspective to his essay "Equitable Compensation: The Future". He also undertakes a wide ranging survey of the increasingly broad (some might even say formless) concept of equitable compensation in relation to both fiduciary and general equitable obligation concluding that perhaps the best we can hope for in this area is development of a set of guidelines rather than more rules as such.

At the end of this book one is left with the impression that "trust" may describe a process as much as a concept and while its future development may prove unsettling to some change seems, nonetheless, inevitable. This work provides practising and academic lawyers with valuable insights into where this evolution has taken us to date and where it may take us in the future.

Kerry Ayers

THE LAW OF TORTS IN NEW ZEALAND

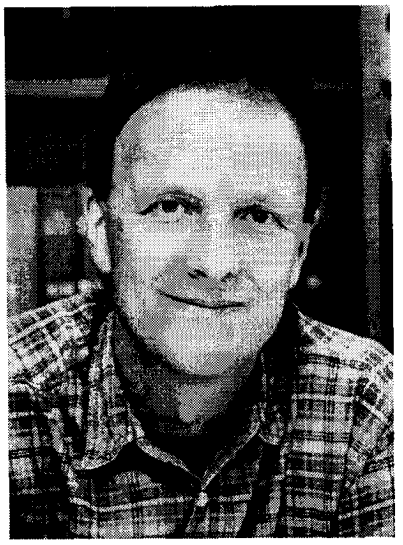
(2nd edition)
by Stephen Todd
Brookers

This is a major update of the 1st edition published six years ago in Australia. The 2nd edition published here by Brookers is rewritten and considerably enlarged. The book is attractively typeset and presented, to a higher standard than the 1st edition. It has a revised structure; some chapters are new and many others are rearranged and expanded.

The author list shows some changes, but the collective intention remains:

> to describe the distinctive approach taken by the New Zealand Courts towards the development of the law of Torts in this country, and to evaluate the position here in the light of decisions elsewhere notably those in England, Australia and Canada.

For this purpose consider the Privy Council a New Zealand Court; it too can apply the Common Law without regard to the dictates of Brussels.



Stephen Todd

Having been taught tort 25 years ago from *Fleming & Salmond*, in which few New Zealand cases rated a mention, I initially approached *Todd*, and its hint of jingoism, with misgivings. Discerning and following the "genius of the nation" is the job of politicians not Judges. Common Law depends for credibility on coherence with tradition and international consistency. If the development of Tort in New Zealand were controlled by the nationality of our Judges, its credibility, and ultimately that of the Judges themselves would be undermined. Allowing free play to personal predilections or characteristics (of nationality, religion, gender or bodily dimensions) must quickly lead to the OJ Simpson syndrome – your case is decided by the selection of your adjudicator.

Hamlin's case provided an important integrity test, and Todd treats it at length. The Common Law is shown to accommodate the different outcomes in *Hamlin* and *Murphy* in light of differences between the New Zealand and United Kingdom environments enumerated in the Court of Appeal decision in *Hamlin* with approval of the Privy Council. I am not sure the authors of *Todd* agree with this simple analysis; they discern a "policy choice" in *Hamlin* rather than a factual distinction. There is a broader question whether there is any real difference between the reasoning process in *Anns* and *Murphy*. The mere fact that New Zealand Judges and commentators are troubled by that question gives reassurance that principle underlies the policy choices.

When a general practitioner reviews a legal text you cannot expect learned appraisal, or, indeed that the reviewer will wade right through the book. I have dipped in, looking up first (quite idiosyncratically), two New

Zealand cases which intrigue me. The first is *Capital Motors v Beecham* in which an unskilled representator making a statement concerning matters of public record in the course of selling a car in his business, was held to owe a duty of care to the representee in terms of the law of negligence. The case was included in the 1st edition, which I had to use to help find it, as it is not in the case index in the 2nd edition.

Coincidentally I had exactly the same experience with the second case of *Holman Construction Ltd v Delta* which held that a carelessly prepared quotation for the supply of timber, relied on by a builder in formulating a tender, gave rise to no liability when the timber supplier withdrew its quotation before the builder accepted it, but after the builder's tender had been accepted.

Both these minor cases are noted uncritically, although of course the first has been overtaken by the Contractual Remedies Act 1979, and the second seems inconsistent with *Abrams v Ancliffe* (which I could not find). More important cases such as *Hamlin, Trevor Ivory* and *Baigent* are the subject of full treatment including carefully written "appraisal" sections.

Each of 16 main Tort categories is introduced with an outline giving its context and the essential ingredients of the cause of action. Negligence requires three full chapters. Eight separate chapters deal with general matters such as remedies and defences. This is, like the 1st edition, a lucid account of the law of Torts for New Zealand lawyers and students. The authors have taken pains to achieve clarity, and the writing style and layout are well adapted to that end. An innovative feature is their use of diagrams to illustrate lines of redress available in relation to defective chattels and defective buildings.

My only real grumble relates to the index. In addition to the omissions I have mentioned, it should also be noted that *Hamlin's* case and *Baigent's* case are indexed only under their proper names (*Invercargill CC v Hamlin* and *Simpson v A-G*). If you want to find Mr Ivory's case, you have to remember his Christian name is Trevor. Index references, when found, are to sections rather than individual pages. The weak index detracts from the convenience otherwise offered by writing so compendious. A neat solution would be to offer purchasers a CD option, as Brookers now does with *Staples*.

The 1st edition ran to 956 pages, and cost $160 paperbound in 1991. The 2nd edition contains 1316 pages, and has an "introductory" price of $144. It is interesting to reflect that were *Todd* a loose-leaf service, subscribers would have been charged vastly more that for the update pages alone, at the current rate of about 70c per page.

Don't wait for the CD – buy the book.

Don Sweet

THE LAW OF CONTRACT IN NEW ZEALAND

by Burrows, Finn and Todd
Butterworths

It is easy to review a book by stating what it is not. It is however not a criticism that this book is not an exhaustive treatise on the law of contract. It does not traverse the entire Commonwealth case law and literature on the points it discusses, nor does it turn over the intricacies of every aspect of contract law or delve into the detail of the philosophical conundrums which beleaguer much of contract law.

These observations simply define the nature of the book. It is a comprehensive examination and explanation of the general principles of contract law which pays particular attention to those matters which are of importance in New Zealand. The text is of particular use in this last respect. Whilst the foundations of contract law are the same as those of its English progenitor there is a substantial overlay of indigenous law of both statute and cases. The obvious example is the body of contract statutes passed in the late seventies and early eighties around which have developed a substantial body of case law. In this text can be found probably the most comprehensive and helpful single discussion of these statutes and the corresponding difficulties.

The traditional textbook style is adopted whereby the authors discuss the principles of contract and proceed to a more detailed analysis of the law. Whilst it might be observed that a more critical, thought provoking, or arguably transaction oriented approach might have been adopted, I think that this would miss the point. This reviewer considers that, from a pragmatic point of view, an orthodox approach is indispensable. Without detracting from the fundamental importance of discussing the basis from which our current system proceeds, we still need people to learn, explain and administer the law as it stands.

Although this book has made a clear decision to depart from its predecessors, the structure is largely unchanged. Indeed parts of it bear a striking resemblance to the now grimy sixth edition which saw me through law school. If a criticism can be made it is that it tends to be more backward than forward looking. Whilst the importance of historical context ought not to be underestimated it needs to be balanced by discussion of the impact of current developments and likely direction of the law.

One area which springs to mind in this regard is the discussion of equitable estoppel. Most of the discussion of the doctrine focuses on the history and traditional limitations on the doctrine. Discussion of the developments beginning with *Walton Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513 is less extensive and does not explore in any real depth some of the issues underlying estoppel, such as whether there is one doctrine of estoppel or many, and the relationship between unconscionable conduct and estoppel. It also seems unfortunate that the section discussing the modern doctrine of estoppel is entitled "the future of equitable estoppel" when it appears that that future is well and truly upon us.

I also found the inclusion of the chapter entitled "Privity of Contract under the Law of Agency" unusual in light of the fact that the rest of the book discusses principles of general application. The chapter appears to go well beyond issues of privity alone and discusses in some detail issues of formation and termination of the agency. I would have thought that this was appropriately left for a textbook on special contracts like *Butterworths Commercial Law in New Zealand* which has a chapter on agency by the same author. It also appeared that there was an element of overlap in some areas between the different authors. For example the chapter on conditional contracts discusses waiver of conditions in substantially the same terms as the chapter dealing with discharge of obligations by agreement.

These criticisms are minor when viewed alongside the achievements of this volume. As has now become expected of this work it maps the entire landscape of contract law in New Zealand in considerable detail. What is more it does this with meaningful discussion of both the principles which

underlie the law and the historical origins of those principles.

This book has become, and will remain, a cornerstone of the study and practice of contract law in New Zealand. It is a significant achievement that this book is useful as a student text, a legal reference source, and a scholarly work. Anyone who needs a comprehensive understanding of the law of contract as it stands in New Zealand today, at any level, should have recourse to this book.

Duncan Webb

WEBB AND MOLLOY PRINCIPLES OF THE LAW OF PARTNERSHIP

Butterworths

The previous edition of this volume has long been recognised as the leading New Zealand text in this area. This has been confirmed by the sixth edition. The contributions of Tony Molloy QC and a conscious decision to write for the practitioner rather than the student has resulted in a comprehensive text which deals with practical issues. The authors do not shy away from addressing the difficult and, at times, technical issues of partnership law. Occasionally the more academic roots of the book can be seen. One example is the extensive discussion of a number of nineteenth century cases decided in the wake of Bovills Act (now reflected in ss 5 and 6 of the Partnership Act 1908). The discussion, whilst interesting, is only of marginal relevance to the interpretation of the law today.

The addition to the work of chapters on taxation of partnerships and floating partnerships enhances its reputation as an indispensable reference work in the area, although the latter chapter is a little brief. The book can also be praised for the attention paid to New Zealand perspective. Partnership law is affected by numerous statutes which are unique to New Zealand. The relationship of the Matrimonial Property Act to the Partnership Act 1908 is one example and the matter is considered in a number of places, including a useful discussion on matrimonial property and other issues arising from family ventures.

Any work of this nature must, of necessity, cover a vast area. This work covers such diverse matters as securities regulation, matrimonial property, fiduciary relationships, constructive trusts and taxation. The price of such scope is, inevitably, some loss of depth and accuracy. The chapter on joint ventures will serve as a useful starting place for research but, unlike other parts of the book, is unlikely to provide many definitive answers. The same can be said of the discussion in chapter three on the responsibilities of partners as recipients or conduits of illegitimate funds under a constructive or resulting trust.

Anthony Molloy QC

The existence of such failings is, however, compensated for by the provision of detailed footnotes which lead the reader to other reference works and primary materials. The bibliography at the commencement of the volume is also a welcome addition which could usefully be adopted in other texts. This book is an indispensable addition to the shelves of anyone who practises in the area. It is also a necessary addition to any law library.

Duncan Webb

COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND – ITS RISE AND FALL

By I B Campbell

Auckland University Press

On 1 April 1974 New Zealand introduced an "epoch-making" no-fault accident compensation scheme. In 1992 this scheme was substantially restructured in the controversial Accident Rehabilitation and Compensation Insurance Act 1992. For Dr Campbell the former heralded the rise of compensation for personal injury referred to in the title of his book, while the latter was a clear signpost of its fall.

Dr Campbell sets the tone for the text at the outset, quoting Harrison's description of the 1992 legislation as "inherently both a betrayal of fundamental constitutional principles and a recipe for serious injustice", and as "a blot upon the statute book". (p 1) The text examines whether these condemnatory words are justified and, in the end, the author has no difficulty in concluding that they are.

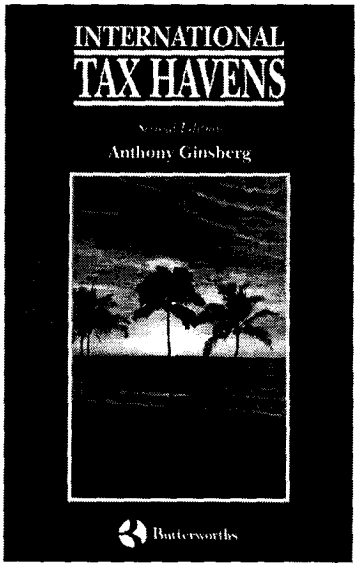
Dr Campbell traces the genesis of compensation for personal injury from the nineteenth century "doctrine of common employment", through the successive efforts at reforming the defects of that doctrine leading up to the era of the Worker's Compensation Acts (1900-1972). These were all merely a prelude to the Woodhouse Commission in 1967, which set down five guiding principles for Accident Compensation – community responsibility, comprehensive entitlement, complete rehabilitation, real compensation and administrative efficiency – and led to the establishment of the Accident Compensation Commission (later Corporation) in 1972.

The real launching point for this book, however, is the 1992 Act, which in the author's view wrought a "savage attack on a system of compensation which, although not perfect, was serving many well". (p 138) Dr Campbell subjects key concepts in the 1992 Act, such as experience rating, to detailed scrutiny. He also examines issues of disease and compensation, the link between compensation and prevention and the economics of compensation in general.

When considering the prescription for the future of Accident Compensation, the author asks:

> Whose interests will be paramount? Should it be the injured and the dependants of those killed, or the providers of the funds?

In posing the issue in this way, Dr Campbell tends to focus the debate on the presumed conflict between the interest of funders and claimants, rather than directly on issues of institutional design and delivery. In key areas of the text, analysis resolves itself into a conflict between compensation advocates (typically unions, academics, law reform associations and accident compensation lobby groups), lined up against those said to be interested primarily in cost containment (notably employers, Government, the Business Roundtable and Treasury). Dr Campbell's own views on whose is the correct



approach are never in doubt. Citing Blackstone's dictum: "It is better that ten guilty persons escape than one innocent suffer", Dr Campbell leaves the reader with the following thought (p 257):

> So is it not better to place emphasis on ensuring that no deserving claimant goes uncompensated rather than on making certain that the undeserving are not compensated?

While this is an admirable sentiment, it could equally be argued that the costs (including unintended effects on behaviour) of a system of compensation are relevant to the system's fairness and ultimately its sustainability. Clearly a system which delivered benefits to 90,000 opportunists and cheats for every 10,000 genuine claimants would not be a laudable achievement, however pure its motives.

Dr Campbell's book reflects a passionate interest in, and virtually a lifetime of service devoted to, the development of a fair system of accident compensation in New Zealand. Accordingly it contains much insight on this difficult subject. In particular, Dr Campbell identifies that the pay as you go approach, which has led to a substantial and burgeoning unfunded liability, has been a source of many problems. The author also points out that there has been an unfortunate tendency to attempt to achieve cost control by parsimony, at the expense of claimants, when a proper focus on prevention and rehabilitation would yield far better results.

Few would anticipate that, with the 1992 reforms and the more recent 1995 amendments, we have come to the end of the road for accident compensation law reform. Dr Campbell's book will be of considerable interest for those concerned about the future of compensation for personal injury in New Zealand, as well as its past.

Ross Pennington

INTERNATIONAL TAX HAVENS

Second edition

by Anthony Ginsberg

Butterworths

The difference, begins Ginsberg quoting from Mortimer Caplin, between a tax collector and a taxidermist is that the taxidermist leaves the hide. He then sets out in this book how one can best preserve one's hide, and possibly some flesh and blood as well.

The book avoids getting bogged down in the details of the laws of various tax havens, and instead seeks to give a reasonably detailed overview, with examples, of how various tax havens can be used to minimise taxes, provide asset protection, and give financial flexibility. Twenty-four jurisdictions are covered ranging from Antigua to Vanuatu. To assist those who find themselves in the position of Lord Palmerston who complained that the colonies were multiplying so fast he had to "keep looking the damned places up on the map", several maps of the globe are set out in the book and the locations of the tax havens covered in the text are identified.

The book is divided into three parts. Part A discusses how to use tax havens and who can benefit from them. It discusses the criteria for choosing a tax haven, financial techniques for using tax havens, and the role of tax havens in international finance. There is a good general discussion on the use of tax havens, not just in a tax context, but also for asset protection purposes. In that regard, the effect of excessive litigation, particularly in the United States, is noted and ways of insulating and protecting assets are discussed. Some interesting practical examples are given; for instance, both to protect assets and prevent opposing parties tracing where they have gone, it is suggested that US persons route financial transactions through Iran as a fail safe technique. One can fairly confidently assume that the Iranian banking system does not supply transaction details to US federal authorities or litigants. In the case of British citizens or corporations, Argentina (still no doubt smarting from the Falklands war) is suggested as a suitable transitional jurisdiction.

Part B discusses, jurisdiction by jurisdiction, the 24 tax havens covered. The book seeks to give a feel for how each particular tax haven operates, the specialities of the tax haven (asset protection, shipping, insurance, access to treaty networks, etc), and deals with the form of business organisations in each jurisdiction. The views of leading professionals in the relevant tax haven are set out and discussed in an interesting and informative way.

For the New Zealand reader, the commentary on the Cook Islands makes for interesting review. Ginsberg observes that until 1988 up to two thirds of the business flowing through the Cooks came from New Zealand and Australia, but notes that the 1987 stock market crash and the Draconian anti tax haven laws introduced in Canberra and Wellington about that time slashed that flow of funds. It now appears that the Cook Islands tax haven business is principally driven by funds from Hong Kong, Indonesia and mainland China. Evidence of this trend is that Hong Kong and Shanghai Bank is the latest member of the finance centre, following its purchase of a trust company in Raratonga. The particular benefits of Cook Islands asset protection trust legislation are discussed.

To take another example: the Netherlands Antilles. After noting that it forms part of the Kingdom of the Netherlands, Ginsberg discusses how to structure to take advantage of the Dutch treaty network, and comments on innovative aspects of the jurisdiction's bare boat charter law. Those not looking forward to another New Zealand winter, could do worse than read up on the retiree incentive programme which comes complete with a flat 5 per cent tax capped at $31,500 and the not too onerous requirement to employ a local maid or gardener.

On which subject, Lord Tomlin's remark in the *Duke of Westminster* case (which concerned payments to his gardener) that taxpayers are not under any obligation, moral or other, to enable the Revenue to put the largest possible shovel into their stores is cited with evident approval, and astute, but legal, action to prevent such depletion is firmly recommended.

Part C, is relatively short, deals with issues peculiar to South African emigrants and is unlikely to be of wider interest.

Ginsberg has produced a very readable book, containing a good overview of the area and feel for the relevant jurisdictions. It should be of interest to all commercial and tax practitioners dealing with the affairs of clients over several jurisdictions or with cross border transactions.

Lance Heenan

CORPORATE RESCUE: INSOLVENCY LAW IN PRACTICE

by David Brown,
John Wiley & Sons, (UK)

According to the House of Lords English law has developed a so-called "rescue culture" which, it is said, seeks to preserve viable businesses. Indeed, the House of Lords considers that this "rescue culture" is so significant that the Insolvency Act 1986 (UK) (to which, it is said, this "rescue culture" is fundamental) should not be interpreted in a manner which would produce a result which rendered any attempt at rescue either extremely hazardous or impossible. (*Powdrill v Watson* [1995] 2 All ER at 76).

The provisions of the Insolvency Act 1986 (UK) which brought about this "rescue culture" primarily relate to the voluntary administration procedure developed from recommendations contained in the Cork Report. Later, recommendations to similar effect were made in Australia through the Harmer Report. In the words of the Harmer Report the stated object of a voluntary administration is to achieve –

> ... a more advantageous realisation of the company's assets than would be effected by an immediate winding up or the continued existence of the company or the whole or a part of its business. (Ibid para 59)

Despite attempts since at least 1988 (in December 1988 the Law Reform Division of the Department of Justice released a discussion paper dealing with insolvency law reform entitled *Insolvency Law Reform: A discussion paper*) to generate a general insolvency law review in New Zealand no detailed review of either corporate or individual insolvency law has taken place in this country during that time. The review is a little like a patient in an intensive care ward. It currently lies in a comatose state in the Ministry of Commerce: time will tell whether it will see the light of day again or whether it will be allowed a dignified death.

Other countries have adopted legislation which enables corporate rescues to take place. Among the more prominent types of legislation can be listed Chapter 11 of the UK Bankruptcy Code, the provisions of the (Canadian) Bankruptcy and Insolvency Act and the (Canadian) Companies Creditors Arrangements Act and, in South Africa, the judicial management provisions of the (South African) Companies Act 1973. There are similar types of procedures available in the civil law countries of Europe; the most prominent among these being the *redressement judiciaire* regime in France.

When reviewing Philip Smart's book *Cross-Border Insolvency* back in 1992 I said this:

> With increased reliance upon overseas trade, we have, in New Zealand, an increasing need to be better informed of the legal principles which apply when an individual goes bankrupt or a company goes into liquidation and there are assets and/or creditors in more than one jurisdiction. ([1992] NZLJ 435)

With the passage of time, that comment has probably increased rather than decreased in significance. However, the nature of this text makes it unlikely to find its way into the libraries of many law firms in this country.

David Brown's book is of almost encyclopaedic proportions and runs to 878 pages. Primarily it discusses English legislation in the context of administration orders made under the Insolvency Act 1986. However, the author discusses also other forms of rescue procedures available under English law. He concludes that portion of the book with a useful analysis of reasons for the low use of administration orders and company voluntary arrangements in England. Proposals for reform are also made. These analyses and proposals will be useful to law reformers in New Zealand.

Subsequent parts of the book, ie from p 689 on, provide a useful comparative analysis of corporate rescue procedures available in other jurisdictions: notably, the United States, Canada, Australia, South Africa, Singapore, Japan, China, Vietnam, France, Germany, Ireland and Eastern Europe. Although Mr Brown is now lecturing at Victoria University of Wellington, there is no reference to New Zealand provisions which might be considered as providing a basis for corporate rescue; eg Parts XIV and XV of the Companies Act 1993. The lack of a reference to the statutory management procedure under the Corporations (Investigations and Management) Act 1989 or the Reserve Bank of New Zealand Act 1989 is also perhaps surprising.

The fact that the text does not refer to New Zealand legislation makes it of limited value to local practitioners. The cost of the book is also likely to be daunting to many.

On the more positive side, the book is a valuable resource which deals in a comparative way with a number of different rescue procedures. The book will be of great assistance to law reformers, academics and those who have an involvement in cross border insolvency issues which might need to take account of the provisions in the legislation to which Mr Brown refers.

While the scholarship of Mr Brown's work cannot be doubted, its general utility in New Zealand can. However, I suspect that the book will find a limited number of shelves upon which to be displayed; probably the shelves of a few law libraries, major law firms and Government agencies involved in insolvency law reform.

Paul Heath

DISPUTES TRIBUNALS OF NEW ZEALAND

Peter Spiller
Brookers
$24.95

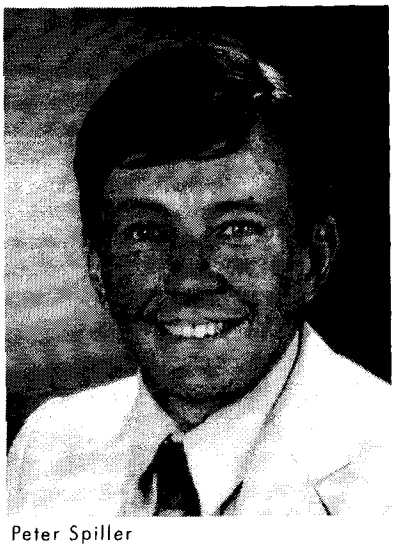
Professor Spiller has written a comprehensive and informative book describing the purpose, procedure and jurisdiction of the Disputes Tribunals, and the people involved in their proceedings. This is a scholarly text which would be instructive for many readers, including academics interested in the small claims tribunal movement, law and other students, Disputes Tribunal Referees and Court Registrars, Citizens' Advice Bureau and Community Legal Service advisers and anyone interested in alternative dispute resolution. It begins with a brief introductory chapter on the history and nature of small claims tribunals as a response to a perceived need for inexpensive, accessible, speedy forums for dispute resolution, free from lawyers and technical rules of law.

Chapter 2 focuses on the Referees, the judicial officers of the Tribunals. The author notes that the effectiveness

and credibility of the Tribunals depend almost entirely on the quality of the Referees so this is an important chapter. It is interesting to learn that 13 of the first 15 Referees appointed were non-lawyers, but now one quarter are legally trained. It is perhaps disturbing to learn that despite training having been considered inadequate in 1986 the improved training instituted in 1988 suffered from the mid-1990s cuts in expenditure, although it is now apparently being reinstated. Referees have not been awarded an increase in remuneration since 1988 and are paid only for Tribunal sitting time, not for preparation of reserved decisions or appeal reports or for research. It would be of interest to know more about their support and resources.

The author notes in ch 5 (on proceedings) that it is the duty of the District Court Registrar to ensure assistance is reasonably available from the Court staff to intending applicants, to enhance accessibility and efficiency of operation. Thus Court staff have a responsibility for the Tribunal's "user-friendly" image. It seems the Tribunals are under-utilised by Maori and Pacific Islanders, and evening and marae hearings have been suggested to rectify this. The objective of the proceedings is that they be simple, informal and fair. The rules of natural justice, particularly *audi alteram partem*, apply. Referees have an inquisitorial role and may make their own investigations, and also have an initial mediation role pursuant to s 18 Disputes Tribunals Act 1988 to assist the parties to negotiate a settlement where appropriate.

Chapter 6 looks at this mediation function and the author notes that its success depends on various factors, including the type of dispute and the skills of the presiding Referee. About one quarter to one third of cases are settled. In the event of no settlement the Referees are given wide discretion in making a judicial decision. They determine the dispute according to the substantial merits and justice of the case, with regard to the law, but are not bound to give effect to legal rights, obligations, forms or technicalities. They can make a variety of orders, and grounds of appeal are limited to cases of procedural unfairness, so there is no appeal on the merits (s 50 of the Act, discussed in chapter 8 on further proceedings). Nor can errors of law constitute unfairness in the conduct of proceedings as the High Court confirmed in *NZI Insurance v Auckland District Court* [1993] 3 NZLR 453,



Peter Spiller

solving the previous District Court divergence of opinion. This is in keeping with the aims of simplicity, speed, commonsense decisions and finality.

Throughout the book there are a number of citations from District Court judgments on appeal and from the *NZI Insurance* case, from which the author has distilled the legal principles. There are many other references in detailed footnotes for further reading. The final chapter (9) outlines five disputes, their outcomes and a comment which demonstrate how the Tribunal works in practice, and could be useful for trainee Referees.

The book is essentially descriptive and factual. It thoroughly examines the main aspects of the Disputes Tribunals' procedure and jurisdiction. It would have been interesting to know to what extent the procedure, the non-legal decisions and the limited grounds of appeal conform with the expectations and needs of the parties. Professor Spiller has noted the tensions arising where a commonsense tribunal model has been created in a legal context. But he has not addressed the normative questions at issue, nor has he questioned assumptions made as to the policy of establishing informal, commonsense tribunals. Clearly the Disputes Tribunal system is a solution (though not necessarily the only solution) to problems of inaccessibility, expense and delay in the Courts. However Professor Spiller has drawn attention to the importance of the skills and attitudes of the Referees in such a system, and thereby impliedly the need for governments endorsing the Disputes Tribunals to ensure that they are adequately resourced, and that their Referees receive adequate training and support.

Janet November

BRIDLED POWER

by Geoffrey Palmer and Matthew Palmer

Oxford University Press

In this third edition of his seminal book, *Unbridled Power* (1979 and 1987), Sir Geoffrey Palmer is joined as co-author by his son, Dr Matthew Palmer, Deputy Secretary at the Ministry of Justice. The authors are advocates of the new electoral system and contend that with MMP "New Zealand government is less skewed in favour of efficiency of decision-making and more encouraging of democratic representation and dialogue". (preface) Hence the new title: *Bridled Power*.

This edition reflects the constitutional and governmental change that has occurred. Each chapter has been substantially rewritten. The chapter on the Crown notes the republican debate; that on the public service details the changes wrought by state sector restructuring; there is new material on Crown entities and public finance; the chapter on the Ombudsmen details the proliferation of complaints agencies. New chapters deal with MMP, the Bill of Rights Act, local government, the media and public opinion, and international law. The Treaty now commands a separate chapter, having received no mention in 1979 and only passing attention as a check on government in 1987.

Bridled Power provides an overview of the governmental system. Extracts are given from statutes, the Standing Orders of the House, the Cabinet Office Manual and other government documents. It is easy to read and it provides a wealth of interesting information – from lists of Cabinet Committees, ministries and departments, to details of chief executives' responsibilities and financial reporting requirements. Pitched at the general reader, *Bridled Power* will nevertheless be of value for students of public law and political science and will undoubtedly be consulted by specialists in these fields.

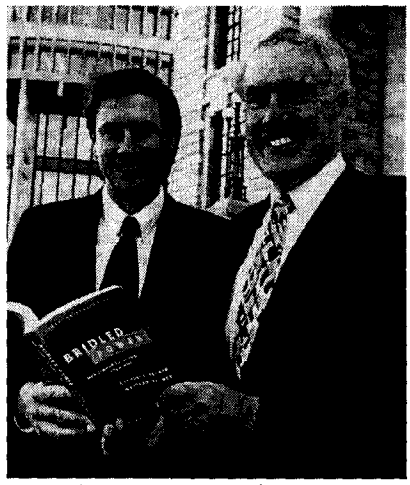
If *Bridled Power*'s strength is its convenient summary of the machinery of government, this might also be seen as a weakness. The authors detail government processes, but at the expense of constitutional principles. There is an emphasis upon the "here and now", but often little in the way of historical perspective. Attitudes may be as important as laws, but there is no attempt to

evaluate the changes in public expectations and political culture that have occurred since 1979.

Bridled Power does not pretend to be a legal text. Readers wishing to understand the fundamentals of our constitution may be advised to consult Joseph, *Constitutional and Administrative Law in New Zealand* (1993), where concepts are given priority over institutions, and distinct chapters are given to basics such as parliamentary sovereignty, the separation of powers, the rule of law, and constitutional convention. *Bridled Power* provides a quite satisfactory outline of relevant law, but omits the historical or legal context necessary to understand it. The entrenched provisions of the Electoral Act 1993 are recited (p 21), but without mention that these provisions are singly entrenched or what this might mean. The authors duly note the importance of s 9 State-Owned Enterprises Act 1986 for the *New Zealand Maori Council* case (p 282), but here too Joseph's text will need to be consulted for discussion of *Te Heuheu Tukino* and the orthodox approach to the incorporation of treaties into municipal law.

Bridled Power is descriptive rather than analytical. The authors recount how Roger Douglas offered to resign as Minister of Finance in 1986 after copies of his budget were prematurely disclosed (pp 75-77), but they offer no analysis of his misunderstanding of the modern concept of individual ministerial responsibility. They draw an analogy with Canada replacing its unentrenched Bill of Rights with a Charter of Rights and Freedoms having the status of supreme law (p 277), but do not mention the quite different judicial approach to New Zealand's unentrenched version. When the authors claim a republic would be a "formidable legal and constitutional undertaking" (p 51), they ignore significant Australian and New Zealand argument to the contrary. They cite the Governor-General having emphasised the limits of his office, but repeatedly suggest "it is likely that the Governor-General will have more power under MMP". (pp 13, 32-3, 47-8)

The major proposal of *Bridled Power* is that New Zealand adopt an entrenched written constitution. An illustrative appendix is offered, amalgamating the provisions of the Constitution Act and the Bill of Rights Act and incorporating the Treaty of Waitangi as originally proposed in the



Dr Matthew and Sir Geoffrey Palmer

1985 Bill of Rights White Paper. There is a slew of minor proposals: review of the Audit Office, making parliamentary privilege justiciable, more consistent legislative drafting, a register of MPs' interests, a more focused Local Government Act, extending the Attorney-General's functions under the Bill of Rights Act, and involving Parliament in the treaty-making process.

This third edition displays considerably less passion and reformist zeal. This may of course be the result of so much of what Sir Geoffrey proposed in 1979 and 1987 having been achieved! An entrenched constitution must be considered unlikely and, compared with previous editions, the other reforms proposed appear somewhat negligible. In *New Zealand's Constitution in Crisis* (1992, pp 17-18) Sir Geoffrey suggested that Cabinet ministers should cease to be MPs upon taking office and should be replaced by party list candidates. This grand design fails to resurface in *Bridled Power*, which is altogether a more serious book, with the call for an entrenched constitution more hesitant. The second edition included interesting material relating to Palmer's experiences as an MP and a Cabinet minister. This has been deleted and the personal anecdotes and insights in *Constitution in Crisis* are not repeated. This is a pity as Sir Geoffrey's significant role in the parliamentary and constitutional reforms outlined is not at all apparent from this book. His unique perspective as a former Prime Minister and key political actor might have been more fully utilised.

Bridled Power suffers from the usual minor blemishes. This reviewer cannot help but notice the reference to his own article, "The Governor-General and MMP" [1996] NZLJ 213, is incorrect. The 1996 Standing Orders are consistently dated as 1995. (pp 125, 145) More seriously, the text makes numerous references to specific Standing Orders, but in the majority of instances these references are incorrect. SO's were amended and renumbered in August 1996.

There is no bibliography and the footnoting is less than extensive. Students relying on *Bridled Power* may be frustrated by the lack of detailed sourcing or further reading; even the general reader may wish to follow up a particular point or topic. The discussion of republicanism makes no mention of the most important New Zealand and Australian texts, namely Trainor (ed), *Republicanism in New Zealand* (1996) and Winterton, *Monarchy to Republic* (1994). The allocation of 17 pages to an illustrative appendix may be questioned in this context.

Of more moment is the delay in publication. The preface is dated August 1996, but *Bridled Power* only reached the bookstore in May 1997. These nine months spanned some of the most important political events of recent times. The first MMP elections were held in October 1996 and the present coalition government was formed in December. *Bridled Power* is subtitled "New Zealand Government under MMP". Likely changes under MMP are a major focus of the book. The authors had two options: to complete and publish in advance of the elections (Boston et al, *New Zealand Under MMP*, 1996), or to defer publication and incorporate the results of the elections and the formation of the first MMP government. Miller (ed), *New Zealand Politics in Transition* (1997) and Mulgan, *Politics in New Zealand* (1997) were each available for sale two months before *Bridled Power*, yet both covered the 1996 elections and the present coalition government. *Bridled Power* stops at August 1996 and is thus already dated.

The authors claim MMP will result in less legislation, a less dominant executive, more accountable ministers, and greater dialogue among parliamentarians. They suggest: "Through encouraging government by more than one political party, MMP is likely to lead to more debate, more consensus, and more national dialogue about government policies before they are enacted". (p 309)

Other commentators are less sanguine. *New Zealand Under MMP* predicted that executive power would remain concentrated even with more than one political party represented in

Cabinet. (p 180) Professor Mulgan commented earlier this year:

> The extent of the change should not be exaggerated. Negotiation and the search for consensus were not uncommon under the previous system. Parties which aspired to win a majority were compelled to appeal to a diverse range of voters .... New Zealand still retains many of the features identified" with "majoritarian" systems, such as the fusion of executive and legislative power in the Cabinet, a single-chamber Parliament, a "unitary" system of government and the absence of a written constitution with judicial review. (*Politics in New Zealand*, p 327)

Bridled Power provides an admirable outline of our current constitutional arrangements. Other books mentioned in this review offer greater historical context, more discussion of constitutional principle, more up to date information, more bibliographic material, and more cynical or realistic attitudes towards MMP. The clarity of writing, the wealth of useful information, and Sir Geoffrey's influence upon the constitution of this country, are, however, such that *Bridled Power* will remain important reading for all who are interested in the shape of New Zealand government.

Andrew Stockley

THE NEW ZEALAND EXPERIMENT: A WORLD MODEL FOR STRUCTURAL ADJUSTMENT?

By Jane Kelsey

Auckland University Press

Kelsey's book (the second edition) is a wide ranging criticism of what she terms the "structural adjustment" implemented by successive New Zealand governments since 1984. Kelsey maintains that monetary, fiscal and labour market deregulation has not been a "success" at all in terms of its social and economic outcomes. Like many of the participants in the debate regarding deregulation, Kelsey concentrates on the economic, and social rather than the legal consequences of reform. Given Kelsey's status as an associate professor of law, and the journal in which this review appears, it is worthwhile to examine her book from a legal standpoint.

However, a legal analysis largely involves reviewing what the book leaves unsaid: nowhere does the author address the important legal and constitutional ramifications of economic restructuring. This is perhaps not unexpected, for I suspect that Kelsey would be unable to reconcile her professed desire for self-determination with the restrictions on individual liberty which are the hallmarks of an interventionist welfare state. As de Jouvenel commented, "income redistribution has come to mean less a redistribution of free income from the richer to the poorer, as was intended, than a redistribution of power from the individual to the state" (The Ethics of Redistribution, 1951). Although the connection between state power and welfare has long been recognised in classical liberal theory, which has always stressed the interconnectedness of economic freedom and freedom in all other areas of life, Kelsey never directly addresses this.

the rule of law (in the sense of government being bound by rules, as opposed having mere legal power) and Kelsey's interventionist state are mutually exclusive

Yet she acknowledges it in an abstract way. Most telling is her analysis of the reasons for the defeat of Muldoon in 1984, where she observes (25-26) that "[i]ndustry, financial institutions, Maori, home owners and workers were all impatient with Muldoon's economic interventions and political authoritarianism ... Muldoon was deeply identified with the strong, interventionist central state, [and] it was not surprising that the anti-Muldoon sentiments were often also anti-state". However, what Kelsey does not concede, is that political authoritarianism and intervention are not historical accidents, caused by individuals like Muldoon, but are rather the inescapable consequence of government attempting to manage an economy in the pursuit of social goals.

For example, Kelsey endorses a "Social Responsibility Act", which would focus on outcomes such as "adequate protection for the least advantaged and most vulnerable citizens [and] the greatest possible opportunities for worthwhile work of a safe, sustainable and meaningful nature". (p 389) However, the *legal* danger of government setting such vague social goals, and then attempting to achieve these by directly managing economic conditions (eg Kelsey recommends controls on foreign investment, in order to channel funds into "genuinely productive enterprises") is that this process cannot be achieved by the use of genuine rules, but rather requires the exercise of unbounded discretionary power. In this respect, it is not surprising that many of the most coercive measures of the Muldoon era (the wage and price freeze, carless days etc) were made under the Economic Stabilisation Act 1948, one of a number of statutes of that era which conferred substantially unfettered power on the Executive.

The legal and constitutional objection to government by discretion is not that it is economically efficient or inefficient, but that it does not involve government acting in accordance with legal rules. Indeed, as a scholar of jurisprudence, Kelsey would be aware of Lon Fuller's warning in *The Morality of Law*, that where a society is governed by discretionary commands, rather than rules, it results not in a bad system of law, but something that is not properly called a legal system at all. In this sense, legislation which aims at "adequate protection for the least advantaged" is not a law in the true sense of the word; it is merely government empowering itself to redistribute property in the most arbitrary and undemocratic manner. In this way, the rule of law (in the sense of government being bound by rules, as opposed having mere legal power) and Kelsey's interventionist state are mutually exclusive. It is significant that throughout the book, Kelsey displays an aversion to government being bound by rules of any kind, calling for a more pragmatic and less principled approach to economic management. How this could be achieved without running into the same constitutional dangers that marked the delegated legislation of the 1970s and 80s is not addressed.

Accordingly, the major flaw of Kelsey's argument is that although she criticises previous governments for being authoritarian, the economic and social programmes she proposes carry the same implicit danger. If the book is to be persuasive, the author needs to address the legal, as well as the economic, consequences of her beliefs.

Adam Mikkelsen

TRADE MARK VALUATION

by Gordon V Smith

John Wiley and Sons (US)

The valuation of intellectual property is an increasingly important area both internationally and in New Zealand. For example Lion Nathan valued its trade marks at over NZ$2 billion in its 1996 annual report.

Smith's book defines and explains the various methodologies which can be adopted in valuing businesses and allocating or apportioning values to specific assets. Unlike tangible assets such as land and building or monetary assets such as cash and marketable securities, it is difficult to identify and allocate monetary returns to intangibles such as trade marks, patents, proprietary technology and other intellectual property.

Having been involved at a practical level in the United States in valuing businesses including trade marks, the author has a wide practical knowledge of the difficulties and pitfalls involved. He discusses and explains the three main valuation techniques which he defines as market value ie the present value of future benefits by obtaining a consensus of what others in the marketplace might have judged the value to be, cost value ie the cost of replacing the trade mark to an organisation or the preferred income approach.

The income approach values the property by measuring the present worth of the net economic benefit to be received over the life of the property concerned.

In attempting to do so, the difficulties in quantifying factors such as the income attributable to the trade mark, the duration of that income stream and the quantification of risk associated with the realisation of that income illustrate the complexities involved.

Various examples are given of values attributed to trade marks including an extrapolation of the value of the Marlboro brand cigarette in 1993 when Philip Morris reduced the price of a pack of the cigarettes by 20 per cent to counter the generic discount cigarette markets in the United States.

A one day loss in the value of Philip Morris stock by US$13 billion resulted in a value of US$65 billion for the trade mark before the price cut and US$52 billion afterwards.

The book is littered with interesting titbits such as this but ultimately one is left with the impression that despite the abundance of graphs and technical data the valuation of a trade mark remains an art rather than a science.

The book succeeds in its analysis of the various criteria for valuing trade marks and will be a valuable reference book but its concentration on the American market and American taxation and accountancy implications ultimately reduces its worth for New Zealand and other markets.

Edwin Hamilton

INTELLECTUAL PROPERTY LAW: GLOBAL JURISDICTIONS

Centre for International Legal Studies, Austria

This book provides a broad overview of intellectual property law in a number of major jurisdictions outside Europe. These include Canada, India, Japan, South Africa and the United States. It is divided into sections by country and each section deals serially with the same subject headings which include trade marks, copyright, patents, confidential information and trade secrets. The various sections are written by lawyers specialising in intellectual property in their respective jurisdictions.

The treatment of the subjects and the quality of content varies according to the idiosyncrasies of each individual author. Some chapters are limited to a general descriptive overview of the local law affecting the various rights including broad descriptions of the relevant statutes. Some chapters, notably the chapter on India, also contain more analytical material including a review of local case law.

The chapter on the United States is particularly interesting and reflects a judicial and statutory approach influenced by the peculiarities of a large technology driven economy and a heritage of anti-trust controls.

Of particular interest is a short section on the impact of technological advances on intellectual property rights. A key example is the pressure coming to bear on copyright law with the emergence of what is commonly described as the Information Superhighway and the increasing digitisation and digital transmission of copyright material.

Although broad brush in its approach, the book is an interesting illustration of the convergence of the rules governing intellectual property rights across jurisdictions even in cases where countries have not yet formally adopted the key international treaties and conventions.

For the New Zealand lawyer it provides an interesting handbook of the basic copyright rules in jurisdictions in which some of their clients are likely to be doing business. Whilst I am sure that we would not presume to give advice on the copyright laws of those countries, it is nonetheless extremely useful to be able to claim at least some familiarity with those rules in order to provide more insightful and efficient advice.

A very useful source book in this regard and eminently readable.

Con Anastasiou

LICENSING INTELLECTUAL PROPERTY – LEGAL, BUSINESS, AND MARKET DYNAMICS

by John Schlicher

John Wiley and Sons (US)

John W Schlicher currently practices law with Fish & Neave in its Palo Alto, California office and also lectures in patent law at Stanford Law School. Apart from his legal qualifications, he also graduated with highest distinction from Northwestern University majoring in chemistry. His current positions are just a chapter in an impressive career in the field with achievements too many to list here.

The book deals primarily with the United States but it provides valuable insights for practitioners in other jurisdictions, given the influence of the US conceptual approach to intellectual property rights.

The book starts by exploring the business and economic basis for licensing arrangements. It addresses the particularly difficult issues of whether or not the creator of intellectual property should exploit it or licence it and if the licensing alternative is selected, how the rights should be structured and priced.

The reader of this initial section would be helped by some rudimentary knowledge of economic theory as the section contains a healthy amount of formula driven analysis and graph presentation. This analysis provides a particularly useful basis for understanding the development of the law in the US which has always grappled with the tension between the protection of

intellectual property rights and the anti-trust ethic. Invariably judicial determinations as to the demarcation line between legality and illegality of a licensing arrangement has been a function of the economic consequences of the arrangements within the context of US anti-trust law.

The next major section of the book deals with US licensing law and its historical development. It absolutely bristles with case references. The discussion and analysis of the case law proceeds in a masterly fashion and clearly evidences the author's intimate and familiar knowledge of judicial determinations in the area.

The rest of the book deals with market specific situations such as tying and packaging arrangements; exclusivity; field of use; price and quantity restrictions and more.

All in all an extremely scholarly and learned work which should be in every serious intellectual property lawyer's library.

Do not be put off by the focus on the US jurisdiction. The business and economic analysis is not jurisdiction specific and is equally applicable to other countries including New Zealand.

The case law analysis whilst jurisdiction specific provides a valuable insight into the development of concepts and trends which have influenced the Courts in other jurisdictions.

Engrossing reading and highly recommended.

Con Anastasiou

HOLDING THE BALANCE:
A History of New Zealand's Department of Labour 1891-1995,
by John E. Martin
Canterbury University Press

Martin and his editors have made an excellent contribution to Labour history, recommended to anyone with an interest in the uses and abuses of government intervention, departmental regulation, and statutory control.

The substantial first chapter accounts for the Department's nascent days when the new Liberal Government created a "Bureau of Industries" in 1891, renamed the Department of Labour in 1892. With William Pember Reeves as the first Minister, and Edward Tregear as the first Secretary of Labour, the Labour Department emerged as the most distinctive of the Liberal Government departments, the very "hallmark" of liberalism. As Martin says (at p 24) "the Liberal Government's reputation for social reform largely depended upon the performance of the department".

At first, the Department was the "partisan advocate of labour", (61) an agency "controlled by a self-styled moral, decent, caring intelligentsia [with] boundless faith in the ability of voluminous and complex legislation to bring about socio-economic change, and a tradition of a massive administrative bureaucracy".

How did the Department counter Treasury's view that jurisdiction over employment contracts should rest in the District and High Courts?

Inevitably, after ten years with Seddon as Minister, the Department "matured" into a neutral position between employer and worker. A pro-labour source, captures Seddon's pragmatism: "Labour should have a share – but not too large a share". (62) With its inspectorate and geographically dispersed district offices, the Department accumulated statutory responsibilities, including some with only a tangential relation to employment. Martin quotes two departmental informants as saying, "so long as we were given the staff we wanted, we would run anything. [The Department] felt it had failed in its duty if, every single year, it did not produce some new legislation; we spawned legislation as a fish spawns roe" (122): barmaids' registration, inspection of footwear, discharged servicemen, immigration, weights and measures, apprentices, fair rents, housing, organisation of compulsory military training intake and so on.

A continuing theme is the Department's responsibility for the unemployed, peaking with the Depression and the Labour Government in 1935. Martin summarises their position:

> [The first Labour Government] identified socialism with an extension of the state and the increasing control of economic and social life through bureaucratic means, to ensure prosperity, full employment, and economic security. Its labour and industrial relations reforms put the seal on the progress set in motion by the Liberals nearly 50 years earlier, and established the framework for the next 50 years. (196)

Three salient points might be noted from Martin's excellent discussion of Labour's Depression-era unemployment manifesto: 1. "labour largely continued with or extended policies [of the Coates Government] under more favourable conditions" (197); 2. labour enacted the Social Security Act 1938 and thereby took thousands of men off the unemployment rolls – by transferring them to the new sickness benefit (209); and 3. there has been no more sovereign remedy for unemployment in New Zealand this century than war in Europe.

All in all, this is an excellent book, with over a hundred pages of useful charts, tables, and appendices. The editors have done a superb job with the text and in complementing Martin's historical prose – which perforce can be pedestrian – with lavish illustrations and cartoons. (Ten cartoons by Minhinnick alone, to recent caricatures of Holyoak, Kirk and Tom Skinner in the *New Zealand Herald*.) I must close with a more critical note. Although the book was "put to bed" in December, 1995, there is precious little discussion of the role of the Department in the coming of the Employment Contracts Act 1991. The story has been told before – notably in *Employment Contracts: New Zealand Experiences* (Harbridge ed, VUP 1993) – but it would have been useful to have the Department's view.

Did the Department set out to save a specialist Court? How did the Department counter Treasury's view that jurisdiction over employment contracts should rest in the District and High Courts? How was it that a personal grievance clause was inserted by law in every employment contract? Martin's final chapter, "New Directions", has two paragraphs on the Employment Contracts Act of 1991 [which "completely transformed the legal framework of industrial relations"], and there is no word on its genesis or any behind-the-scenes struggle on its contents.

That aside, this book adds to our understanding of New Zealand labour history, and takes a place alongside Howe's *Life of Edward Tregear* and Holt's *Compulsory Arbitration in New Zealand*.

Bill Hodge

THE DICTIONARY OF NEW ZEALAND BIOGRAPHY, VOL 3 1901-1920

Edited by Claudia Orange

Auckland University Press

Like volume one this third volume begins with the name of the patriarchal spiritual father of us all – Abraham. Perhaps amusingly, in both cases these first entries under that name are biographies of women. In this present case her maiden name was Martyn – Constance Palgrave Martyn (1864-1942). And a very interesting woman she was. Born in England, she came to New Zealand after her marriage in 1890. She is described as a community leader who "pursued an active career in voluntary social work" for more than 40 years. She was an accomplished sportswoman being an excellent equestrian, a tennis champion and a golf champion. She established the Palmerston North branch of the YWCA, founded the Plunket Society in the city, and for some 15 years was an elected member of the local hospital board.

Constance Abraham had a comfortable and respected life in New Zealand. Sadly the same cannot be said of the whole lifetime of the last entry in the volume, Zedlitz, George William Edward Ernest von (1871-1949). When he came here in 1901 as the first professor of modern languages at Victoria College, Wellington he had every reason to expect a successful and comfortable life. But he was German born. He had left Germany with his English mother when he was four and never returned. Nevertheless during the First World War a statute, the Alien Enemy Teachers Act 1915, was passed to force the Victoria College Council to dismiss him, which they had twice refused to do. Von Zedlitz never regained his chair, but he did finally receive recognition. In 1936 he was made professor emeritus and was also elected to the Senate of the University of New Zealand.

These two biographies illustrate the extraordinary variety of the 606 personalities in this volume. The indexing by categories enables readers to follow particular interests. Casual browsing also brings to light intriguing relationships and opens up lines of thought. The biographies of Sir Apirana Ngata (1849-1924) and Te Kirihaehae Te Puea Herangi (1883-1952) – Princess Te Puea – raises the question of a revision of understanding of the so-called Maori Wars, and of subsequent grievances. As Sorrenson points out, a great uncle of Ngata led Ngati Porou troops on the side of the Crown, ie the settlers, in the 1860s. Ngata himself was loyal through his life "to the Crown and Empire". Princess Te Puea however had a different heritage in the King movement. She pointedly stayed away from the 1940 Waitangi celebrations. She is said to have agreed with the comment of another Maori that "this is an occasion for rejoicing on the part of the pakehas and those tribes who have not suffered any injustices during the past 100 years".

There is inevitably a problem of what to include and why, in any work of this nature. The present volume, like volumes one and two, leans towards contemporary political correctness. For instance there is the entry on Van Chu-lin (1893-1946), a Chinese storekeeper. She came here illegally and spent her life behind the counter of her husband's shop in Wellington. The reason she is included is given as exemplifying "the plight of the immigrant Chinese woman" who endured "not only the eternal bondage to childbearing and family chores, but also the institutionalised prejudice which stigmatised her as an undesirable alien". No comment seems to be called for! Her husband however seems to have been a more interesting and significant character. It is noted that "he was much revered as the long term Wellington president of the Chee Kung Tong (Chinese Masonic Society) the overseas branch of the powerful Triad Society in China. This social and political organisation transcended the smaller clan associations". One would like to know more about him, particularly recalling other important Chinese figures such as Sew Hoy of Dunedin, Chow Chong in Taranaki, and Sam Chew Lain in Central Otago. In this volume however, Chun Yee Hop, despite the significance of his ethnic position, gets a mention only because he was the husband of Van Chu-lin. In this respect it is also amusing to note that of the 23 medical practitioners included 12 are women. In 1900 there were five women registered medical practitioners out of 711 – see entry for Daisy Platts-Mills (1868-1956). It would seem that in the 20 years covered by this volume the women who qualified must have made a proportionately extraordinary contribution to the health of New Zealanders.

For lawyers of course the volume has its own specific interest. As in the previous volumes there is a category called Law and Law Enforcement. This lists eight Judges from Alpers (1867-1927) to Skerrett CJ (1863-1929), and includes the infamous Edwards J (1850-1927) who is described by Bernard Brown as "undoubtedly the most controversial man to have sat on the Bench of the Supreme Court of New Zealand". Leaving the Judges out there are 23 legal practitioners in the volume. Interestingly most of them – some 16 in all – were also politicians. One, Annie Rees (1864-1949) wrote political pamphlets with her lawyer father. She was principally a schoolteacher but having obtained a law degree in her 40s she joined her father in practice in Gisborne for a few years. On his death however she returned to teaching.

The one who surprised me most was Harry Dodgshun Bedford (1877-1918). Born in England he went to school in Invercargill. After completing his primary schooling he worked as a farm labourer and a blacksmith. He got some help and eventually at 19 he matriculated. In 1901 he graduated MA and was University of New Zealand debating champion. He went into Parliament when only 25. In 1906 Bedford graduated LLB, was admitted, and went into practice. Over the next six years he was, in addition to his practice, a lecturer at Otago University successively in politics, then history, then law. In 1915 he was appointed professor of economics and history, became fellow of the Royal Economic Society, London, and a member of the Academy of Political Science, New York. He also acquired other degrees, wrote for the daily newspapers, was a Methodist lay preacher, was active in the temperance movement and took classes for the WEA. He also played cello in an orchestra and went mountaineering. In 1918, aged 40, he drowned while swimming. Obviously an extraordinary man.

The great name in the legal list is of course Sir John Salmond (1862-1929). Alex Frame has written an excellent entry about him derived from his unique knowledge as Salmond's biographer. A somewhat pleasant personal surprise was to find my name in the three line biographical note for an essay I wrote on Salmond in *New Zealand Heritage* in 1972.

There is an interesting piece on Professor Garrow of textbook fame, and another on William Joliffe (1851-

1927) who was a law draftsman and secretary to the commission responsible for the great 1908 consolidation of the statutes. Interestingly, before coming to New Zealand, Joliffe practised for a time in North Shields where Salmond was born. In 1896 he settled in Ashburton. Salmond was in practice in Temuka from 1891, and Alpers took up practice in Timaru in 1905. None of them stayed, but it is an interesting temporary Canterbury connection of three very different legal careers. Strangely none of the three biographical entries refers to the others. This is particularly surprising since Salmond was appointed counsel to the Law Drafting Office in 1907 while Joliffe was working on the consolidation.

The New Zealand Law Society gets scant attention in this volume. The first President, W S Reid, the Solicitor-General of his day, is not included in this volume nor in the preceding one. Sir Francis Bell, the second President, is in volume two, but his successor C P Skerrett is duly included in volume three as a lawyer and Chief Justice. Reid was not a colourful character, while Sir Francis Bell is acknowledged as "the man who must be regarded as the chief architect of the New Zealand Law Society".

Two other biographical notes are worth remark. The first, alphabetically, is Frederick de la Mere (1877-1960). As Dr Barton QC describes him he was a man who espoused many good causes including penal reform, prohibition, and anti-gambling. The latter two were somewhat of a surprise for a rationalist, but Stout had similar views. De la Mere served on the Senate of the University of New Zealand for 28 years from 1920. He was a sole practitioner in Hamilton for almost 30 years. Patrick Joseph O'Regan (1869-1947) had a colourful career as newspaper editor, politician, lawyer and eventually a Judge of the Arbitration Court. He had radical political views, was strongly in favour of Irish independence, and equally strongly opposed to conscription in the First World War. In his early years he worked at bush-felling, fencing, milking and pit-sawing. It was hardly surprising therefore that for some years he acted for the Federation of Miners and the Federation of Labour.

The biographies of so many lawyers of the time show how varied were their backgrounds, and how someone could get on in the world with fierce application and talent. Life could be hard for many.

The category of Law and Law Enforcement comprises a disparate group in addition to lawyers and Judges. There are Assessors, policemen and probation officers, but in human interest terms there are three criminals and two litigants listed. One of the criminals was Edward Lionel Terry (1873-1952) who murdered an elderly Chinese in Haining Street Wellington in 1905 because of his obsession with the "yellow peril". He was convicted and sentenced to death, but was subsequently diagnosed as a paranoid schizophrenic and spent the rest of his life in confinement, most of it necessarily in solitary confinement.

Alice Parkinson (1889-1949) in 1915 shot a man who had got her pregnant and then refused to marry her. She was tried and convicted of manslaughter. There was a campaign in her favour and eventually in 1921 she was released. The biographical note is properly sympathetic to her, but the effect seems to be rather spoilt by the last sentence which explains that she now appears to have been "a woman driven to solve her problems by violence, and whose efforts resulted in tragedy". It seems unlikely that many feminists would take a sympathetic view (and I do not suggest they should) if that sentence were amended by replacing "a woman driven" by "a man driven" and "her problems" with "his problems". The sentence as it stands could too easily appear to justify the violence of gang members, although I am sure that would not have been the intention of the author.

There is an amusing shift of terminology in the cases of Edward Lionel Terry and Alice Parkinson. In the category index they are listed under the word criminal. But within the entries themselves they are described as "racist murderer" and "manslayer". The terms themselves are perfectly justifiable but rather obviously politically correct. I would like to think that the term "manslayer" was chosen by a feminist with a sense of black humour. Anyway I liked it as a pun whether it was intentional or not.

The two litigants chosen for inclusion in the volume are Annie Chemis (1862-1939) and Effie Richardson (1849-1928). It would be hard to think of two women whose lives were so different. Annie Chemis was born in Ireland. Her husband, an Italian, was convicted of murder in 1889 on circumstantial evidence. She petitioned for his release and ran a campaign to achieve this. It finally succeeded after eight years, but a year after his release he committed suicide as he was unable to get work. His wife worked as a charwoman in Parliament scrubbing floors and cleaning toilets until her retirement in 1926, and on her own brought up her five children. Effie Richardson, on the other hand, was the widow of a Nelson solicitor. After his death she lived for many years in England and France. However she had considerable land holdings in the Nelson area to look after for her daughters. She apparently was ready to go to law whenever necessary to protect the family interests and this made her unpopular in the district. Two very remarkable, strong-willed women in very different circumstances.

Despite the niggling criticisms I have made *The DNZB* is a work that should be on the shelf of every educated New Zealander. This third volume rightly takes its place beside the earlier two as a work of erudition, enlightenment and entertainment that the writers and the editors are entitled to be proud of.

P J Downey

LEGAL BIOGRAPHIES

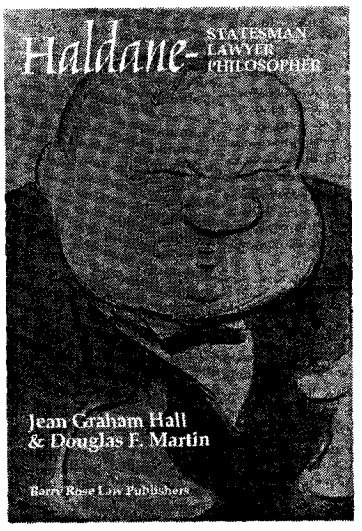
Barry Rose Publishers

The subjects of this trio of legal biographies, published by a small English independent press, may seem at first sight to all be of somewhat marginal interest to New Zealand lawyers. However, aficionados of judicial biography, the Victorian crime scene, or English legal history will find much of interest in all three books.

POLITICS AND LAW IN THE LIFE OF SIR JAMES FITZJAMES STEPHEN

by John Hostettler

The subject of the first of Hostettler's two books reviewed here, James Fitzjames Stephen, will probably be the most familiar of the three to New Zealand lawyers. Stephen is best known for his unsuccessful attempt to prepare an English criminal code, which was – as the author notes – an important influence on the codification of criminal law in this country, and for his *History of the Criminal Law of England* (1883), still occasionally read, (or at least



cited). In his biography Hostettler thoroughly explores Stephen's family background – the Stephen family was a key segment of the influential Anglican Evangelical group known as the Clapham House sect – his career as a barrister, his work on the codification of criminal law in India and England, and his work as a Judge and scholar.

Stephen became a Judge of the High Court in 1879 and he presided at the Old Bailey over two of the most sensational criminal trials of the day; that of Israel Lipski, convicted of murdering a woman by the grisly means of pouring nitric acid down her throat, and of Florence Maybrick, convicted of murdering her husband (who Hostettler believes may have been Jack the Ripper) by arsenic poisoning. Lipski was hanged, and Mrs Maybrick, although reprieved, spent fifteen years in prison. Stephen's directions to the jury in both cases have been a source of enduring controversy.

Hostettler portrays Stephen as a very able lawyer but also as a harsh, austere, and not especially likeable man, an advocate of authoritarian rule in India and Ireland, and rather prone to intemperate language in his summings-up. He was also greatly given to opium smoking, which the author suggests may have unhinged Stephen's mind towards the end of his life.

THOMAS ERSKINE AND TRIAL BY JURY

by John Hostettler

Although Erskine served for a time as Lord Chancellor, it is for his career as a defence lawyer that he is best remembered. Erskine, ironically a Scot, and a product of the Scottish Enlightenment, was devoted to the Common Law and the traditions of the English Bar, and is best known for his successes as defence counsel in 1794 in a number of seditious libel cases rather unwisely brought against a number of prominent radicals by Pitt's government. A Radical Whig himself, Erskine also acted as defence counsel for Tom Paine, and near the end of his life, as a Member of the House of Lords, was a committed supporter of Queen Caroline in the celebrated divorce case in 1820. Hostettler's book is a thorough and well-informed life of a great defence barrister and Radical Whig, although for more detail on the political context of the times the reader will have to turn elsewhere.

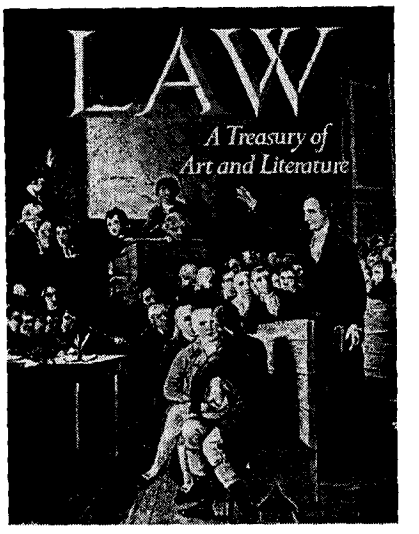
HALDANE – STATESMAN, LAWYER, PHILOSOPHER

by Jean Hall and Douglas Martin

The last book of the trio, is a full account of one of the most strangely neglected figures of twentieth century politics. Although a very successful lawyer and Lord Chancellor, Haldane is more notable as a reforming politician and prominent Asquithian Liberal. He was also, rather unusually for a British barrister and politician, a real intellectual, one of the most important of the British Hegelians. It was his links with German intellectual life that eventually led to absurd claims in World War 1 that he was pro-German (in fact Haldane's army reforms were a main factor behind the successful halting of the Germans in the opening campaigns of the war). The campaign of press vilification led to the resignation of Asquith's government in 1915 and the formation of Lloyd George's coalition. Haldane retired from public life but was reappointed – briefly – as Lord Chancellor by the Labour Government of 1924. Hall and Martin's book is a thorough and well-written study of an interesting and unusual man and an exploration of a key figure of the New Liberalism in Great Britain.

Barry Rose publishers are to be congratulated for making available these three new legal biographies and for adding to the burgeoning literature on legal history. One minor criticism is that none of the books tell us anything about their respective authors; it would be nice to know something about them.

Richard Boast



LAW: A TREASURY OF ART AND LITERATURE

Edited by Sara Robbins

Beaux Arts Editions (New York)

This is a treasure indeed. It is an anthology of words and pictures related to the law. It opens with a selection of pieces originally in the Sumerian language and dated to about 1850 BC.

These extracts cover criminal law, family law, and contracts or torts, in our terms. For instance it is provided:

> If a man enter the orchard of (another) man and was seized there for stealing, he shall pay ten shekels of silver.
>
> If a man's wife has not borne him children but a harlot (from) the public square has borne him children, he shall provide grain, oil and clothing for that harlot; the children which the harlot has borne him shall be his heirs, and as long as his wife lives the harlot shall not live in the house with the wife.
>
> If a man rented an ox and damaged its eye, he shall pay one half of (its) price.

And in the succeeding extract from the Code of Hammurabi of about 1770 BC it is provided:

> If the agent be careless and do not take a receipt for the money which he has given to the merchant, the money not receipted for shall not be placed to his account.

So, for nearly 4000 years we have a continuous record of the law with the same basic facts of human, social and commercial life. The answers vary, but the problems of human behaviour remain much the same. As the editor says

in her introduction law deals with the normal, the pedestrian, the sometimes sublime but often mean, everyday behaviour of people.

This book moves from the Middle East, through Greece and Rome to the medieval and the modern periods with a side-track into Asia. It contains a great variety of extracts, most of them only a few pages long, from Plato to *Alice in Wonderland*, from Cicero to Scott Turow. There is something here for everyone to learn from and to enjoy.

The emphasis of the book is American, but English and European extracts are plentiful including F E Smith, Oscar Wilde, Emile Zola, Dickens, Blackstone and de Maupassant. This is not a book of law as reflected in literature. This makes it particularly entertaining to read, and emphasises that the law affects the lives of all citizens in different ways, and is not merely the intellectual preserve of lawyers.

Inevitably of course it contains pieces on women's rights and racism. Strangely there is nothing on the Judge made law on abortion. Many will be interested to read of the difficulties that Belva Ann Lockwood had in becoming the first woman to obtain the right to appear before the United States Supreme Court. She became an attorney and commenced practice in lower Courts in 1873, two years before our Ethel Benjamin was born. Lockwood was refused audience in the Supreme Court until 1879 when she succeeded in getting the United States Congress to pass a law allowing women to be admitted to the Supreme Court Bar.

The coloured illustrations in the book are a delight. Many of them admittedly are art as illustration rather than art as aesthetic experience, but there are enough of both to make the book a publication of beauty. There are 113 colour plates, from an Egyptian bas relief of about 1300 BC to an Andy Warhol of 1963. Many of these are portraits, including a striking one of Belva Lockwood. There are also innumerable black and white illustrations including a photograph of the notorious Judge Roy Bean holding court in Langtry, Texas. As the reference on the building to "Jersey Lilly" makes clear the town was named after Lillie Langtry about whom the self-appointed "Judge" had an obsession.

Law: A Treasury of Art and Literature is a book for browsing in, to enjoy, perhaps to give as a wonderful present, but not to lend as you are unlikely to get it back.

P J Downey

ESSAYS ON INSIDER TRADING AND SECURITIES REGULATION

Charles Rickett and Ross Grantham (eds)

Brookers

Some essays in this book will be of practical help to lawyers looking for guidance in an unfamiliar field. Roger Partridge and Peter Fitzsimmons will reassure you that it is the law, not your interpretation that is wrong, if you have concluded that the law seems bizarre, even inconceivable as affects your client. Lend Lindsay Fergusson's victim account to the client who is not taking insider trading allegations seriously.

Buy it for its tables of cases and statutes, and for the policy issues that could be relevant in argument before a Court considering untried issues.

Don't read it if you prefer to believe that law makers value intellectual integrity, that there is a commitment to law which delivers what it promises, and does not promise what it can't deliver. Don't buy it if you are angered by law and exemptions which shelter the "guilty" and catch the innocent, or depressed by law which is tolerated only because of a tacit expectation that few will take advantage of the opportunities it offers for tactical misuse.

The heading of Bryce Wilkinson's contribution encapsulates his conclusions "weak analysis and troubling outcomes". Justin Mannolini provides an Australian practitioner's response to bad law in Australia. He poses the question "why regulate insider trading?". His themes are repeated by eminent commentators, Barry Rider and James D Cox respectively. These English and American perspectives are noteworthy for their surveys of trends in securities law generally. They emphasise the risks for New Zealand of uncritically picking up legal fashions and mechanisms from overseas. For example, the slogan "disclose or abstain", which underlies the Securities Commission's attitude to market information rules generally, is criticised by both Rider and Cox.

Barry Rider teases out a thread of a requirement for moral blame-worthiness in a number of troubling cases about business information *IDC v Cooly* [1972] 2 All ER 162 and *Boardman v Phipps* [1966] 3 All ER 721.

Both correctly identify insider trading law questions within the context of information as intellectual property. The Securities Commission's lamentable performance (in its recent recommendations for amendment to insider trading law) is highlighted by the absence of that context of information as property. It has not placed its interventions in any principled context. None of the essays connect our appalling new s 6A Securities Act, and the ineffective but troublesome s 149 Companies Act 1993, with the inability to create a coherent insider trading law.

The essays record a wealth of scholarship. Unconsciously, however, they show the sterility of New Zealand soil for such analysis. Law makers have not been interested in it. Law has been overtly driven by gut feelings comparable to the Moslem hostility to interest. Explanation that a time value for money is vital to the functioning of a capital market is only mildly interesting to those whose beliefs tell them that usury is "unfair". If we are not willing, or perhaps capable, of the intellectual effort needed to distinguish usury from appropriate risk adjusted interest perhaps we deserve our confusion.

Not only have the law makers been uninterested in reconciling reality and rhetoric. The writers in this book show little interest in each others' work. Barry Rider and James Cox and the Hon Justice Michael Kirby all suggest that the law is not justified by theoretical or empirical research and indeed may be counter-productive. Nevertheless, all feel able to recommend more law. Kirby J cites the unhappy Australian experience of regulating in this area with criminal sanctions. He rightly queries our Securities Commission views that the issues are not susceptible to cost benefit analysis. His ten conclusions, nevertheless, end the book with clarion calls for action, purportedly as an expression of a consensus among the commentators which was not evident to this reviewer at the symposium session in Wellington and is not evident in the essays, even in Kirby J's own paper.

Why is New Zealand so well served with books on securities law issues when Courts and other bodies responsible for the quality of the law seem to treat research and scholarship as muzak?

Stephen Franks

LITIGATION

edited by
Andrew Beck

CASE MANAGEMENT: WANT OF PROSECUTION

The law has long recognised that a plaintiff has some obligation to progress a matter towards trial, but the duty has always been a light one. The leading English decision of *Birkett v James* [1978] AC 297 held that, in order for a proceeding to be struck out, the delay must have been intentional and contumelious, or inordinate and inexcusable causing serious prejudice. While the first limb is seldom relied on, the second has been consistently approved in New Zealand as applicable to R 478 of the High Court Rules: *Lovie v Medical Assurance Soc of NZ Ltd* [1992] 2 NZLR 244. The standard to be met by an applicant is very high, and the approach has been criticised as providing insufficient sanction for excessive delay: see *Westminster City Council v Clifford Culpin & Partners* (1987) 12 Conv LR 117. The House of Lords in its most recent pronouncement, *Grovit v Doctor* [1997] 2 All ER 417, recognised the validity of these criticisms, but declined to modify the approach of *Birkett v James*, leaving the development of appropriate case management mechanisms to the legislature.

THE RISE OF CASE MANAGEMENT

The two recent decisions of the New Zealand Court of Appeal discussed below also illustrate that the leisurely approach tolerated by the common law is no longer acceptable in an era where there is a heightened consciousness of the scarcity of resources and the need to dispose of litigation efficiently. The function of an application to dismiss for want of prosecution has been overtaken to some extent by new techniques of case management. Under the case management system, control of legal proceedings is no longer seen as the prerogative of the parties, but as a matter with a strong public interest,

In a comprehensive case management system, an application to strike out for want of prosecution would simply never arise

where an active role is taken by the Court itself to ensure expeditious progress. In a comprehensive case management system, an application to strike out for want of prosecution would simply never arise: before that stage some action would have been taken by the Court to ensure that the matter did not lie dormant.

New Zealand has not yet reached the position of having a fully operative case management system. There have, however, been a number of steps taken along the way. One of those was the introduction of R 426A into the High Court Rules as from the beginning of 1993. This rule attempts to keep litigation moving by requiring leave from the Court to continue the proceeding where no step has been taken for 12 months. It can therefore be seen as a fairly basic incentive to plaintiffs to prevent proceedings from languishing.

While the rule has a simple objective, it has given rise to quite a number of cases, in particular because it requires the party seeking leave to establish first that there is a "proper issue to be tried". The appropriate standard to be adopted for this test, and the degree of difficulty to be experienced in surmounting the barrier have exercised the minds of many Judges. Two distinct approaches can be discerned. One, epitomised in the cases of *Saxpack Foods Ltd v J Wattie Foods Ltd* (1993) 6 PRNZ 120 and *Redoubt Farm Ltd (in rec & liq) v R R McAnulty Ltd* [1994] 1 NZLR 451, holds that the barrier is not a significant one, and should not prevent any genuine case from getting to Court. The other, as demonstrated in *Sullivan v Atchison* [1995] 2 NZLR 22 and *Larimda Holdings Ltd v Philips NZ Ltd* (1996) 9 PRNZ 435, considers that a plaintiff who has fallen foul of the rule needs to do some serious explaining in order to be permitted to proceed. The application for leave is therefore not a foregone conclusion.

The battle between the two approaches came to a head in *McEvoy v Dallison* (1997) 10 PRNZ 291, when the rule was considered for the first time by the Court of Appeal. In that case, Chisholm J had refused leave to proceed. There had been a delay of some four years eight months since the commencement of proceedings, and three years since the filing of the statement of defence, the last step taken. The Court considered that the explanations for the delay were entirely unsatisfactory.

The Court of Appeal reversed the decision, unequivocally adopting the former, or "soft" approach to the rule.

PROPER ISSUE TO BE TRIED

The Court held that the phrase "proper issue to be tried" could not be equated with the notion of the "serious issue to be tried" used to determine interim injunctions. Although the expressions appear remarkably similar, the Court noted that the considerations which apply to granting an interim injunction do not apply under R 426A. All that an applicant for leave needs to show is that there is an issue which is "sufficient to warrant resolution by the Court". There is no need to examine the merits of the case, and evidence on the merits is not required.

It is clear from the reasoning of the Court of Appeal that the "proper issue to be tried" hurdle is no barrier at all. Because there is to be no examination of the merits of a claim, in essence all the plaintiff needs to do is to show that the matter is justiciable by the Court, and this leg of the rule will have been satisfied. The outcome of the application will therefore turn solely on the exercise of the Court's discretion. While it is all very well to have a discretionary case management rule, it is difficult to understand why R 426A should have been framed in its particular terms if so little content had been intended. It seems that the only proceeding which would ever fail the "proper issue" test would be one which should have been struck out already.

DISCRETION

Even if the plaintiff has established a proper issue to be tried, the Court retains a discretion to refuse leave under the rule. The Court of Appeal stressed, however, that the discretion is to be exercised in accordance with the underlying purpose of the rule, which is to promote the objective of case management. The focus is on the history of the proceeding, the length of the delays involved, and the explanation for the delay. Prejudice to the other party is relevant only to the extent that it could be seen to infringe the principle of sound case management. The Court of Appeal has made its view abundantly clear that a consideration of prejudice to the defendant properly belongs in an application under R 478, not one under R 426A.

The Court embarked on an extensive consideration of the underlying purpose of the rule, going so far as to examine the minutes of the Rules Committee, and concluded that the rule could only be seen as a case management device. Thomas J also pointed out the anomaly which could arise if the onus of satisfying the Court that there is good reason to allow the proceeding to continue were effectively to be shifted onto the defaulting party. This would make R 426A a more powerful weapon than R 478. The Rule could therefore not be treated in the same way as RR 477 or 478, especially as those Rules have such stringent requirements.

The Court also emphasised the difference between R 426A and RR 477 and 478, noting that RR 477 and 478 have a long history. Thomas J considered that, if a different approach to those Rules had been desired, they could have been amended. By itself, however, this does not seem to be a significant factor. Rule 426A is undeniably an attempt to do something different from RR 477 and 478, but it is also evidence of a change in the context of litigation. There is a certain element in the Court of Appeal's judgment of the matter being "merely one of case management", and therefore not justifying severe sanction. But there is a wider issue at stake. It is simply no longer acceptable to tackle litigation at an amble, taking a year or more to take a step along the road to trial. In that context, it can be understood why there might well be a change in onus, or why a plaintiff might be called on to justify itself in a rigorous way. As indicated above, proper case management would obviate the need for R 478 altogether, and in that sense R 426A could well make it otiose. To read too little into the Rule renders it practically useless.

The message to plaintiffs is clear: move the proceeding along or risk having it thrown out. It should not be viewed as a question of "forfeiture" when the remedy is easily within the plaintiff's power

Finally, the Court referred to the right of access to the Courts, and said that fairness had to prevail over the demands of efficiency; a person's right to air a matter in Court was not to be lightly removed. In fact, the Court went so far as to say that refusal of leave is the

> ultimate sanction available to the Court where the history of the litigation is so bad or the delay so great that the applicant can be said to have forfeited his or her right of access to the processes of the Court. (at 299)

There are no doubt human rights considerations involved in terminating a legal proceeding for a procedural reason, but this seems to be placing a gloss on the rule. The rule contemplates quite obviously that leave may be refused, and should be refused in certain circumstances. The message to plaintiffs is clear: move the proceeding along or risk having it thrown out. It should not be viewed as a question of "forfeiture" when the remedy is easily within the plaintiff's power.

APPLICATION OF THE TEST

After the groundwork had been laid for an extremely lenient test, it was almost inevitable that the appeal had to succeed. The Court accepted that the delay was undue, but considered that the issues raised by the plaintiff were such as could be tried. They appeared to accept the explanations for the delay proffered by the plaintiff: family disputes and financial problems. The Court therefore granted leave to proceed, requiring an application for directions to be made to the High Court. Not only that, but the Court awarded costs to the appellant in respect of both High Court and Court of Appeal hearings. It is suggested that this cannot be a sound practice. The application under R 426A requires an indulgence, and should be paid for by the applicant. It could certainly not be said that the application was unreasonably opposed in this case, and it is hard to see why the award should have gone this way.

FURTHER DEVELOPMENTS

Within two weeks of the decision in *McEvoy*, the issue was to come before the Court of Appeal again in the case of *NZ Kiwifruit Marketing Board v Waikato Valley Co-operative Dairies Ltd* unreported, 28 April 1997, CA51/96. Once again, this was a decision in which the High Court had refused leave, but this time there had already been a previous application under R 426A, dealt with by the Registrar by consent. The proceeding had been commenced on 16 June 1991, and the second R 426A application was filed on 11 December 1995. The only explanation offered for the delay was that the plaintiff has borne a heavy burden of prosecuting a number of other claims.

After the decision in *McEvoy*, the outcome of this case was hardly in doubt, particularly as the High Court had relied on the notion of prejudice in exercising its discretion against granting leave. The Court of Appeal did, however, describe the applicant's affidavit as "wholly inadequate" and offering a "worthless" excuse. An applicant under R 426A is required to disclose fully and frankly all relevant

information bearing on the history of the proceeding and the delay. There should be a detailed chronology, and explanation of delays, together with an indication as to how an order "might assist in ensuring that the proceeding could be completed expeditiously". Presumably this means that an appropriate timetable should be suggested.

The Court of Appeal went as far as saying that, ordinarily, the necessity for a second application under R 426A "could well justify leave being refused". Nevertheless, it held that the applicant's conduct could not be said to amount to a forfeiture of its right of access to the Court. It would therefore appear that, even where an applicant has no justification for a 12 month delay, leave should be granted unless there is some extra feature which spells forfeiture. What that feature might be is far from clear, but if the necessity for two applications under the rule is not sufficient, it is hard to see what would be, which would not satisfy the requirements of R 478 as well.

Although the appeal was allowed, the Court treated costs differently from *McEvoy*. No order for costs was made in the Court of Appeal, but the costs and disbursements awarded in favour of the respondent (the reference to appellant in the judgment is an error) in the Court below were allowed to stand. The Court unfortunately did not take the opportunity to discuss how costs on R 426A applications should be dealt with, and it seems that, once again, the defaulting party was let off rather lightly. It is suggested that there should be a clear presumption that costs be awarded against the applicant in such applications.

A further significant feature of the case is the comment by Thomas J that it was regrettable that the first application for leave had come up before a Registrar, rather than being referred to a Master or Judge, who could have "stressed to the parties the need to make improved progress, and initiated a requirement that the case be called for mention by a certain date". This may turn out to be a very unfortunate remark, with the likely result that no Registrar will now be prepared to make a consent order. So, while the Court of Appeal has reduced the content of the rule, it has at the same time increased the time, expense, and procedural burden of complying with it, particularly in centres which do not have a permanent Court.

RESOLUTION OF R 426A APPLICATIONS

It is evident from these two judgments that the Court of Appeal considers that the appropriate response to a R 426A application is a timetable order. If a case is lagging in the system, then it must be given a prod. Quite why this should require an application for leave to continue the proceeding was not explained by the Court, save to say that the rule is a "crude instrument" when considered against modern case management techniques.

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The Court pointed out that timetable orders are not without teeth, and that there is a suitable sanction under R 277. Anyone who has attempted strict enforcement of such an order will know, however, that the practice is not so simple. Striking out for non-compliance with a timetable is highly unlikely, and there is very little else which can be done.

At the very least it is important that a proper jurisprudence of costs in R 426A applications be developed. It is suggested that, in many cases, it would not be inappropriate for an applicant to have to bear a substantial costs burden.

RAMIFICATIONS

The proper approach to R 426A has been spelt out in no uncertain terms. It now seems certain that in general applications under the rule will no longer be opposed, but will be consented to on the basis that an appropriate timetable order is made. It will, however, not ordinarily be possible to achieve this by a simple consent memorandum approved by the Registrar because the matter will be referred to a Master or Judge.

It may well be that the rule is something of an anachronism in a fast-developing field, but it is hard to imagine that this is exactly how it was intended to operate. Nor is a timetable a very effective remedy to impose after a significant delay. It is not exactly a hardship to require a plaintiff to take a step towards trial during a period of 12 months, and a clear jurisprudence had been developing in the High Court, with improved case management as a result. Now that the Court of Appeal has seen the rule in terms of deprivation of rights, however, it has confirmed that R 426A is effectively a non-rule. It will be up to the Rules Committee to take urgent steps to put a more effective case-management system in place.

ANOTHER ANGLE

The problem which arose in *Grovit v Doctor* was a somewhat different one, but nevertheless highlights the need for proper sanctions for delay. In that case the plaintiff in a defamation claim had taken no steps for some two years. The problem was in demonstrating that the defendant had suffered any prejudice. The important feature of the case was that it was found by the Court at first instance that the plaintiff had no real interest in pursuing the case, but was keeping it alive as a sword of Damocles. The Judge held that the very existence of such a proceeding was intolerable.

In the Court of Appeal, the Court apparently linked the two limbs of *Birkett v James*, and considered that elements of abuse of process could be considered prejudice so as to justify dismissing a claim. The House of Lords was asked to consider whether a situation which did not wholly satisfy either limb of the test could be resolved by using an amalgamation of the two. Lord Woolf, delivering the principal judgment, declined to answer this question. He was satisfied, however, that there was an abuse of process which by itself justified the dismissal of the proceeding.

In New Zealand terms, this would amount to a striking out under R 477 rather than R 478, and in such cases, as pointed out by Lord Woolf, it is not necessary to refer to want of prosecution as such. The case might, however, give a clue as to the route to success under R 426A. If it can be shown, as in *Grovit v Doctor*, that the plaintiff has no genuine intention of prosecuting the claim to trial, this may be sufficient to justify refusing leave to proceed. It seems, however, that evidence beyond the delay of 12 months will be needed to persuade the Court to draw this inference. It should not be necessary to go the lengths of satisfying the Court that there has been an abuse of process. The 12 month rule, coupled with a lack of genuine intention to progress a matter to trial, must be enough to justify the invocation of even a case management rule.

LITIGATION AGAINST THE CROWN

The report of the Law Commission, *Crown Liability and Judicial Immunity* (Report No 37) foreshadows changes in future litigation involving the Crown. Although the impetus for the report was *Baigent's Case* [1994] 3 NZLR 667 (establishing a remedy for breaches of the Bill of Rights) and *Harvey v Derrick* [1995] 1 NZLR 314 (holding that District Court Judges do not have the immunity of High Court Judges), it is clear that much wider issues require to be addressed.

The Law Commission recommended that all Judges should enjoy the same immunity from liability as High Court Judges, but that there should be a remedy – not under the NZ Bill of Rights Act – for those who suffer punishment because of a miscarriage of justice. It also recommended that there should no legislative intervention to alter the effect of *Baigent's Case*, but there should be a systematic review of legislation conferring privileges or immunities on the Crown.

There will no doubt always be disagreement on developments such as *Baigent's Case* and the appropriate response. These are illustrated in the editorial of *The Capital Letter* of 27 May 1997. One of Professor Smillie's chief complaints is that the decision moves away from treating the civil liability of the Crown in the same way as that of any other person: (1994) 8 Otago LR 188. It seems, however, that the motivation behind the case is in fact the opposite: to ensure that the Crown should bear liability for a breach of duties owed to others. As recognised by the Commission, the Crown has far greater powers than ordinary persons, and with that go added responsibilities, so

> the principle of equality ... means that when those powers are exercised the state should be liable for wrongdoing in the same way as an individual. (p 97)

There has been an increasing trend to remove the special status of the Crown as a litigant, and this is now enshrined in s 27 of the Bill of Rights Act. A general review of legislation affecting that status is therefore to be welcomed. This should encompass the Crown Proceedings Act 1950 as well, and the availability of remedies against the Crown. Although the intention of that Act was to make liability of the Crown more akin to that of the ordinary citizen, it does not reflect current views of how the Crown ought to be treated. If a comprehensive review is to be undertaken, however, it is difficult to see why it should not encompass the proper approach to liability under the Bill of Rights Act.

As far as the liability of Judges is concerned, *Baigent's Case* has brought about the need for some immediate action. The importance of judicial immunity is not in issue, but the fact that there is inequality of treatment of various Judges clearly demands legislative input.

From the litigation point of view, what is of more interest is the possibility of compensation when a Judge has done something which turns out to be manifestly wrong. The Law Commission's report stresses that appeal and review should be the principal means of correcting error, but recognises that this might not cover every situation. The main concern is with punishment already suffered which cannot be effectively redressed on appeal. There is very limited scope for such proceedings, and a provision for compensation seems unexceptionable. It may be questioned, however, whether there should not be a more general remedy to compensate for loss suffered in such circumstances, acknowledging that this would only be available as a last resort.

CROSS EXAMINATION IN REVIEW PROCEEDINGS

In *Roussel Uclaf Australia Pty Ltd v Pharmaceutical Management Agency Ltd* [1997] 1 NZLR 650, the Court of Appeal considered whether the High Court Rules permit cross examination as of right in proceedings for judicial review.

The case involved a challenge to a decision by Pharmac which had the effect of reducing the subsidisation of a drug under the Pharmaceutical Schedule. A large number of affidavits were filed, and Roussel gave notice that it would require several of the deponents to be available for cross examination. In the High Court, Gallen J refused the application for cross examination, noting that it was not permitted of right, and concluding that it would not add anything.

The Court of Appeal considered the relevant legislative provisions, and stressed the objectives of convenience, expedition and effective and complete determination of the proceeding mentioned in s 10(1) of the Judicature Amendment Act 1972. Richardson P also held that it was implicit in the provisions of s 10(2) that the normal mode of evidence in review proceedings is by affidavit. The Court referred to *Minister of Energy v Petrocorp Exploration Ltd* [1989] 1 NZLR 348 and *Attorney-General v Air New Zealand Ltd* (1994) 4 PRNZ 1, where the Court of Appeal had previously stated that there is no right to cross examine ministers in review proceedings, and that this is generally inappropriate.

Although R 508 appears to give a right to cross examine deponents, the Court held that this could not have been intended to alter settled practice, and that it would be inconsistent with the nature of review and the provisions of s 10. Cross examination will therefore only be allowed where the interests of justice require it. The Court of Appeal was not persuaded that there was a need for it in the case before it.

While this decision contains few surprises in terms of established practice, it does highlight the inadequacy of the procedure for applications for review. Such applications are brought under Part II of the High Court Rules (R 628(1)) which means that the ordinary method of evidence will be oral evidence unless otherwise directed. The rules should make it clear that in an application for review, evidence will be by affidavit unless otherwise ordered, and that cross examination will only be permitted with leave. ❑

BAIGENT: AN UPDATE

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update the law on public law compensation remedy for breach of the New Zealand Bill of Rights Act 1990

INTRODUCTION

In *Simpson v Attorney-General [Baigent's Case]* [1994] 3 NZLR 667 a 4:1 majority of the Court of Appeal recognised a new public law cause of action for breach of the New Zealand Bill of Rights Act 1990 ("NZBORA"). The majority emphasised that the action is not a private law action in the nature of a tort claim for which the state is vicariously liable, but a public law action directly against the state for which the state is primarily liable. It is not affected by s 6(5) Crown Proceedings Act 1950 (immunity for execution of judicial process) as that provision relates to liability in tort. Breach of NZBORA will not always attract monetary compensation, for there may be an alternative effective remedy available such as the exclusion of evidence or cessation of the trial.

a mere breach of NZBORA that causes no damage will not sound in compensation; one may question whether this is consistent with a rights-centred approach

The purpose of this article is to update the law on the public law damages remedy available since *Baigent's case*. For a full discussion of the new remedy created in *Baigent*, readers are referred to an article by Dr Rodney Harrison QC: "The Remedial Jurisdiction for Breach of the Bill of Rights" in G Huscroft and P Rishworth *Rights and Freedoms* (1995).

STANDING

It seems likely that only beneficiaries of a right who have suffered a transgression of their right may bring an action for public law compensation. In *R v Wilson* [1994] 3 NZLR 257 (an exclusion of evidence case decided prior to *Baigent*), Cooke P said (at 259) that "[t]he rights affirmed [in the Act] are those of the persons to whom they are granted. It is not any part of the scheme of the Bill of Rights Act that a person whose rights have been in no way infringed should be able to capitalise on an infringement of someone else's rights". (See also *R v Bruhns* (1994) 11 CRNZ 656, 657.)

It may be noted that *R v Wilson* should pose no difficulties for claimants seeking compensation for breach of NZBORA following the death of a loved one when the deceased was the beneficiary of the transgressed right. That is because s 3(1) Law Reform Act 1936 provides that on the death of any person all causes of action vested in him or her shall survive for the benefit of his or her estate (although by s 3(2) claims for exemplary damages are excluded (confirmed in *Re Chase* [1989] 1 NZLR 325 (CA)).

FAULT REQUIREMENTS?

Questions of fault are relevant at two levels: first, a specific right may stipulate a particular "fault" requirement that must be established to prove breach, for example, the right under s 21 to be secure against "unreasonable" search or seizure, and the right under s 22 not to be "arbitrarily" arrested or detained. Secondly, at least until recently, there was a question as to whether the Courts would impose a generic fault requirement when the remedy sought for breach of NZBORA is damages. The two levels where fault could be relevant are therefore the substantive right level and the remedial level.

The present concern is with the second, remedial, level. In 1995 Harrison observed that the Courts had shown no sign of seeking to add any requirement that there be established a particular standard of conduct or state of mind, not forming part of the Act's definition of the right in question (cited above, p 422). He observed that the absence of any such requirement was implicit in criminal cases dealing with exclusion of evidence, and also that the judgments in *Baigent* were of little assistance, suggesting (if anything) that mere breach of the right would entitle the plaintiff to a damages remedy (assuming damages to be an effective and appropriate remedy).

Harrison's views were confirmed in two recent High Court decisions. In *Upton v Green* (unreported, 10 October 1996, High Court Christchurch, CP 91/94) Tompkins J considered an argument that the plaintiff's rights under s 25 NZBORA (in particular, the right to a fair hearing, the right to be presumed innocent until proven guilty, to present a defence, and to the observance of the principles of natural justice) had been infringed when he was sentenced to three months' imprisonment without having an opportunity to address the Court and make submissions before the sentence was imposed. Tompkins J held that for a person to be sentenced to imprisonment without having been given an opportunity to be heard was a clear breach of these rights.

Tompkins J referred to *Baigent* and asked whether public law compensation should be awarded. His Honour said "[t]he plaintiff is entitled to compensation if he can demonstrate that the events that occurred, resulting from the denial of his right, justify an award of compensation".

His Honour added that in the case before him the issue was:

> whether, and if so to what extent, the events that occurred, that is the sentence to three months' imprisonment, may have been otherwise if he had been heard (p 20).

He said that if the result would have been the same, the plaintiff is entitled to a declaration, but no case for compensation will have been made out. This comment seems to suggest that a mere breach of NZBORA that causes no damage will not sound in compensation; in such a case compensation will not be an appropriate remedy. Although one may question whether this is consistent with a rights-centred approach, in the authors' view it accords with common sense. In any event, arguments can still be made as to what amounts to "recoverable damage" for a cause of action under NZBORA.

a remedy may well be granted against a Crown Health Enterprise if its actions are responsible for the breach

Tompkins J concluded that although he could not reach any clear conclusion on whether, if the plaintiff had been fairly and fully heard, the result would have been different, there was a reasonable possibility that a lesser sentence would have been imposed (p 23). For loss of this chance, His Honour awarded $15,000. In this case there was no deliberate denial of right by the Judge; the omission as to natural justice was a mere oversight.

The second case is *Whithair v Attorney-General* [1996] 2 NZLR 45. Eichelbaum CJ was asked to decide whether damages lay for a breach of a right in NZBORA in the absence of any pleading of conscious violation of, or reckless indifference to, the plaintiff's rights under that Act. The Chief Justice rejected the argument that there was or should be such an additional requirement. His Honour could see no principled basis for circumscribing the damages remedy with some additional requirement. Thus, on the case law to date one must conclude that if there is no other effective and appropriate remedy for breach of NZBORA, damages should in principle lie regardless of absence of fault.

The absence of a generic fault requirement does not, however, mean that the defendant's state of mind will be irrelevant. Although much remains to be worked out, one can surmise that the more repugnant the defendant's state of mind, the greater the damages which will be awarded. The starting point may be that a rights-centred approach to infringement does not require a "guilty state of mind", such that damages are (subject to the Court's discretion to refuse relief) available for a breach per se but if (additional) damages are awarded for reasons of deterrence (which the authors believe is desirable), then questions of fault must be addressed. In *Whithair* (cited above), the Chief Justice observed that "[w]hether an award should be increased to reflect punitive or deterrent components ... will depend on the facts" (p 57).

BREACH OF PROCEDURAL RIGHTS

Upton v Green (discussed above) is an example of the Court awarding damages for breach of procedural rights, in that case criminal procedure rights. It seems the same will be true in the case of breach of administrative procedural rights. In *Rawlinson v Rice* (unreported, 19 March 1997, Court of Appeal, CA 246/96) the plaintiff sought damages for misfeasance in a public office against a retired District Court Judge. If his pleadings are taken as stated the plaintiff was subjected to a non-molestation order which the Family Court had no jurisdiction to make and which was made at a hearing conducted in breach of the rules of natural justice. Further, when the lack of jurisdiction was pointed out, the Court failed to acknowledge the fact. A 2:1 majority of the Court of Appeal allowed an appeal from a successful strike out application.

What is of interest for present purposes is discussion of an alternative action available to the plaintiff under NZBORA. McKay J observed that the plaintiff had initially pleaded against the Crown as an additional defendant, damages for breach of s 27 of NZBORA but had subsequently abandoned that claim. Counsel for the Crown informed the Court that the Crown accepted liability for damages for breach of s 27 and was prepared to negotiate as to an appropriate sum of damages. Noting the potentially fatal hurdles facing the plaintiff, McKay J observed that the NZBORA action provided the plaintiff with a straight forward course by which he would "receive appropriate compensation either by settlement or from the Court" (p 18). His Honour added that the plaintiff "would be wise to consider this before pursuing his present claim against [the defendant], which if he succeeds will apparently be the first case of its kind in the common law world" (p 18). Tipping J agreed the plaintiff "would be wise to concentrate on his Bill of Rights cause of action" (p 7). Barker J, who was in the minority in holding the misfeasance action should be struck out, was also of the view that the plaintiff should amend his pleading and seek damages under NZBORA.

CLAIMS ONLY AGAINST THE CROWN?

One of the many questions concerning the *Baigent* compensation remedy that still remains is whether the Crown is the only appropriate defendant. In *Hobson v Harding* (1995) 1 HRNZ 342 (HC), Thorpe J struck out a Bill of Rights claim against non-Crown defendants.

However, the question of whether the Crown is the only appropriate defendant in a NZBORA claim was further considered in *Innes v Wong & Others* [1996] 3 NZLR 238; (1996) 2 HRNZ 618. In this case Cartwright J was asked expressly to decide whether the Crown was the only possible defendant for breach of NZBORA such that a cause of action against the third defendant (Counties Manakau Health Ltd) should be struck out. The argument seems to have proceeded on the assumption that the CHE was a body independent of the Crown whose acts in the performance of its acknowledged public function brought it under the provisions of s 3(b) NZBORA. Counsel for the CHE argued that remedy for breach of the Act is a public law action for which the state is primarily liable, not a private law action in the nature of a tort claim for which the state might vicariously be liable. Consequently, although the CHE fell within the provisions of s 3(b), any remedy which might be granted to the plaintiff would be met by the Crown.

Cartwright J observed that the remedy sought was financial and it was therefore at least arguable that under the provisions of the Health and Disability Services Act 1993, which established the CHE as an independent and financially autonomous body, the CHE would itself be responsible. Her Honour referred to the judgment of McKay J in *Baigent* which supports the view that liability is against the Crown

alone, but noted that the Court of Appeal does not appear to have finally determined the issue. Her Honour referred to Hardie Boys J's analysis of Irish cases and the passage in His Honour's judgment which said:

> That has not prevented the Courts from developing remedies, including the award of damages not only against individuals guilty of infringement, but against the State itself.

Cartwright J concluded that:

> inferentially a remedy may well be granted against a Crown Health Enterprise if its actions are responsible for the breach" (p 4).

Accordingly, Her Honour would not strike out the cause of action against the CHE. She was not satisfied on the argument that she had heard to date that the Crown would be directly responsible for the actions of the CHE's employees in that the CHE's relationship with the Crown was so close that the Crown would automatically be liable for any remedy. Her Honour also said (at 5):

> It may well be that the plaintiff in order to ensure that it does not lose the opportunity of obtaining a remedy against the Crown will wish to join the Attorney-General in respect of Counties Manakau Health Ltd in the right of the Crown, but that is a matter for the plaintiff to consider and I make no directions.

Finally, Her Honour noted that counsel for the second defendant, the Attorney-General, made no submissions but adopted the arguments of the third defendant, a position she found a little surprising. The authors too find this stance somewhat surprising.

The Law Commission, in its forthcoming report *Crown Liability and Judicial Immunity: A Response to Baigent's Case in Harvey v Derrick* (NZLC R37) makes, in the authors' view, a most sensible proposal. The proposal is that public bodies subject to NZBORA under s 3(b) of that Act should have primary responsibility for their own conduct and that of their personnel which entails breach of the Act. The Crown should be liable only to the extent that it was a party to the relevant conduct of the private body.

CIRCUMVENTING ACC?

In some cases individuals may suffer personal injury at the hands of the government or a public authority in circumstances where they would not be able to bring an action for exemplary damages and hence would be barred from bringing an action in tort by s 14 of the Accident Rehabilitation and Compensation Insurance Act 1992 ("ARCIA"). For example, the threshold of outrageous, contumelious conduct might not be met or the claim may be made by an estate (an estate cannot claim exemplary damages (s 3(2) Law Reform Act 1936)). If it transpires that the personal injury was suffered in circumstances where the government or public body breached NZBORA, an important question becomes whether s 14 precludes an action for public law compensation under NZBORA.

Depending on the facts, it could be argued that a claim for compensation under NZBORA is barred because it arises directly or indirectly out of personal injury covered by the Act. However, there are sound reasons why this argument should not prevail. As John Miller stated (in "Seeking Compensation for Bill of Rights Breaches" (1996) *Human Rights Law and Practice* 211, 212):

> [The] bar can now be avoided by bringing an action for compensation for breach of the Bill of Rights.
>
> The claim will be against the Crown directly [query public functionaries] for a breach of the Bill of Rights. The award is public law compensation not common law damages. The focus of the claim is on the breach of rights not on the personal injury, and is similar to the approach adopted for exemplary damages claims. Such damages also focus on punishing the conduct of the wrongdoer rather than compensating the victim for the personal injury.

The focus of the claim is on the breach of rights not on the personal injury, and is similar to the approach adopted for exemplary damages claims

Miller's statements find support in the recent case of *Innes v Wong* (1996) 2 HRNZ 618; [1996] 3 NZLR 238. Having discussed *Baigent* and the nature of the new remedy of public law compensation, Cartwright J said (at 634):

> I am not aware of any case which has considered the relationship between the Accident Compensation and Rehabilitation Insurance Act and public law compensation for breach of the Bill of Rights. It appears to be at least arguable in this case that public law compensation would not arise directly or indirectly out of personal injury covered by the Act. Leaving aside the question of cover, it also appears arguable that the public law compensation arises from the breach of the Bill of Rights Act, not from personal injury.

Although one cannot say the matter has been authoritatively determined, it is certainly arguable now that a claim for public law compensation will not be barred by s 14 in the circumstances envisaged above.

THE SIGNIFICANCE OF *BAIGENT* FOR ADMINISTRATIVE LAW

The significance of *Baigent* for administrative law, at least so far as Court action is concerned, can be summarised as follows:

- breach of NZBORA by an administrative body constitutes illegality, for which parties whose right has been breached can seek judicial review;
- breach of NZBORA may sound in public law compensation if that is an effective and appropriate remedy;
- it must follow that where the established ground of review is breach of NZBORA (a form of illegality), damages may be available (it should not make any difference whether the plaintiff chooses to pursue his or her remedy by way of judicial review or by pleading a separate *Baigent* cause of action);
- thus in principle damages should be available in conjunction with a traditional judicial review remedy, such as certiorari, where there has been a breach of NZBORA (assuming the Courts do not hold the traditional remedy to be the *only* appropriate remedy);
- because there is no requirement of lack of good faith, recklessness, negligence or such like for the compensation remedy, citizens may now be able to seek a pecuniary remedy in circumstances where they would have no remedy in the law of civil obligations (most notably, tort). ❑

DNA ON APPEAL

Bernard Robertson and Tony Vignaux

examine some English Court of Appeal cases which they find unhelpful

The interpretation of DNA evidence has not been considered at any length in the New Zealand Court of Appeal. In *R v Pengelly* [1992] 1 NZLR 545, some interpretational issues were raised but the method of expressing the evidence was not questioned; in *R v Dougherty* [1996] 3 NZLR 351 the argument centred on what should have been mentioned in evidence. In England in the meantime, the Court of Appeal has considered methods of interpreting and giving DNA evidence. Unfortunately some of the cases go back to a past era and concern themselves with problems that have by now been eliminated.

In New Zealand, DNA evidence is routinely expressed in the form of a "likelihood ratio", which expresses how much more probable the evidence is if the accused were the source of the mark than if (usually) a randomly selected New Zealander were (eg *Pengelly*). This is known as the "Bayesian method". In *R v Deen* (CA(E&W), 21 December 1993), an English Bench including the Lord Chief Justice accepted this method and went on to deal with a particular problem, known technically as the transposition of the conditional and popularly as "The Prosecutor's Fallacy".

This usually occurs when a witness's evidence is misunderstood, but occasionally when the witness gives evidence incorrectly. A clear example of the former is to be found in *R v Amoa Amoa* CA, Cook Is, 11 Aug 1993, CA 3/93, an incest case. The witness testified that the results found were 72 times more probable if the accused were the father of the baby than if a randomly selected person were. In other words only 1 in 72 of the remainder of the population would be expected to produce such an analysis. The Judge, in summing up, told the jury that the witness had said that the odds were 72 to 1 that the accused was the father of the baby. In fact, of course, the odds in favour of the accused's guilt would depend, for a start, on the number of other possible suspects. If there were 720, for example, we would expect 10 to produce such an analysis and the odds of the accused's guilt would be 10 to 1 against. In fact, other evidence already pointed to the accused's guilt, so that the odds before considering the DNA evidence (the prior odds) were already favourable to the proposition of guilt.

Unfortunately, other Benches of the English Court of Appeal have subsequently questioned the basic principles that were accepted in *Deen*. In *R v Adams* (CA(E&W), 29 April 1996) the prosecution gave evidence relating to the results of a DNA test. The witness gave that evidence in the form of a likelihood ratio, as accepted in *Deen*. The defence then produced Professor Donnelly who explained to the jury how to combine that evidence with other evidence in the case which pointed to the accused's innocence. Giving evidence in likelihood ratio form assumes that the correct way to do this is by applying Bayes' Theorem.

Professor Donnelly went further and explained to the jurors how they could use Bayes' Theorem to combine each of the other items of evidence in the case with each other. When the case went on appeal, the Court said that it had not heard argument about this and could not "express a concluded view on the matter". Nonetheless it had "very grave doubt as to whether that evidence was properly admissible".

This was because the evidence seemed to trespass "on an area peculiarly and exclusively within the province of the jury, namely the way in which they evaluate the relationship between one piece of evidence and another". This raises some basic issues to which we shall return. Had the Court stopped at this point all might have been well. Unfortunately the reasons that Their Lordships gave for this view were, it is respectfully submitted, the wrong ones.

The Court did admit that "Bayes' Theorem may be an appropriate and useful tool for statisticians and other experts seeking to establish a mathematical assessment of probability". This is ambiguous. The word "mathematical" here could refer simply to the appearance of precision, or it could imply a distinction between "mathematical probability" and other probability. We would reject the latter proposition. There is only one kind of uncertainty and there is only one way to measure uncertainty. That is called probability; the only logical way to reason in a state of uncertainty is in accordance with the axioms of probability.

The Court then made a number of detailed observations with which we deal in turn.

- *the theorem can only operate by giving to each separate piece of evidence a numerical percentage representing the ratio between the probability of circumstance A and the probability of circumstance B granted the existence of that evidence.*

Two quibbles. First, probabilities may be expressed in percentages, but a likelihood ratio is just a number: it cannot be a percentage. Secondly, in the last part of this sentence Their Lordships have transposed the conditional. A likelihood ratio is the ratio between the probability *of the evidence* given circumstance A and circumstance B. It describes the strength *of the evidence* in distinguishing between proposition A and proposition B. What Their Lordships described is the posterior odds that the Court is trying to assess. But if these corrections are made this is a correct statement about Bayes' Theorem which should not be read as pejorative.

- *The percentages chosen are matters of judgment: that is inevitable. But the apparently objective numerical figures used in the theorem may conceal the element of judgment on which it entirely depends.*

One would hope that these "judgments" would be made in the same way that all assessments of probability should be made: rationally and by reference to the evidence. The figures given are merely expressions of strength of belief.

Any system for expressing strength of belief must comply with some simple rules such as:

(a) if I believe that A is more likely to be true than B and that B is more likely to be true than C, I must believe that A is more likely to be true than C; and

(b) equivalent levels of belief are expressed equivalently and divergent levels of belief expressed divergently.

Not only are numbers a convenient way of achieving this, but any system of expressing strength of belief which complies with these rules can be reduced to numbers.

- *the theorem's methodology requires, as we have described, that items of evidence be assessed separately according to their bearing on the accused's guilt, before being combined in the overall formula*

This is correct only up to a point. At some point in the deliberative process items of evidence have to examined separately, indeed it is hard to see how a body of evidence can be rationally assessed without some dissection. But when an item of evidence is examined, it must be in the light of the evidence already considered. This leads to the criticism of Bayesian reasoning that the interdependencies of the items of evidence make the process far too complex. There are several answers to that. One is that all Bayes' Theorem does is to make obvious complexities which exist in reality. It is hard to understand how decision making can be improved by deliberately ignoring them. Secondly, the idea that a jury sits in Court with a pre-set "prior probability", computes a likelihood ratio for each item of evidence and then combines them one by one is an unhelpful model. The jury considers the evidence when it has withdrawn. By that stage a large amount of evidence will have been accepted as true and the dispute will often have narrowed down to a choice between two or three well-defined stories. At this point the jury's deliberation begins. It only has seriously to consider evidence which is genuinely in dispute and which distinguishes between disputed alternatives. This enormously reduces the complexity.

- *That in our view is far too rigid an approach to evidence of the type that a jury characteristically has to assess, where the cogency of (for instance) identification evidence may have to be assessed, at least in part, in the light of the strength of the chain of evidence of which it forms part.*

Where an item of evidence is genuinely part of a chain, it must be considered in that light and Bayesian reasoning explains in formal terms how that is done. Clearly, an identification is affected by the *Turnbull* factors and these are to be considered when assessing the strength of the identification as evidence. If, however, the Court was referring here to the rule that a weak identification is treated differently according to whether or not there is supporting evidence, Bayesian reasoning reveals this as plainly illogical. If an analogy must be used, the appropriate one when an identification and supporting evidence are considered is not a chain but a rope composed of several strands. The strength of one strand may affect the strength of the whole rope but it cannot affect the strength of another particular strand. The rule in *Turnbull* that a weak identification should only go to the jury if there is supporting evidence amounts only to saying that a weak identification can go to the jury if the case is otherwise strong and not if it is otherwise weak.

- *Jurors evaluate evidence and reach a conclusion not by means of a formula, mathematical or otherwise, but by the joint application of their individual common sense and knowledge of the world to the evidence before them.*

But what does this mean?. Bayes' Theorem is merely the formal expression of how one applies common sense and knowledge of the world to the evidence. It makes clear whether evidence can be regarded as strengthening or weakening a case. While Bayes' Theorem is not the only tool provided by Bayesian reasoning, any analysis that does not comply with Bayesian principles is illogical and wrong. Professor Donnelly was instructing the jury on how Bayes' Theorem works but few would argue that jurors should consciously apply it to each item of evidence as they hear it. But whenever a Judge instructs a jury in how to consider evidence or an appeal Court rules on how facts are to be thought about, these instructions must be consistent with logic and reason, the formal expression of which is Bayesian formulae. The obvious analogy is that the instructions that a parent gives when teaching a child how to ride a bicycle must conform to the laws of mechanics; but there is no need to have any conscious knowledge of mechanics before one can successfully teach a child to ride a bicycle.

whenever a Judge instructs a jury in how to consider evidence or an appeal Court rules on how facts are to be thought about, these instructions must be consistent with logic and reason

- *Scientific evidence tendered as proof of a particular fact may establish that fact to an extent which, in any particular case, may vary between slight possibility and virtual certainty. For example, different blood spots on an accused's clothing may, on testing, reveal a range of conclusions from "human blood" via "possibly the victim's blood" to "highly likely to be the victim's blood".*

Unfortunately there is a major misunderstanding here. For decades scientists have given evidence in this sort of form, especially in paternity cases. The result is that the Courts have become used to hearing evidence like this, and become puzzled when the scientific evidence appears to establish a fact to a virtual certainty but there is cogent non-scientific evidence pointing the other way. In fact there is no logical way of combining such a statement with the remainder of the evidence in the case, which is itself sufficient reason for rejecting it. The evidence in *Adams* was not given in this way, but lawyers have become so used to hearing evidence like this that when it is correctly given they hear it incorrectly, as evidenced by Their Lordships' transposition of the conditional pointed out above.

In fact a scientist who expresses a conclusion of this sort usurps the role of the jury to a greater, and more insidious, extent than Professor Donnelly may have done. The assessment of a posterior probability, which a statement such as "highly likely to be the victim's blood" is, requires the assessment of a prior probability for that proposition. In paternity cases this has arbitrarily been treated as 0.5, but there is no warrant for this. The prior probability depends upon other evidence and is a matter for the jury. Professor Donnelly's sin was to make his assumptions and reasoning transparent, whereas the Court illogically appears quite content with expressions which conceal the expert's assumptions.

- *Individual jurors might differ greatly not only according to how cogent they found a particular piece of evidence (which would be a matter for discussion and debate between the jury as a whole), but also on the question of what percentage figure for probability should be placed on that evidence.*

Again, the reference here should be to a likelihood ratio and not to a "percentage figure for probability". That apart, this statement appears to be tautological. Two people who disagree on the strength of a item of evidence will naturally disagree on its likelihood ratio. An important point however, is that the process of constructing a likelihood ratio will make clear why two people disagree. At the end of an argument structured in this way one or both may wish to change their view of the evidence.

- *Different jurors might well wish to select different numerical figures even when they were broadly agreed on the weight of the evidence in question.*

This would, of course, make perfect sense if it means that jurors only agree broadly and not precisely about the strength of the evidence. If two people agree that a piece of evidence is "very strong" they must both presumably accord it a likelihood ratio higher than a piece of evidence each regards as only "strong" and so forth.

- *They could, presumably, only resolve any such difference by taking an average, which would truly reflect neither party's view; and this point leaves aside the even greater difficulty of how twelve jurors, applying Bayes as a single jury, are to reconcile, under the mathematics of that formula, differing individual views about the cogency of particular pieces of evidence.*

At this point, it is respectfully submitted, Their Lordships are wrong in law. The only matter on which the jury is required to be unanimous is that "the prosecution [has] prove[d] the charge it makes beyond reasonable doubt". *Mancini v Director of Public Prosecutions* [1942] AC 1 (HL) per Viscount Simon LC at 11.

The jury are not required to be unanimous as to how the offence was committed. This was regarded as "clear beyond argument" by the Court of Appeal in *Attorney-General's Reference (No 4 of 1980)* [1981] 2 All ER 617. A more dramatic example is the Supreme Court of Canada's upholding the verdict in *Thatcher v The Queen* (1987) 39 DLR (4th) 275 in which the prosecution told two mutually inconsistent stories.

Likewise the jurors are not required to agree on the evidential route by which they reach their individual verdicts. As Turner J put it in *Thomas v The Queen* [1972] NZLR 34, at 41:

> It is of course inherent in the process of conviction by jury that the jury must be convinced as a whole, and each member must be convinced individually, beyond reasonable doubt *of the guilt of the accused*. This necessarily extends to every essential element of the crime charge ... it does not logically follow that each of the members of the jury must base his or her individual conclusion upon the same reasoning as the others. Different members may individually be convinced beyond reasonable doubt of the guilt of the accused, by their individual acceptance of *different facts*. (emphasis in original)

A fortiori, where they reach their verdicts on the basis of the same facts there is no requirement for jurors to be precisely agreed on the strength of any particular item of evidence.

- *To introduce Bayes' Theorem, or any similar method, into a criminal trial plunges the jury into inappropriate and unnecessary realms of theory and complexity deflecting them from their proper task.*

It may indeed plunge the jury into unnecessary realms of theory and complexity, but it can hardly be described as a deflection from their proper task. Bayes' Theorem constitutes not a deflection from this task but a formalisation of it, a formalisation which, we would agree may not always be necessary or helpful to a juror, but which is the only appropriate yardstick for those, such as appeal Courts and academics, who judge Judges.

There is arguably a much simpler and more compelling reason why experts cannot be allowed to give evidence on how jurors should combine non-scientific evidence using Bayes' Theorem. If such evidence were admissible in *Adams* it would be admissible in every single criminal case. While this might be good for those qualified to give the evidence, this would not do anything for the cost-effectiveness of the criminal justice system.

In fact it is doubtful whether an explanation of Bayesian reasoning is "evidence" at all. It is merely a detailed analysis of common sense. A Judge might in a particular case wish to hear a detailed explanation, but would then be hearing a witness in order to take judicial notice of a matter, not taking evidence. Such instruction could be included in counsel's closing addresses to the jury and in the Judge's summing up since Judges are required to instruct the jury on how to consider the evidence.

We have always favoured expert witnesses explaining the effect of the likelihood ratio by saying words to the effect of "whatever you consider the odds of guilt are on the basis of the other evidence, my evidence should cause you to multiply those odds X fold". This makes it clear that the witnesses are giving an opinion only on the strength of their own particular evidence and not of the case as a whole and also stresses that scientific evidence must be considered in combination with the other evidence in the case.

The ground for quashing the conviction was that the Judge's summing up concentrated on Bayes' Theorem:

- *... without indicating to the jury the more commonsense and basic ways in which it would be open to them to weigh up the relative weight of the DNA evidence... [the jurors were left] with no other sufficient guidance as to how to evaluate the prosecution case ... in the light of the other non-DNA evidence in the case.*

The defence case, however, was not that the DNA evidence should be weighted relative to the other evidence but that it should be combined with it. Apart from this, the Court failed to explain what these "more commonsense and basic ways" are. If it had attempted to explain it would have been in a quandary. The advice could either be meaningless waffle or it could have some content. Such content would either have had to conform to the requirements of Bayesian reasoning or be illogical and wrong. ❑

Next month the authors discuss R v Doheny *and* R v Dougherty.

Bernard Robertson and Tony Vignaux are the authors of Interpreting Evidence: Evaluating Forensic Science in the Courtroom, *published by John Wiley and Son Ltd (UK), 1995, where these matters are more fully discussed. This article was first published in* The Criminal Lawyer.

APPLES AND ESPIONAGE

Duncan Stewart

considers the recent interception of apple budwood by New Zealand Customs

Recently, four Chinese scientists and an interpreter visited orchards round New Zealand as guests of the Government. Members of the party allegedly took budwood from apple trees at one or more of these orchards. The party were reported to have been asked to desist by their tour guide, yet did not, and were intercepted at customs (*Evening Post*, 24 April 1997, p 1; 25 April 1997, p 2; *TVNZ One Network News*, 24 April 1997). Once the material was recovered, the visitors were allowed to proceed with their flights out of the country. This led to a minor outcry from horticulture specialists and politicians. The Minister of Customs was reported as admitting that the decision was influenced by consideration of China as a major trading partner (*Evening Post*, above).

More emphasis could have been given to the existence of legal protection against industrial espionage. China is apparently not a member of the International Union for the Protection of New Varieties of Plants (UPOV), but, like New Zealand and most other nations, has signed the *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods* (TRIPs). TRIPs would appear to be the common ground for basing the prevention of further misappropriations of this nature. Indeed, the need to protect against unfair competition is mentioned in TRIPs. However, the provision of this protection has not yet been reflected clearly in our domestic law.

Recently, the options for creating greater legal protection against industrial espionage were reviewed by Stewart: *Industrial Espionage in New Zealand*, 1996, Massey University Business Law, Occasional Papers (No 3). The following discussion is, in part, a digest of that review.

UNFAIR COMPETITION

Under s 7, art 39 of TRIPs, "undisclosed information" is protected from "unfair competition". This information must be secret, have commercial value because of its secrecy, and have been the subject of reasonable efforts to maintain that secrecy; that is, a trade secret. The protection extends to the disclosure, acquisition or use of information by other than "honest commercial practices". This wording repeats the protection, also cited in art 39, which is found under art 10*bis* of the Paris Convention (1967). Under art 10*bis* (2) of that Convention:

> Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

In addition, "a manner contrary to honest commercial practices" is defined in art 39 of TRIPs to "*at least*" mean "practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition" (emphasis added). Thus, it is not limited to the practices specified. If it reasonable to assume that espionage is a dishonest commercial practice, then both the spy and third parties in receipt of the information in question may be liable.

In New Zealand, trade secrets may be protected under an obligation of confidence (see Stewart, *Trade Secrets and the Action for Breach of Confidence*, 1996, Massey University Law Occasional Papers (No 2)). Breach of confidence is defined as a dishonest commercial practice in TRIPs, so it would seem that adequate protection exists against the dishonest disclosure and use of trade secrets. A major flaw in the efficacy of the duty of confidence as a legal barrier is that it exists *in personam* only, yet no relationship or confidential communication may exist between the information owner and a spy.

Moreover, the costs of establishing that espionage occurred may defeat recognition of an informal relationship between the parties, on which some may argue that a duty of confidence could be based. Proposals which rest on the extension of a duty of confidence to spies therefore strain the existing doctrine (see *Industrial Espionage* 6-9). Hence, the dishonest disclosure and use of trade secrets may be prohibited, as required under TRIPs, but not the dishonest acquisition of such secrets.

A problem is that the grounds for prohibiting espionage are not established, in part because cases of espionage are rare (see *Industrial Espionage*). However, without precedents, victims may not risk legal action, as they are uncertain about the outcome, and because they may have to disclose their trade secrets in Court. In theory, if espionage remains unpunished it could increase the risk of market failure in the production of information (see further, Stewart, "The Intellectual Property Rights Continuum" (forthcoming) *NZ Law Rev*). Indeed, commentators on the recent apple episode have emphasised that expenditure by the Government on research and development might be wasted if the resultant information is misappropriated. Legislative action may therefore be necessary to fill this gap in the law and to fulfil New Zealand's obligations under the TRIPs agreement.

FRANKLIN v GIDDENS

In *Franklin v Giddens* [1978] Qd R 72, a rare example of industrial espionage was at issue, and was decided on the basis of equitable principles. An orchardist was convicted of stealing nectarine budwood, with a view to growing trees and selling their fruit in competition with the plaintiff. The primary trade secret in question was the genetic information in the wood. This information was likened by Dunn J to a formula, was the product of generations of cross-breeding, and was impossible to replicate. Thus, the trade secret at

issue appears similar to the apple budwood confiscated by New Zealand customs.

The second trade secret in *Franklin*, knowledge of which enabled the theft to occur, was the secret location of the fruit trees. It was during voluntary labour for the plaintiffs that the defendant learned where the trees were situated and acquired the budwood. Thus, there was no formal relationship between the parties, such as an employment contract, which might have been used to imply a duty of confidence. The information was also not communicated specifically to the defendant, who knew that the plaintiffs wanted to keep it to themselves. Hence, there was no confidential communication which might have been used as the basis for an "equitable" duty of confidence.

In the end, Dunn J decided the case on a broad principle of unconscionability: (at 80)

> The thief is unconscionable because he plans to use and does his own wrong conduct to better his position in competition with the owner, and also to place himself in a better position than that of a person who deals consensually with the owner.

It is interesting to note that Dunn J found that the conduct was no more unconscionable than if committed under an employment contract by a traitorous servant. Perhaps His Honour would not have referred to unconscionability had he been able to find a formal relationship on which to base a duty of confidence.

Gurry has criticised the application of unconscionability in *Franklin*, finding it to be too broad and open-ended a principle, and because it cannot be used to distinguish between illegitimate espionage and "legitimate competitor intelligence or surveillance" (*Breach of Confidence*, 1984, p 165); that is, unconscionability represents too low a standard of proof. In the context of this discussion it would be an unsuitable basis for legislation. On the other hand, the treatment of the issue in the Crimes Bill 1989, below, may represent too high a standard.

CRIMES BILL 1989

The Crimes Bill 1989 contained a clause which was aimed at deterring the misuse of trade secrets:

> **185. Taking, obtaining or copying trade secrets** – Every person is liable to imprisonment for 5 years who, with intent to obtain for himself or herself or for any other person any pecuniary advantage, –
>
> (a) Dishonestly takes, obtains, or copies (whether by a photographic process or otherwise) any document or any model or other depiction of any thing or process; or
>
> (b) Dishonestly takes or obtains any copy (whether produced by a photographic process or otherwise) of any document or of any model or other depiction of any thing or process, –
>
> believing that the document, thing, or process is of commercial value.

Dishonesty was defined in clause 178:

> ... A person dishonestly does any act or dishonestly omits to do any act in each of the following circumstances:
>
> (a) In respect of any act or omission requiring the authority of any other person and for which that authority has not in fact been given, where he or she –
>
> (i) knows that no such authority has been given; or
>
> (ii) does not believe that any such authority has been given, –
>
> and has no reasonable grounds for believing that the other person would have given that authority had he or she been asked;

The Crimes Consultative Committee reported back to the Minister of Justice in 1991, and proposed (at 35) a definition of "trade secret" which reflected an earlier Canadian definition, and closely resembles the definition of "undisclosed information" under art 39 of TRIPs (see *Industrial Espionage*, at 2, n 3). The emphasis on dishonesty also appears to be similar to that in TRIPs. It may therefore be asked whether this clause ought to be revived, even in a separate piece of legislation, to fulfil New Zealand's commitment to protect against the dishonest acquisition of trade secrets.

If enacted, clause 185 would at first glance have provided suitable protection against the alleged apple espionage. The budwood was evidence that a "thing" was taken; the reported warning was evidence that the party knew that permission had not been given and had, as a result, no reasonable grounds to believe that it would have been given by the budwood owners (assuming that the translation was adequate); the matter concerned valuable genetic information which could plausibly have been used to the pecuniary benefit of the individuals concerned.

An investigative problem was said to be the "practical difficulties in laying charges" for police, who would have had to have known "... exactly who the plant material belonged to, where it came from and when it was clipped" ("Police Headquarters", *One Network News*, above). Of course, the information might have been researched according to the itinerary of the party, and prosecuted as in other theft cases. However, the cost of this undertaking highlights the importance of physical evidence of misappropriation if legal action is to be feasible. In this case it was confiscated, but perhaps a reason why similar acts, of which commentators claim an awareness, have gone unrecognised, is that there is little direct evidence of theft, the date of the theft, nor the exact target. The only evidence may be the fact that the alleged spy is growing the material. In other circumstances, the information may be memorised surreptitiously, so that the only evidence of acquisition is its use.

If clause 185 of the Crimes Bill was to have been of general application it ought to have addressed such problems. Clear-cut evidence of acquisition may be rare, so that the act of taking, obtaining or copying is too costly to prove. In that case, the distinction between knowledge that no authority was given and lack of belief that it was given may not be that useful. Similar concerns may limit the effectiveness of attempts to prohibit espionage through a non-statutory emphasis on illegal means (see *Industrial Espionage*, at 18-20). This problem is compounded by the fact that the Crimes Bill clause involved criminal sanctions. It would have meant that an even higher standard of proof was required so that the emphasis on physical evidence of misappropriation would be, in effect, greater than in a civil case.

On the other hand, non-statutory protection against improper, yet legal means may be too imprecise to be relied upon (see further *Industrial Espionage*, at 12-18). Thus, too great a level of uncertainty about the outcome of a dispute may exist so that, in the absence of clear precedents, it may not reach the Courts. A statutory solution is still needed.

GROSS NEGLIGENCE

Third parties in receipt of undisclosed information of another are liable under TRIPs if they knew, or were grossly negligent in failing to know, that it was acquired through a dishonest commercial practice, above. If espionage is accepted as such a practice, then spies ought also to be liable on this basis. Lack of physical evidence of misappropriation may limit the finding that the alleged spy knew that the acquisition was dishonest, but it is unclear if it precludes liability on the grounds of gross negligence.

Gross negligence is not defined in art 39 of TRIPs, but there has been limited use of the term in English and New Zealand law, notably with regard to the duties of company directors. In *Re City Equitable Fire Insurance Company Ltd* [1925] 1 Ch 407, 427, Romer J held that "so long as a director acts honestly he cannot be made responsible in damages unless guilty of *gross or culpable negligence in a business sense*". This approach was expressly adopted in *Kuwait Asia Bank EC v National Mutual Life* [1990] 3 NZLR 513, 533 and by Gallen J in *Grayburn v Laing* [1991] 1 NZLR 482, 490 who found:

> The reference to gross and culpable negligence suggests that the standard of care required differs from that which may be considered appropriate in the case of what might be described as ordinary or standard negligence. The expansion by the Judge as a concept with reference to particular illustrations makes it clear that the extent of the obligations must be considered in relation to the particular case and the nature of the directorship subject to the over-riding consideration that in the case of honest action liability will not be imposed unless there is some feature of the situation which suggests the need for a greater degree of care than would usually be the case. Perhaps the matter is best expressed in terms of onus.

Recently, the New Zealand Courts appear to have adopted a standard of ordinary negligence, following the enactment of the Companies Act 1993 and a similar judicial trend in Australia (see *Industrial Espionage*, at 37-39). However, the earlier precedent may be of use for the prosecution of espionage, provided that the term is distinguished from ordinary negligence. Ordinary negligence may present too low a standard of proof which could, in effect, deter informal trading of know-how under threat of espionage litigation (see *Industrial Espionage*, at 30-32).

Gross negligence is a more difficult standard to meet than that of ordinary negligence. The "feature[s] of the situation which suggests the need for a greater degree of care than would usually be the case" (Gallen J, quoted above), could refer to the nature of the information, the nature of the relationship between the parties, such as commercial rivalry, and the potential pecuniary benefits of the alleged acquisition. The onus for identifying these features would lie with the plaintiff.

Of course, the information would also have to be shown to be the same as that owned by the plaintiff. This could prove to be a limitation on the effectiveness of both the domestic law and its application to incidents of international industrial espionage. Extensive powers of search within New Zealand may be needed, especially when the information has been used to improve an existing product, including apple varieties.

The outcome may be prima facie proof that the alleged spy had no reasonable grounds for believing that authority for the acquisition would have been given if asked. In effect, it is evidence that the alleged spy has acted dishonestly under the latter part of clause 178(a) of the Crimes Bill, above. Thus, gross negligence need not be limited to a specific activity nor physical evidence of it, nor evidence of whether the defendant is the actual spy or a third party.

According to Doone, the Crimes Bill definition of dishonesty poses a "strict liability test without precedent in the United Kingdom or Australia" ("Commercial Fraud in New Zealand: Contemporary Legal and Investigative Issues" (1990) 20 *VUWLR Monograph 3*, 159, 171). Doone objects to what he views as the "increased potential for injustice by requiring a defendant to displace *prima facie* proof of an absence of reasonable grounds for belief" (ibid). However, the defendant in an espionage case could displace it by showing that the information is not a trade secret, or that the acquisition was legitimate, such as through proof of purchase or of independent discovery. Indeed, an incapacity to create the trade secret may be why the information was misappropriated. Thus, once the grounds for taking a greater than ordinary degree of care are established, the onus may shift to the defendant. In the case of stolen apple trees, with unique genetic lines developed over many years, proof of legitimate acquisition could be difficult. As a result, gross negligence may prove to be an effective standard by which to judge allegations of espionage. If the action is civil, not criminal, then the standard of proof needed for a conviction may not be insurmountable. (Other legal options were considered and rejected, including liability based on fair trading law, the tort of interference by unlawful means, and "commercial privacy": see *Industrial Espionage*.)

CONCLUSIONS

It is recommended that legislation be introduced to fulfil New Zealand's agreement in TRIPs to protect against the dishonest acquisition of undisclosed information. This legislation ought to include a definition of trade secrecy in accordance with that found in TRIPs, and the earlier proposal by the Crimes Consultative Committee. The action could be labelled "unfair competition" in order to satisfy art 39 of TRIPs.

Civil liability could be imposed for conduct that involved knowledgable dishonesty on the part of a spy or third party, or gross negligence in failing to know of it. The issue of knowledgable dishonesty could be defined in terms of clause 178(a) of the Crimes Bill 1989 to mean that the defendant/s knew that no authority had been given, or did not believe that any such authority had been given. If such knowledge could be proved, as was apparent in the apple budwood episode, it may be unnecessary to proceed with a claim of gross negligence. In many cases of espionage, however, this evidence may be missing.

Gross negligence could be defined in terms of an onus on the plaintiff to show that a greater than ordinary degree of care was required. This may include proof that a trade secret was at issue, was owned by the plaintiff, was possessed by the defendant, and other commercial factors. If established, then the onus would shift to the defendant to prove legitimate acquisition. This standard has the advantage of wider application than approaches which rely, in effect, on physical evidence of misappropriation. Lastly, if the action is developed from TRIPs, the prosecution of foreign nationals caught within New Zealand may be acceptable to our trading partners. However, cooperation in restricting international industrial espionage is still needed. ❑

INDIRECT DISCRIMINATION IN EMPLOYMENT

Dr Isaacus Adzoxornu, Editor, Human Rights Law and Practice

examines two recent cases on indirect discrimination

This article examines two recent decisions of the Employment Court touching upon the distinction between "direct" and "indirect" discrimination in employment. In *Trilford v Car Haulaways Ltd* [1996] 2 ERNZ 351 a full Court held, correctly, it is submitted, that the language of s 28(1) ECA naturally encompasses indirect discrimination and that on the facts of the case the employee suffered direct discrimination. However, is argued that the Court was wrong to suggest that for the purposes of personal grievances there is no need "to descend to the subtlety of distinguishing between direct and indirect discrimination" (Chief Judge Goddard, at 353). Also, the decision is criticised for reading into the concept of direct discrimination, an employer's state of mind and motives.

Dryfhout v New Zealand Guardian Trust, 12 September 1996, Judge Colgan, AEC 58/96; A 132/96, which was not decided under the personal grievance or discrimination jurisdiction, illustrates the fundamental problems that may arise from the full Court's decision that no distinction should be drawn between the two forms of discrimination and that in all cases, the test for discrimination should be the "but for" test developed by Chief Judge Goddard in *NZ Workers IUOW v Sarita Farm Partnership* [1991] 1 ERNZ 510.

TYPES OF DISCRIMINATION

Anti-discrimination law at both the international (see, McKean, "The Meaning of Discrimination in International and Municipal Law" (1970) 44 BYIL 177, 181; and Ben-Israel, "Equality and Prohibition of Discrimination in Employment" in Blanpain (ed), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (Kluwer,1990) 87, 90) and domestic levels has for some time distinguished between "direct" and "indirect" discrimination. New Zealand is no exception. Section 27 Human Rights Commission Act 1977, the predecessor to the Human Rights Act 1993 (HRA), differentiated "discrimination by subterfuge" from other forms of discrimination. The HRA renamed the concept "indirect discrimination". (s 65) The Complaints Review Tribunal and its predecessor the Equal Opportunities Tribunal have also utilised this distinction (*Wheen v Real Estates Agents Licensing Board* (1996) 2 HRNZ 481; *Proceedings Commissioner v Air NZ Ltd* (1988) 2 NZELC 78-251). Furthermore, some opinions rendered by the Human Rights Commission have applied the distinction and found that some complaints had substance as a result of indirect discrimination (see, for example, *Re Religious Discrimination Complaint* [work on religious holy day] 13 December 1990, HRC, C206, 207/90; *Re Race Discrimination Complaint* [no taonga rule] 31 October 1994, HRC, C112/91. Finally, the Human Rights Commission discusses the two types of discrimination in *Pre-Employment Guidelines* (1995); *Advertising Guidelines* (1995) and *Superannuation Guidelines* (1996).

Beside direct and indirect discrimination, the jurisprudence also encompasses "systemic" or "institutional" discrimination. Some conceptual distinction among these various forms of discrimination is necessary. The distinction between "direct" and "indirect" discrimination is discussed sufficiently by the writer in Brooker's *Human Rights Law* IN.7-7.05 to justify abbreviating the present analysis.

Direct discrimination

Direct discrimination (also known as "disparate treatment", "facial" and "overt" discrimination) occurs where D (the alleged discriminator) treats C (the complainant) less favourably because of a prohibited ground of discrimination. Direct discrimination requires a causal connection between D's less favourable treatment of C and a prohibited ground. (*Re Ontario Human Rights Commission and Simpsons-Sears Ltd* (1986) 23 DLR (4th) 321, 332).

The preferred formula for direct discrimination in s 22 HRA and s 28(1) ECA is that D must treat C less favourably "by reason of" a prohibited ground of discrimination. The developing New Zealand case law has interpreted "by reason of" to mean that a prohibited ground is the or a substantial or operative explanation for the less favourable treatment (*HRC v Eric Sides Motors Ltd* (1981) 2 NZAR 447, 457; *H v E* (1985) 5 NZAR 333, 344). In *Sarita at* 516, Chief Judge Goddard preferred the "but for" test in the House of Lords decisions *James v Eastleigh Borough Council* [1990] 2 All ER 607 and *R v Birmingham City Council* [1989] 1 All ER 769. Under *Sarita*, direct discrimination occurs where "but for" a prohibited ground, an employee would not have been treated less favourably.

The "but for" test is, however, of limited value where there are multiple reasons (some legitimate) for the less favourable treatment, eg *Price Waterhouse v Hopkins* 490 US 228 (1989). In such a case, less favourable treatment would not necessarily occur "but for" a prohibited ground of discrimination.

Indirect discrimination

Indirect discrimination (also known variously as "disparate impact", "adverse effect", "disproportionate impact", "unintentional" and "constructive" discrimination), occurs in the employment context, where an employer imposes on all employees or all applicants for employment, a neutral or non-discriminatory requirement or condition, which has a

disproportionately adverse effect on members of a class of employees identified in terms of a prohibited ground of discrimination. If the employer cannot justify the requirement or condition, the employer will be guilty of indirect discrimination against that class of employees.

The key to indirect discrimination is not so much the reason behind the requirement or condition as its effect on minorities. In most cases, the rule is harmless, hence the descriptive terms "facially neutral", and "unintentional" requirement, rule or condition in the burgeoning case law.

The decision of the US Supreme Court in *Griggs v Duke Power Co* 401 US 424 (1971) is credited with introducing the concept of indirect discrimination. In *Griggs*, the employer required a high school diploma and a satisfactory passing score on two professionally administered tests as conditions for appointment to, or promotions within, the company. While the two conditions applied to all potential applicants and existing employees, none bore any manifest relationship to an individual employee's ability to learn or perform a particular job or set of jobs. More importantly, the diploma and the test requirements had the effect of excluding from employment or congenial positions, a much higher proportion of African-Americans most of whom lacked basic educational qualifications. The African-American employees brought a class action alleging racial discrimination contrary to the Title VII Civil Rights Act 1964 (US).

The Supreme Court observed that the purpose of Title VII was to achieve equality of employment opportunities and to "remove barriers that had operated in the past to favour an identifiable group of white employees over other employees". Under the Act, practices procedures, or tests neutral on their face, and even neutral in terms of intent, could not be maintained if they operated to "freeze" the status quo of prior discriminatory employment practices (at 430). The Court emphasised that good intent or absence of intent would not redeem a procedure or testing mechanism that was "fair in form but discriminatory in operation" (431) and that, Congress had directed the thrust of Title VII of the Civil Rights Act to the consequences of employment practices, not simply their motivation (432).

Systemic discrimination

It is not always easy to draw a hard and fast distinction between direct and indirect discrimination. Where this is the case, the jurisprudence has utilised the concept of "systemic discrimination", also sometimes known as "institutional discrimination" Systemic discrimination, which denotes something broader than indirect or adverse effect discrimination, draws upon practices which may be both directly and indirectly discriminatory.

Systemic discrimination has been explored in a report by Judge Abella of Canada (*Equality in Employment: A Royal Commission Report* Ottawa 1984). In *Action Travail des Femmes v Canadian Railway Co* (1987) 40 DLR (4th) 193, 210, Dickson CJC described "systemic" discrimination as:

> [D]iscrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of "natural" forces, for example, that women "just can't do the job".

Systemic discrimination is best explained as a third method of proof of discrimination which requires evidence of discriminatory patterns or practices with adverse consequences for a group to which the complainant belongs. The lower Tribunal decision in *Action Travail des Femmes* (1984) 5 CHRR D/2327 is an example of a decision based on systemic discrimination. Systemic discrimination will not be discussed further in this article.

INDIRECT DISCRIMINATION

Indirect discrimination is now specifically recognised in s 65 HRA, but the ECA does not contain a comparable provision. While s 28 ECA prohibits "discrimination", it does so in language reminiscent of the requirements of direct discrimination. The elements of s 65 HRA have been treated in detail in *Human Rights Law* (HR65.04-09) with the added benefit of a discussion of the structure and means of proof developed in both the domestic and overseas case law on the subject. Only the bare outlines will be discussed here.

Where D is an alleged discriminator, and C a complainant, the following elements must be present to establish indirect discrimination under the HRA:

(a) D must impose a requirement or condition;
(b) which is not apparently in breach of any provision of Part II of the Act;
(c) but which nevertheless has the effect of treating C or a group differently;
(d) on a prohibited ground of discrimination; and
(e) cannot establish "good reason" for the requirement or condition.

Requirement or condition

The case law has not distinguished between the terms, conduct, practice, requirement or condition. Here, we refer to them simply as "requirement or condition". Because C bears the legal or persuasive burden of proof of discrimination, C is required to prove that D has imposed a requirement or condition. The case law makes clear that C must identify the impugned requirement or condition with some precision (*Waters v Public Transport Corp* (1992) 103 ALR 513, 556; *Bhudi v IMI Refiners Ltd* [1994] ICR 307, 315; *Wards Cove Packing Co v Antonio* 490 US 642 (1989)).

"Requirement or condition" has been interpreted as: "a must"; "something which has to be complied with" (*Perera v Civil Service Commission (No 2)* [1983] ICR 428, 436; *Meer v London Borough of Tower Hamlets* [1988] IRLR 399, 402) "a stipulation which must be satisfied if there is to be a practical (and not merely a theoretical) chance of selection" (*Secretary of Foreign Affairs and Trade v Styles* (1989) 88 ALR 621, 629; *Waters v Public Transport* at 521).

Not apparently in contravention

This element merely indicates that a requirement or condition need not be discriminatory on its face. In most cases, the requirement or condition applies to all employees. It may also indicate that it is not necessary for C to establish a discriminatory intent or motive on D's part. *Griggs* and *Wheen* (above) make it clear that intent or motive to discriminate is not necessary for indirect discrimination

It is suggested that in practice, mere proof by C of the requirement or condition will dispense with the need to prove that the requirement or condition does not contravene any provision of Part II of the Act.

Effects of requirement or condition

The key element in indirect discrimination is that the impugned requirement or condition, although fair and neutral in form, nevertheless imposes more onerous obligations, penalties or restrictive effects on C or a group of persons to which C belongs than on others. This crucial element in indirect discrimination was emphasised by the US Supreme Court in *Griggs* and in New Zealand in *Wheen v Real Estate Agents Licensing Board* (1996) 2 HRNZ 481, 494.

The burden of proving adverse or disproportionate effect is not discharged by assumptions. C must present specific proof of impact. The Complaints Review Tribunal indicated in *Wheen* at 494 that the US approach requiring the plaintiff to prove disproportionate or adverse impact through a preponderance of statistical evidence is "in terms of general principle appropriate" for New Zealand.

On a prohibited ground

It is only persons who are protected under a prohibited ground of discrimination who can claim that they have been discriminated against indirectly. C must prove that C or a group represented by C, is more adversely affected by the impugned requirement or condition than others. The prohibited grounds of discrimination are listed in s 21 HRA and s 28 ECA. The Complaints Review Tribunal indicated in *Wheen* (at 494) that "groups" will be limited to the ones relating to the enumerated grounds of discrimination.

Absence of "good reason"

A claim of indirect discrimination can only succeed if D cannot establish "good reason" for the impugned requirement. (*Wheen* at 495) Following *Griggs*, US Courts require an employer to establish "business necessity".

The requirement that D should establish "good reason" or "business necessity" for the impugned requirement or condition appears to concede to D something akin to the benefit of the doubt since the impugned requirement or condition is treated in the first instance as neutral or non-discriminatory in its application, if not purpose. The Complaints Review Tribunal held in *Wheen* at 495 that in establishing "good reason", a defendant may rely on the specific exceptions to the grounds of unlawful discrimination in the Human Rights Act. However, Human Rights Commission jurisprudence, which appears the better view, is to the effect that proof of "good reason" is not necessarily identical to proof of any such exceptions: *R v W Ltd* [Stagecoach opinion] (1995) 1 *HR Law and Prac* 117.

There appears to be no support in overseas case law or in s 65 HRA for the Tribunal's conclusion in *Wheen* (at 495) that D must show good reason for the different effects of the requirement or condition. It is submitted that D's burden is limited to the reasons which D considers provide legitimate support for the requirement or condition. In reality, D has no control over the disproportionate effects that the impugned requirement or condition might bring about. The policy of the law has been to impose a burden on a party who is in a better position than the other to justify a particular conduct. It is only where the D cannot establish "good reason" or "business necessity" for the requirement or condition that a finding of indirect discrimination is open.

Importantly, the need for D to establish good reason or business necessity only arises after C has discharged the burden of proof on the balance of probabilities in respect of elements (a) to (d): s 83(2) HRA requires the Tribunal to be satisfied on the balance of probabilities; see *Wheen* at 495. Further, note that because "good reason" is a statutory defence under the HRA, the employer bears the burden of proof in respect of this matter, not merely an evidential burden (see s 85 HRA).

TRILFORD

In 1992, the employee was denied appointment to a position as transport supervisor because the position was "more male orientated" [sic]. According to the employer the position required a person who had truck driving experience and truck drivers were normally male. In 1994 the same position became vacant but this was not mentioned to the employee. The position was offered to another male employee.

The employee alleged that she was discriminated against by reason of sex. It was argued on behalf of the employer that if the employee suffered any discrimination, it could only be indirect discrimination since in filling the position, the employer appointed a male because truck drivers were usually male. It was argued further that the employee could not sustain a claim of indirect discrimination under the ECA because that Act does not recognise this concept.

It was held in the Employment Tribunal that the employee could not discharge her burden of proof on the balance of probabilities that she was discriminated against sexually. The employee appealed and the employer cross-appealed the Tribunal's decision that the employee was unjustifiably dismissed during her notice period.

The employer's submission was misconceived in fact and in principle. This was a case where an adverse employment decision was informed by a stereotyped assumption that to be a truck driver, one has to be male and for that matter, to be employed as a transport supervisor, one requires a truck driver licence. The facts of this case come more within direct than indirect discrimination. The adverse hiring policy was a product of the employer's assignment of roles based sex. Prima facie, the rule lacked that "facially neutral" attribute which should be present in indirect discrimination. However, it is possible the facts of *Trilford* can also be accommodated under the concept of "systemic" discrimination.

On the merits of the case, the full Court of the Employment Court held that the employee was discriminated against directly and that the principles developed by the Labour Court in *Sarita* applied to the burden of proof.

The Court then turned to the submission that indirect discrimination was not covered by s 28(1) ECA but was intended to be confined to causes of action arising under s 65 HRA. The Court's conclusions on this submission were obiter given the full Court's earlier holding that the employee had suffered direct sex discrimination.

Judge Palmer, writing the main judgment, relied on the purposive approach to statutory construction and on some overseas cases including *Waters v Public Transport Corp* and *Empson v Monash University* (1995) EOC 92-694) in holding that s 28(1) ECA "should be construed and applied as naturally encompassing both direct and indirect discrimination" (at 375). It is submitted that the decision in this respect is commendable. As noted above, although s 28 ECA is couched in the language of direct discrimination, the full Court could not have refused to read into that language indirect discrimination. Also, as noted earlier, indirect discrimination is now part of the New Zealand jurisprudence. Therefore, absence of specific mention of the concept in the ECA, is best explained as Parliamentary oversight.

Intention and motives

Although the full Court in *Trilford* was correct to have held that the employee suffered direct discrimination and that the Tribunal was required to determine whether "there was evidence establishing a causal connection between [the failure to promote the employee] and the claimed gender discrimination" (per Judge Finnigan, at 354), it is submitted that the Court fell into error when it also held that the Tribunal should have considered "the employer's state of mind and its motivation" (ibid).

To state the obvious again, in direct discrimination cases such as *Trilford*, it is the reason for the less favourable treatment which is the most important finding. The alleged discriminator's intent to discriminate or motive for the discrimination, is not a crucial element of liability. If anything these can help determine the true reason for the less favourable treatment. They may also be taken into consideration in a remedies setting.

The requirement in the early days of anti-discrimination legislation that a complainant prove the defendant's state of mind or motive, has been rejected in both the New Zealand and overseas jurisprudence. (see Vizkelety, *Proving Discrimination in Canada* Carswell, 1987 Introduction and ch 1) The justifications for this are obvious and include evidentiary ones which in turn were the reasons for the recognition of the effect theory in anti-discrimination law. Discrimination can occur even if at the relevant time the alleged discriminator has no intent to discriminate. Also, it is possible to discriminate even though the alleged discriminator's intention or motive is honourable. The overseas cases relied on by the Employment Court in *Trilford* including *Waters* and *Birmingham CC*, were at pains to point this out. To those may be added *Simpsons-Sears*.

In New Zealand, the position is specifically recognised in s 86(3) HRA which provides that it is no defence to a complaint of discrimination that the discrimination was unintentional or without negligence.

"Direct" or "indirect"?

The second criticism of the decision in *Trilford* is the comment of the Chief Judge in his brief concurring judgment that there is no need for the purposes of the personal grievance jurisdiction, to descend to the subtlety of distinguishing between direct and indirect discrimination and that in all cases of discrimination, the method of proof prescribed in *Sarita* should enable the Employment Tribunal to ascertain whether there has been discrimination. (at 353) Judge Palmer came to the same conclusion at 385 that the *Sarita* approach "is of equal relevance regardless of the form of discrimination at issue in any particular case".

It is submitted that these conclusions are wrong in policy and law. The distinction between direct and indirect discrimination is based on sound policy considerations.

Differences in objective

Direct discrimination is based on the principle of equal treatment and seeks to prohibit less favourable treatment of persons on the basis of a prohibited ground of discrimination. Under the equal treatment theory, discrimination no longer exists when formal and deliberate obstacles to equal opportunity are eliminated. However, the equal treatment theory made it impossible to challenge policies and practices which although neutrally or unconsciously motivated, have exclusionary effects on members of minority groups. Hence, the recognition of the effects theory in the forms of indirect and systemic discrimination.

The goals of indirect discrimination are the elimination of the effects of past societal and institutional discrimination and the prevention of exclusionary effects of past discrimination. More importantly, indirect discrimination has a "class" or "group" implications. To fail to distinguish the two concepts would amount to not only confusing the different goals of the concepts but also to ignore significant domestic, overseas and international case law on the distinct nature of these two types of discrimination.

Structure and elements of proof

Distinguishing direct from indirect discrimination has implications not only for the different structures, but also the different elements, of proof. Direct discrimination requires proof of different treatment because of a prohibited ground of discrimination. Indirect discrimination on the other hand requires proof of different or disparate impact on different groups of what is essentially a neutral requirement or condition. It follows, therefore, that the two types of discrimination cannot be accounted for by applying the same method of proof. *Sarita* and *Trilford* were direct discrimination cases. It will be argued below that the "but for" method of proof prescribed in both cases cannot be relied on in an indirect discrimination case.

Differences in consequences

Furthermore, it is important to know that different consequences follow a finding of direct and indirect discrimination. Where a requirement or condition is found to have discriminated against an employee directly, prima facie, that requirement or condition is struck down as unlawful unless it can be saved under a recognised exception such as the genuine occupational qualification exception. On the other hand, a rule which is found to have discriminated against an employee indirectly is not, prima facie, unlawful. The employer may be required to accommodate the circumstances of the employee complainant or the group of persons adversely or more disproportionately affected by the rule.

DRYFHOUT

In *Dryfhout*, the employee had occupied a position as trust manager for eight years. After parental leave, she wanted to be employed part time or in the employer's Takapuna office which was closer to her home. Instead she was offered her previous position at the employer's Auckland City office and was required to be at work from 8.30 am to 5 pm Monday to Friday. The employee had continuing child care responsibilities. Because she was unable to obtain a nanny who could start before 8 am and also because she was subject to the vagaries of Auckland's public transport, she purported to accept the offer of the trust manager position on condition that she be allowed to work between 8.45 am and 4.35 pm each day with a 20 minute lunch break instead of the usual one hour. She also offered to work outside those hours if required, among other things, for staff and client meetings and training, providing that advance notice was given.

The employer refused to let her work during the substituted hours and the employee applied for an interim injunction requiring the employer to facilitate, and not impede or obstruct in any way, the employee's return to work in the city office on her proposed conditions.

Requirement or condition

The first element of indirect discrimination is a requirement or condition. In *Dryfhout*, this was the requirement that the employee be available for work from 8 am to 5 pm Monday to Friday and to have an hour's lunch break each day. This element can be ascertained under Chief Judge Goddard's recommended method of proof in *Sarita* (at 515). There was present "a course of conduct".

Neutral requirement or condition

The second element of indirect discrimination which was present in *Dryfhout* is that on its face, the requirement or condition is not in breach of any provisions of either the ECA or the HRA. The requirement or condition in *Dryfhout* was indeed, neutral in the sense that it applied to all employees and by and large represents the normal New Zealand work rule. The *Sarita* "but for" test cannot account for this requirement. In *Sarita* the requirement was discriminatory because it applied exclusively to the employee who had engaged in certain prima facie protected union related activities. The employer's conduct in *Sarita* was, therefore, "by reason of" the prima facie protected Acts. As Chief Judge Goddard would have put it, the employee would not have been dismissed "but for" his having engaged in certain prima facie protected union related activities (at 517). On the other hand, the requirement or condition in *Dryfhout* was not imposed because of the employee's family status. Accordingly the relevant inquiry could not be whether the employee would have been treated equally "but for" her family status.

Adverse impact on prohibited ground

The requirement in *Dryfhout* impacted more adversely on one group of employees – those with child care or family responsibilities. While all members of this group may not have been affected to the same degree as the applicant, this is beside the point. The appropriate comparison is between the effect of the requirement on employees with child care or family responsibilities and those without. Judge Colgan granted the interim injunction sought partly because the employer's stated position might infringe s 21(1)(d) HRA which mentions "family status" as a prohibited ground. Although His Honour did not discuss indirect discrimination, the result would have been the same had he done so.

It is submitted that the *Sarita* test of "but for" has no role to play where the inquiry is whether a requirement or condition has adverse or disproportionate *effect* or *impact* on a group protected under human rights legislation. The *Sarita* test was designed to discover or infer the reason or reasons an impugned requirement or condition was introduced or applied. As a result, that method is inappropriate for proof of adverse impact, an element not adverted to nor borne out by the facts in *Sarita*.

Good reason

Assuming the employee in *Dryfhout* was able to establish the above elements on a balance of probabilities, the onus would then shift to the employer to provide "good reason" or business necessity for the requirement or condition. The case did not go this far given the essentially interim injunction nature of the proceedings. Nevertheless, the employer sought to oppose the application by invoking "a sound commercial reason" for the rule. According to the employer, the interim injunction application should fail because (a) staff needed to be available to customers during usual hours since the company was endeavouring to compete in the market place; (b) the company believed employees in general and trust managers in particular needed a "decent" lunch break; (c) the company could not allow employees to pick and choose their own start and finish times to meet their own requirements; and (d) to create an exception in respect of the employee would lead to an opening of the "flood gates" with staff coming and going as they pleased.

It is doubtful whether these arguments would have been sufficient to establish "good reason".

Reasonable accommodation

Suppose Judge Colgan held that the employee was discriminated against indirectly, quite apart from any remedies the Court may order, the Court would also need to consider what to do with the impugned requirement that employees be available for work from 8 am to 5 pm Monday to Friday. As already noted, in *Dryfhout* the requirement is fair and neutral on its face. More importantly, to a large extent, it represents the normal New Zealand work rule. Surely, the Court cannot strike this requirement down as unlawful thus forbidding the employer to operate it. Rather than do this, the Court might require the employer to accommodate the affected employee or the group of employees who might be adversely affected by the requirement. However, the requirement would continue to apply to those employees not adversely affected by it. This is not an option open to a decision maker who has found that a requirement or condition directly discriminated against an employee.

Under the provisions of the HRA the employer must make reasonable accommodation unless to do so would not be reasonable or would entail unreasonable disruption (see, for example ss 28(3), 29 and 35 HRA).

The facts of *Dryfhout* itself suggest alternative arrangements which might go a long way towards meeting the employer's duty of reasonable accommodation. The employee requested to start work at 8.45 am and finish at 4.35 pm and to be available on notice for other activities. Arrangements of this nature have been held by the Complaints Division to amount to reasonable accommodation of religious practices of employees (see, eg *A v S Ltd* Complaints Division (1995) 1 *HR Law and Prac* 119; see also *Human Rights Law* C.4.03 for some overseas cases). Under the HRA, the employer would bear the onus of showing that these suggested avenues of accommodations would entail unreasonable disruption of the employer's activities and, as a result, they constitute "good reason" for the work rule.

CONCLUSION

The Employment Court's conclusion, albeit obiter, that s 28(1) naturally encompasses indirect discrimination is welcome. It is nevertheless submitted that the Court should not approach indirect discrimination complaints in the same way as direct discrimination complaints. The two types of discrimination are conceptually different. Also, evident in the overseas case law cited copiously in *Trilford*, there are different approaches to proof of direct and indirect discrimination. While it is conceded that the Employment Court's indirect discrimination jurisdiction is new, the Court and indeed, the Employment Tribunal, can learn from the expertise developed by the Human Rights Commission and now the Complaints Division, in this crucial area of anti-discrimination law. It will be a pity if the Employment Court and Employment Tribunal ignore that expertise and instead choose to develop their own jurisprudence. ❑