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# DISMISSAL OF JUDGES

The Minister of Justice wants to widen the grounds on which District Court Judges can be dismissed. Sir Geoffrey Palmer wants to accord District Court Judges the same protection as High Court Judges, in the name of the independence of the judiciary. Which way to go?

First, Sir Geoffrey's argument. We are dealing here with lower Court Judges. Counting Environment Court Judges, part-timers, acting Judges and other lower Court Judges we have to produce getting on for 150. There are bound to be some wrong appointments and there are bound to be some Judges who go off the boil, especially if current trends towards more youthful appointments continue.

High Court Judges can only be removed by the Governor-General following a formal Address by the House of Representatives. Before the House can pass such an Address it has to hold what amounts to a trial at the Bar of the House. This is an enormously cumbersome and expensive procedure which has never been put into effect in New Zealand.

But provided the High Court is protected in this way, is it really necessary to give the same level of protection to District Court Judges? Cases from the District Courts are appealed to the High Court or to the Court of Appeal which is staffed by High Court Judges. So long as that avenue of appeal exists there is little point in District Court Judges making biased decisions. Furthermore, the High Court is the heart of the judicial system. It sets the tone, it creates the culture of the judiciary. So long as the High Court has an attitude of independence that attitude should permeate the system as a whole.

So a relatively simple method of dismissing District Court Judges seems to be potentially necessary in practical terms and unproblematic in constitutional terms.

What effect would widening the grounds for dismissal have? It is hard to see what effect it could have had on the Beattie case. The ground on which the minister refused to consider dismissing Judge Beattie was that the jury had presumably decided that there was a reasonable doubt that Judge Beattie had been honest. But the ground for dismissal is "misbehaviour" not criminality. Several commentators have opined that there was sufficient grounds on which to dismiss, or at least take a proper decision whether to dismiss, for misbehaviour. So unless it is to be a ground of dismissal that one made a mistake filling out one's expense claims, it is hard to see what additional ground would have enabled the minister to dismiss him.

The real problem is the process to be followed, rather than the grounds for dismissal. A District Court Judge can only be dismissed by the Governor-General. The Governor-General can only act on advice and, the Act being silent, it is assumed that the Minister of Justice will tender that advice.

Quite clearly, the Judge concerned must be given the opportunity to present a defence. This means that some kind of inquiry has to be held and the Judge be given the opportunity to be heard. It does not really seem appropriate that this should be done personally by the Minister of Justice.

## Solicitor-General's opinion

Hence the Solicitor-General's opinion that there would have to be some kind of formal tribunal, consisting preferably of High Court Judges and District Court Judges.

There seem to be at least three objections to this suggestion.

The first is that the examples the Solicitor-General quoted were all occasions when a parliament has considered dismissing a Judge of at least High Court level. If the House of Representatives were to consider an Address aimed at the dismissal of a High Court Judge it might well decide that a full trial at the Bar of the House was not the best procedure and establish instead a tribunal to report to it.

Secondly, while the House can do what it likes, a minister supposedly accountable to the House cannot. And to propose a tribunal to hear a formal charge against a Judge is to abdicate responsibility. Once the tribunal has reported the minister will effectively be bound by, and be able to shelter behind, the tribunal's judgment.

Thirdly, all are agreed that the conduct that can lead to dismissal need not be criminal but, whether or not it is criminal, it must be sufficient to cast the judiciary into disrepute. That is a value judgment. It is not a matter to be proved before a tribunal, it is a judgment that needs to be made by an individual who has some responsibility for the operation of the system.

## English Circuit Judges

The appropriate precedents that the Solicitor-General might have examined are those in relation to the dismissal of Circuit Judges in England. The Lord Chancellor has statutory power to dismiss a lower Court Judge (in fact dismissals of Justices of the Peace are frequent). Although the Lord Chancellor is a Cabinet Minister, powerful conventions attach to the office which do not attach to the Minister of Justice.

The advantage of the English system is that the Lord Chancellor deals with the matter personally. He (so far)

inquires into the complaints, hears the Judge and makes a decision. Provided that the Lord Chancellor has made a genuine inquiry, has given the Judge the opportunity to be heard and there is some plausible evidence and grounds on which the decision could be made, the Courts will not interfere by judicial review. The Courts have certainly not laid down that there should be some kind of tribunal and it seems well to make this point before this suggestion attains the status of conventional wisdom.

So how to replicate such a procedure here? One answer might be to give the responsibility to the Chief Justice. The Chief Justice is above the fray as he does not deal with District Court Judges in the normal course. On the other hand he has a sense of the requirements of the judicial system and is in a position to make a value judgment of the kind required. And in the end the Chief Justice is accountable (as a tribunal is not) as the House can move an Address to dismiss him.

The Chief District Court Judge could appear before the Chief Justice, either in the role of a neutral adviser or effectively as "prosecutor". Actual dismissal by the Governor-General could be retained for symbolic reasons.

All that is needed to bring this about is to amend the District Courts Act by adding the words "on the advice of the Chief Justice". Whether the Chief Justice would welcome such a move is, of course, another matter.

### RETIRING AGES AND THE HUMAN RIGHTS ACT

A final point worth making is that the difficulties caused by problematic Judges have largely evaporated since the introduction of compulsory retiring ages. This therefore provides a test case for the proposition that compulsory retiring ages (miscalled discrimination on grounds of age) be outlawed. If the ban on compulsory retiring ages is to override retiring ages provided for in Acts of Parliament then the only way to get rid of elderly and failing Judges who misjudge their own abilities will be to make individual decisions to dismiss them for inability. Is this what we really want? And if not, why should we force this on private sector employers? ❑

### THE E-DEC REPORT

The next issue of this *Journal* will contain extensive comment, editorial and contributed, on the E-DEC Report on the structure of the Law Societies. A number of lawyers representing a wide range of practices have been invited to comment on the Report by the editor.

Comments are invited from all readers who wish to make them. Comments should be as brief as possible and be submitted on disk, to arrive by Monday 3 November. ❑

# LETTERS

### OPEN LETTER TO THE MINISTER OF JUSTICE

Dear Minister,

Rumour has it that you have been earnestly seeking a solution to the issue of "problem Judges", and that you have gone as far as thinking of changing the law. I am happy to tell you that this will not be necessary – the legislature has already foreseen and made provision for this eventuality in s 11 of the District Courts Act 1947.

Section 11 is a little-known provision, but has enormous potential. It allows the Governor-General to appoint a Judge to exercise jurisdiction in the Chatham Islands. One of the beauties of the section is that the normal criteria for the appointment of Judges do not apply – the person only has to be a "fit person". "Fit" is not defined in the Act (nor is person, but that should not cause too much difficulty). A browse through the *Shorter Oxford Dictionary* yields a number of possibilities, viz:

"adapted to the requirements of the case"

"possessing the right measurements or size"

"in good health"

A worthy Governor-General would have no difficulty identifying a large healthy specimen with a penchant for fishing. And let it not be forgotten that Te Kooti was considered fit for the Chathams.

There are other benefits. A Chathams Judge is not removable only for inability or misbehaviour. No long drawn-out Court proceedings are required to decide this issue. The Judge holds office only "during the pleasure of the Governor-General". So once His Excellency ceases to be pleased with whatever is happening out there the appointment terminates forthwith. And such a change in thought processes is surely not subject to judicial review, let alone the wiles of the Employment Tribunal.

But best of all, the salary of a Chathams Judge is not protected from diminution while in office. The only entitlement is to what is appropriated for that purpose by Parliament in any given year. So the ultimate control at last rests with the people. They can express what is in their hearts by voting a pittance for the poor arbiter out east. Note, too, that there is no provision for retirement or resignation of the Chathams Judge. Should the incumbent continue to please His Excellency despite impecuniosity, he or she must remain there forever sifting the wheat from the chaff (or perhaps the crays from the pots).

There is, of course, another aspect to the question. Would His Excellency's emissary be acceptable to the loyal citizens of the Chathams? I have not been able to gauge support for this course of action, but I believe that the Chatham Islanders have their own special ways with the law. I'm sure they would respond creatively.

Blind Justice

# "THE ORDINARY COURSE OF BUSINESS"

*Mike Ross, University Of Auckland*

*argues that this does not mean "usual business conduct"*

## INTRODUCTION

Liquidation law has long required some creditors to repay moneys received prior to an insolvent liquidation. Creditors paid in full are seldom sympathetic to liquidators' demands that payment be returned, leaving them unpaid or partly paid as unsecured creditors.

The new liquidation code has wrought radical change in this area. The need to prove an intent to prefer is no longer the primary requirement when seeking to avoid pre-liquidation payments. Now, creditors paid in the two years prior to an insolvent liquidation can be forced to surrender the benefit received as a voidable transaction unless payment *took place in the ordinary course of business.*

Payment is made *in the ordinary course of business* if it was made on due date by the usual and ordinary means whereby payments of that kind are made in commerce. Creditors are entitled to retain payments received on due date regardless of the debtor being insolvent at the date of payment or the creditor having knowledge at that date of the debtor's insolvency.

Interpretation of the new rule is proving confusing. Court rulings have left both creditors and liquidators perplexed as to which pre-liquidation payments can be reversed. An understanding of both early insolvency law and judicial interpretation of Australian corporations law clarifies the position.

## HISTORY

The new regime for voidable transactions which permits creditors to retain payments received in the ordinary course of business is contained in s 292 of the Companies Act 1993. It was imported from Australian companies law which in turn adopted principles contained in English and Australian bankruptcy law. From June 1993, the *ordinary course of business* defence for creditors was dropped from Australian companies law. It still operates in Australian bankruptcy law.

A detailed exposition of the historical position is found in *Harkness v Partnership Pacific Ltd* (1997) 143 ALR 227. The phrase has its origins in sixteenth century English bankruptcy law designed to control fraudulent preferences on bankruptcy. Allegations of fraud typically required proof of an absence of good faith and notice of the debtor's insolvency. Principles were developed protecting those traders acting in "the usual and ordinary course of trade and dealing". Examples of creditors not paid in the usual and ordinary course of trade were creditors paid late, or late by instalments, or after threat of legal proceedings, or on enforcement of Court judgments. Similarly, it was not payment in the usual and ordinary course of trade to be paid before due date, or on rescheduled terms when the debtor was unable to pay on the prior agreed date.

The common thread through early English bankruptcy law is that the creditor was entitled to keep payment as made in the usual and ordinary course of trade if the debt was incurred as a normal business transaction and was paid on due date, being the agreed date for payment. The date for payment could be agreed explicitly or inferred from past conduct.

Questions of intent to prefer or knowledge of the debtor's insolvency were not relevant to the issue of payment being in the usual and ordinary course of trade. These questions were relevant to issues of fraud or lack of good faith.

The specific phrase *in the ordinary course of business* appeared first in statute in 1924 Australian bankruptcy legislation. The phrase owed its origins to prior terminology regarding transactions in the usual and ordinary course of trade. Subsequent case law interpreting *ordinary course of business* has emphasised a need to consider the nature and character of the transaction in question, rather than consider the general business practices of the debtor or creditor.

## INTERPRETATION

Section 292 of the Companies Act 1993 permits the liquidator of an insolvent company to recover payments made to creditors in the two years prior to liquidation where the creditor received a better return than if the company had gone into liquidation at that date.

Payment is not recoverable if the debtor company was solvent at the time payment was made or if payment was made *in the ordinary course of business.* The onus of proof varies; falling on the creditor seeking to retain payments received in the six months prior to liquidation, on the liquidator seeking to recover payments made within two years of liquidation but outside the six month period.

Section 292 does not impose any obligation to prove good faith. If payment was due and payment was made when due, payment may be kept regardless of the debtor company's insolvency or the creditor's knowledge of that insolvency.

Generally, questions of an intent to prefer are not relevant. But proof that the creditor knew the debtor intended to prefer the creditor may lead the Court to order repayment despite payment otherwise being in the normal course of business: s 292(4).

The most quoted case on what is payment *in the ordinary course of business* is the Australian case: *Downs Distributing Co Pty Ltd v Associated Blue Star Stores Pty Ltd (in liq)* (1948) 76 CLR 463. In this case payment was not in the ordinary course of business when a debtor unable to pay cash on due date first offered post-dated cheques in satisfaction of the account and when a number of these cheques were dishonoured then handed goods to the creditor in satisfaction of the balance of the debt.

Often, this factual context is overlooked by those quoting Rich J's dicta (at p 477) that ordinary course of business means:

> ... that the transaction must fall in place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business carried on, calling for no remark and arising out of no special or particular situation.

This common law formulation refers to the character and nature of an individual transaction under consideration. It asks whether the transaction in question is one which would be transacted between solvent traders.

It does not ask how the transaction in question mirrors what would be the normal practice for that debtor, or that creditor, or even for that industry. Neither does it ask whether the transaction in question arose as part of the company's normal trading activities, was on capital account or income account, or part of some new novel business venture. All these issues are irrelevant. The question is whether the transaction was of the type entered into between solvent traders.

Applying the *Downs Distributing* test to insolvent liquidations, the issue is commonly not whether the initial transaction was entered into in the ordinary course of business, but whether payment (sought to be recovered) was made in the ordinary course of business. That in turn depends upon the terms for payment and whether payment was made on due date. Payments made by cash, cheque or bank transfer on due date are payments made "as part of the undistinguished common flow of business ... calling for no remark".

Care is required when applying Australian cases because of the two part statutory test formerly applying in that jurisdiction: the creditor must have acted in good faith *and* received payment in the ordinary course of business. Judgments do not always clearly differentiate which facts were relevant to the question of good faith and which relevant to the question of ordinary course of business.

A clear trend develops when isolating from Australian case law factors relevant to the single element of ordinary course of business.

Late payment in *Downs Distributing* by a series of post-dated cheques plus delivery of unsold goods was not payment in the ordinary course of business.

Neither was payment made long after due date by postdated cheque with instructions that the cheque be held and not banked until the debtor gave approval; as in *Starkey v APA Transport* (1993) 11 ACLC 1,144.

A law firm was ordered to repay some A$12,000 in fees received just prior to the debtor company's liquidation in *Re Buckleys Earthmoving Pty Ltd* (1994) 14 ACSR 45. Payment was late and was made only after the law firm pressed hard for payment of arrears. This was not payment in the ordinary course of business.

And from Canada; payment of taxes can never be payments in the ordinary course of business: *re Norris* (1995) 28 CBR 167. A tax is an impost, not a commercial debt.

***payment of taxes can never be payments in the ordinary course of business: A tax is an impost, not a commercial debt***

## APPLICATION

There are few New Zealand cases to date on s 292 where creditors have attempted to argue that payment was made in the ordinary course of business. These few cases can be reconciled to the general principles previously discussed, though the reasoning adopted in some cases might well lead to later misinterpretation.

Cutting through judicial speculation as to what might or might not be the test for *ordinary course of business*, features similar to Australian case law become apparent.

- Arrears of payment under a lease totalling $30,900 were not payments in the ordinary course of business. Payments were up to two years late and were extracted from the lessee on assignment of the lease. It was no defence to argue that it is normal business practice for lessors to recover lease arrears when giving consent to the assignment of a lease. Common business practice is not necessarily evidence of what is the ordinary course of business: *Countrywide Bank v Dean* (1997) 8 NZCLC 261,325.
- Parents paid school fees for their child by company cheque. The debt was not a company debt. Gratuitous payments are not payments in the ordinary course of business: *Gray v Chilton St James School* (1997) 8 NZCLC 261,306.
- Payment of an account already nine months overdue with payment by post-dated cheques was not payment in the ordinary course of business: *Frost & Guy Ltd v Radio NZ* HC Wgton, M.517/95, 22 August 1996.
- Delivery of a blank cheque to a creditor for completion with the creditor completing the amount payable for all arrears plus payments yet to fall due was not payment in the ordinary course of business: *re NZ Spraybooth Ltd* (1996) 7 NZCLC 261,075.

## CONCLUSION

A synthesis of the judicial dicta is that the test for ordinary course of business is not what is common industry practice or past practice by the debtor. Such a test elevates usual business conduct to ordinary course of business.

Ordinary course of business is intended to protect creditors paid on a timely basis by an insolvent debtor. The statutory provision is not intended to validate either late payments of arrears or successful attempts by unpaid creditors to recover arrears. Creditors of an insolvent company paid otherwise than on due date or paid in an unusual manner are receiving an advantage over other creditors. The liquidation code requires this advantage be surrendered when the debtor company is liquidated insolvent.

Creditors need not refund payments received if the debtor company made payment on a current invoice pursuant to previously agreed terms. In the rare commercial instances where there is no express term for credit, payment must have been made either following demand or within any credit period inferred from previous dealings between the parties. ❑

# MEDIATION AND THE HIGH COURT

*Phillip D Green, Barrister, Wellington*

*questioned R 442 at the AIC 1997 Administrative Law Conference*

The Supreme Court, at least since 1890 in this country, has had power pursuant to s 15 Arbitration Act 1890 (an adoption of s 14 Arbitration Act 1889 (Imp)) to order the whole cause or any question or issue of fact arising to be tried before an arbitrator. Here Parliament recognised that in certain circumstances a different form of dispute resolution from that prescribed under the old Supreme Court code might be more efficient. This provision, in turn, found its way into the Arbitration Act 1908. (Curiously, the same provision does not appear in the Arbitration Act 1996.)

Ninety-five years later, a significant step occurred with the introduction of R 442 High Court Rules. This gave a Judge power, at the request of all parties, "before the trial commences" to convene a conference in Chambers "... for the purpose of negotiating for a settlement of the proceeding ...". The Rule was amended as from 1 February 1996 by omitting the words "At the request of all parties". This provision, while ostensibly about negotiation has, in fact, introduced its own hybrid form of mediation.

Under this Rule, a Judge convening a settlement conference cannot preside at any subsequent trial unless all parties taking part in the conference consent or the only matter for resolution at trial is a question of law.

As matters stand, R 442 empowers the Judge to do two things – first, to convene a conference and, second, to "... assist in such negotiations".

Mediation as a form of dispute resolution is no passing trend. It is a formalised and highly refined process. As the commercial world becomes more aware of the mediation option, it is also becoming the more insistent that this be tried before proceedings are filed and again before the hearing.

Our law reports are the lasting testament to failed negotiations. The conceptually muddled R 442 thus has a hint of head-banging about it. Or is that a cynical view of what is meant by judicial assistance?

Words matter. The High Court Rules and their interpretation are the supreme example of black letter law. Precision is everything. Yet negotiation is not mediation.

Mediation is the third party neutral intervention upon the negotiating process. It "assists", to use the High Court Rule wording – but does so by the application of identified processes which work within defined parameters. To assist in negotiating is not necessarily to mediate. To mediate *is* to assist in the negotiating process.

So the seeds of mediation are sown in R 442 – but the fact of mediation as a reputable process for dispute resolution is not in fact addressed by the Rule.

## PARTY CONSENT

The absence of party consent in the R 442 process is significant.

Mandatory mediation and Court driven voluntary mediation, are laden with the expectation that mediation will occur, and have long been part of our law in specialist jurisdictions – for example s 17 Family Proceedings Act 1980. Other jurisdictions also offer a kind of imposed mediated process – for example the Employment Tribunal personal grievance procedure and the Residential Tenancies Act.

Freedom of choice in these jurisdictions is not always what it seems.

The hidden agenda driving a party to take part in the process might include the desire not to look bloody-minded before the decision making body (even if a different person will ultimately make the decision) or to learn more about the other side's case as part of trial preparation.

There is now ample statistical data available to demonstrate that pure voluntary mediation has exceptionally high prospects of success while imposed mediations including the imposed so-called voluntary kind have by comparison, a high fail rate. Both from a practical and purist viewpoint head-banging and true mediation are mutually exclusive.

Rule 442 should not be dressed up to be something which it is not. Instead, the rules ideally should provide for a mediation process. That might include a trained High Court Judge taking the role of mediator depending upon what mediation model is to be applied to the process.

## THE JUDGE AS MEDIATOR

Different qualities and attributes are required for different tasks. The characteristics of the successful mediator are not necessarily the characteristics of a successful Judge. No doubt, many Judges would make excellent mediators and some mediators may make excellent Judges. But, the different skills and attributes must be acknowledged.

William Simpkin, Director of the Federal Mediation & Conciliation Service in the United States is attributed with describing the ideal qualities of a mediator to include:

the patience of Job,
the wit of the Irish,
the physical endurance of a marathon runner,
the guile of Machiavelli,
the wisdom of Solomon, and,
the hide of a rhinoceros.

Judges operating under R 442 may not want to acknowledge possession of all these attributes – if indeed they are required. Certainly counsel who wish to test the thickness of the hide of a High Court Judge may be in for a rough ride!

The mediator manages a process which includes the utilising of emotion to achieve a result. A Judge is part of a process which is managed by its context, its formality, staff, and in a criminal trial by police. Judges control only part of the process. That control is designed to keep the process content focused and emotion free. Most Judges feel more comfortable repressing a party's desire to express emotion rather than encouraging it even in a controlled way.

In my own experience of training, teaching and examining would-be arbitrators and mediators, I have developed a growing confidence in the belief that responsible and aware people are well able to recognise where their own strengths and weaknesses lie.

Judges interested in the processes of mediation, are well able to determine even before the end of their training whether or not this particular process is something that they would like to take part in.

## THE JUDICIAL MAGIC WAND

One has to ask what is so special about High Court Judges acting as mediators?

Why should it matter that the mediator is a High Court Judge?

Is it appropriate for a Judge to sit as a mediator?

This section of the paper considers some of these issues. It does not offer an indepth analysis nor does it promote a particular view.

Self-evidently the standing of the mediator can have enormous impact on the result. It is not surprising that Sir Laurence Street, Retired Chief Justice of NSW is in such high demand as mediator for large commercial causes.

In his mediation process, perhaps a hybrid form, the parties in caucus, have an opportunity to hear the impartial third party neutral speak authoritatively about the law and how that law might impact on the particular case.

Mediation purists may be cringing at this point for they would argue that it is not the role of a mediator to second-guess the litigation driven outcome. Yet if a High Court Judge is to take a mediating role, the only justification for doing so must be to use the legal knowledge which comes with the office. If a Judge cannot use that knowledge when asked by a party to do so, then the justification for the role change disappears. The mediating task could just as easily be left with others – and some would say in response to the "power" issues that this is the preferred option.

Any party in a mediation confronting litigation as an alternative must have some concern about cost. Litigation as an option must stand up to a cost benefit study – including the probability assessment for success or failure. Whatever counsel's view of the case may be, for the parties actually to hear from a High Court Judge that their case is likely to be determined in a particular way will encourage a settled outcome.

No mediated settlement will be achieved unless the time is ripe for settlement. Judicial reflection on the potential outcome of a case can be seen as a powerful ripening agent!

In the Employment Tribunal one can see the impact of a mediator, upon request in caucus, giving a tentative and guarded expression of possible outcome which then turns a party towards moderating its position.

Which brings me to a further concern about R 442 in its present form.

It is silent as to whether or not the parties will be present as part of the process or whether only counsel get to see the Judge. The Rules should include a clear direction requiring the parties to be present. And given that judicially driven mediation has the attributes of "power mediation" the process should not take place in a conventional courtroom with a Judge sitting as for Chambers.

Power based mediations bring their own problems and can, unless skilfully directed, interfere with the win/win desired result. Some would even argue that because of the power issues that flow from a Judge sitting as a mediator it is inappropriate for a Judge to be in a mediating role.

Perhaps the issue is one of training. And by training I do not mean a week's course of learning with a glossy certificate presented at the end of it.

Finally, I believe there should be a blanket exclusion on any Judge sitting as mediator having anything further to do with the case.

The proviso to R 442 is of dubious value. Parties should not be given the freedom to let the mediator shift to decision maker. The prospect of that pollutes the mediation process and, like the second proviso which suggests that determination of law is somehow different from determination of fact, fails to grasp the fundamental anatomy of mediation.

I am aware that in some countries for certain types of dispute, co-med-arb is very successful. It could be said R 442 just offers a variation upon this well-known alternative. (See Green, *"Co-Med-Arb"*, AINZ Conference 1994 The concerns there expressed must apply with even greater vigour to a judicial role switch currently embodied in R 442. Now is not the time to rehearse those concerns.)

## TIMING OF THE INTERVENTION

Because the prospect of the power based mediation impacting on result is so high, the need to consider the timing of intervention becomes a critical question. Early intervention may achieve a settlement – but not necessarily a fair settlement or the best settlement. The integrity of the process then comes under challenge.

In the Family Court, mediation is timed to prevent parties filing damaging affidavits which have the potential to further harm future relationships. In mediation of this kind it is not possible to venture opinion on prospective outcome because fundamental facts have not been disclosed.

Trying to mediate at such a formative stage in commercial mediation may be time wasting. Sir Laurence Street typically brings parties to the mediating table as if they have prepared for trial. Discovered documents, expert opinion and exchanged briefs may all be available. Short of hearing cross-examination the mediator is well informed as to the facts. Timing of intervention will in turn affect judicial contribution to the mediated settlement process.

This paper is not the place to discuss the fascinating issues arising from judicial power based mediations, and so I leave the topic noting that further debate is required as to the appropriateness of direct judicial intervention in the mediating of commercial disputes. ❑

# DISCRIMINATION: LIFE-EXPECTANCY

*Andrew Shann*

***asks how banks should deal with loan requests from the elderly***

In terms of the Human Rights Act 1993, is one precluded from differentiating on grounds of a person's life-expectancy? To date there seems to be no firm answer to this.

This question came to light while I was writing a thesis on the effects of the prohibition of age discrimination in the provision of certain goods and services – namely long term lending facilities. This has particular relevance when borrowers may seek facilities for terms beyond their remaining life-expectancy. If, for example, a loan were taken out by an elderly couple, one died and the survivor was unable to maintain repayment, a bank might be faced with having to repossess against an elderly unsupported victim.

Section 21 of the Human Rights Act 1993 prohibits discrimination on a number of grounds including age, race, sex, and disability. However, this section makes no mention of life-expectancy. Whilst differentiation based on life-expectancy may not specifically be prohibited by the Act, it could be difficult to define in terms of it. There are two views that could be taken, either

- it is a separate matter that you are not prohibited from discriminating on; or
- it is an amalgam of prohibited grounds, for instance, age, sex, disability, employment status, and race.

If all the factors that determine life-expectancy are individually prohibited, then one could argue that the whole (product) could not be greater than the sum of its parts. Alternatively, if only some of the factors are prohibited the whole could be different unless it would be considered unreasonable to make a decision on the non-discriminating factors. For instance, some factors may be so minor in the circumstances that one could not justify a different decision on the basis of them.

Life-expectancy is made up of innate characteristics, socio-economic factors, and secular influences.

The innate characteristics include age, sex, race, and hereditary characteristics (disabilities). All of these individual characteristics are prohibited grounds under the Act. Accordingly treating these as an amalgam should be no different from treating them individually.

The socio-economic factors such as; occupation, nutrition, shelter, geographical, social class, and lifestyle, can affect individuals. Whilst these factors may not specifically be referred to in the Act, quite often they can relate to race. Looking at family socio-economic factors from this point of view, race could be regarded as an amalgam of these factors. For instance, race and ethnic backgrounds often determine the socio-economic status and lifestyle for certain groups of individuals. The more affluent the environment and the better the education a person is raised with the healthier the life-style. The different life-expectancy patterns between different races is more to do with the socio-economic status they share rather than directly to the race they belong to. Race is a very delicate issue and not even insurers are permitted to differentiate on this.

The innate factors listed could be regarded as the significant characteristics that pertain to life-expectancy. Other characteristics like secular influences could be considered insignificant in New Zealand society and may not be substantial enough to justify a different decision based on them. If this was concluded then differentiation on the grounds of life-expectancy may be contrary to the Human Rights Act.

According to the *New Shorter Oxford English Dictionary*, life-expectancy is said to be the average period a person of a specified age, in a known state etc, may be expected to live, especially as derived from statistics of the population at large. Undoubtedly age is the biggest factor that determines a person's life-expectancy and age is, of course, a prohibited ground of discrimination.

We again look at long term contracts such as housing finance. When a lender refuses or offers finance on less favourable terms because a borrower is unlikely to see out the term of the loan, this has the effect of discriminating on a person's age. Indirect discrimination is prohibited by s 65 of the Act unless good reason can be established for it.

If it was concluded that life-expectancy was an amalgam of prohibited grounds – and that non-prohibited factors were so insignificant as not to have a bearing – then it could be argued that life-expectancy was a ground prohibited by s 21. If this was the case then good reason for indirect discrimination under s 65 may not apply because differentiation on life-expectancy would be direct discrimination. Accordingly, s 97 may be the only means of seeking any dispensation in such a situation.

A second argument would be that if Parliament had intended life-expectancy to be taken into account when trying to establish good reason under s 65, then life-expectancy would not be specifically provided for in relation to insurers in s 48. Accordingly, this could be argued as being Parliament's intention that life-expectancy was not to be considered when assessing good reason. For the same reason it might be argued that it was beyond the competence of the Complaints Review Tribunal to grant a dispensation on this ground under s 97.

A matter of considerable everyday importance to banks and other lenders is therefore shrouded with uncertainty. The government is apparently reviewing the operation of the Human Rights Act. Some clear answers on this question would be of great benefit. ❑

*The author's researches are continuing and he welcomes comment.*

# TAX TREATMENT OF COMPENSATION AND REIMBURSEMENT

*David McLay and David Coull, Bell Gully Buddle Weir*

*look at a topic dear to readers' hearts*

The tax treatment of compensation and reimbursement payments received by taxpayers has recently been considered by the High Court of Australia in *FCT v Rowe* 97 ATC 4,317. This case is noteworthy because the High Court unanimously rejected the asserted "general principle of law" that an amount received which compensates or reimburses a taxpayer for a deductible expense is income according to ordinary concepts.

The case concerned a taxpayer who had incurred legal costs for being represented at a Government inquiry. He had claimed, and the Commissioner had eventually allowed, a deduction for these legal costs in an earlier year. The Queensland Government reimbursed him for these legal costs by way of a ex-gratia lump sum payment. The Commissioner included this receipt in the taxpayer's assessable income. The Federal Court held that the payment was not assessable income. The High Court of Australia granted the Commissioner leave to appeal to test his asserted general principle.

## GENERAL PRINCIPLES

The Court noted that previous Australian decisions were inconsistent with this general principle. *Allsop v FCT* (1965) 113 CLR 341 and *HR Sinclair & Son Pty Ltd v FCT* (1966) 114 CLR 537 both doubt whether a nexus between the deductibility of expenditure and the assessability of any reimbursement exists. In the later case, Taylor J commented:

> The character of the amount which the [taxpayer] received cannot, in the absence of some appropriate statutory provision, be thought to vary according to whether or not deductions were claimed and allowed of expenditure which includes the sum now reimbursed.

The majority of the High Court noted that these statements would need to be rejected if the Commissioner's general principle was accepted.

The majority of the Court declined to accept the asserted general principle for a number of reasons. The "fundamental difficulty" was that the asserted general principle diverted attention away from the usual inquiry required by income tax legislation. The legislation requires the Court to assess whether a receipt is income according to ordinary concepts. The character of the receipt in the hands of the taxpayer is one of the determinative factors.

The general rule for determining the character of a compensation payment was established in *FCT v Wade* (1951) 84 CLR 105. This case concerned a payment made to a dairy farmer as compensation for the compulsory destruction of cattle. The majority of the Court in *Wade* held that the compensation payment was on revenue account. This decision was based on the principle that compensation for a loss incurred in respect of an item on revenue account (such as trading stock) will be assessable income. The New Zealand Court of Appeal has recently applied this reasoning in *Egmont Co-operative Dairies Ltd (In Liquidation) v CIR* [1996] 2 NZLR 419. This approach is therefore settled law in both New Zealand and Australia.

Section 25(1) of the Income Tax Assessment Act 1936 includes income derived from all sources within a taxpayer's assessable income. The receipt must therefore be income according to ordinary concepts to come within s 25(1). Whether compensation and reimbursement payments are income according to ordinary concepts is determined by applying the principle stated in *Wade*. This, however, is not the effect of the asserted general principle. The principle, if accepted, would render a compensation payment liable to tax simply because the taxpayer had claimed a deduction in an earlier year for the expenditure for which he or she was being compensated, irrespective of the underlying nature of the compensation payment. The difficulty in accepting the asserted general principle is that it bypasses the inquiry required by the Act of whether the receipt is income according to ordinary concepts. The majority of the High Court recognised that the asserted general principle was inconsistent with the inquiry required by s 25(1).

The majority of the Court also held that specific provisions in the Australian legislation which included certain kinds of reimbursed expenditure in a taxpayer's assessable income told against the existence of a general principle. The example given was s 26(j) of the Australian Act. Section 26(j) includes in a taxpayer's assessable income "any amount received by way of insurance or indemnity for or in respect of any loss ... of profit or income which would have been assessable income ...". The majority considered that the legislature had provided that certain kinds of reimbursements would be included in a taxpayer's assessable income and that a more general (Judge-made) principle would be inconsistent with these specific provisions.

The minority also declined to recognise the existence of the general principle contended for by the Commissioner. The minority identified a number of considerations that were relevant to determining whether a receipt was income according to ordinary concepts. These included periodicity, substitution for what would have been a revenue receipt, return of an outgoing, payment for or in connection with the provision of services, the relationship to employment,

the engagement in business or other sufficient connection with any other revenue producing activity carried on by the taxpayer. These considerations, rather than the asserted general principle, should determine whether amounts received as compensation or reimbursements are income according to ordinary concepts.

The minority considered the analogy drawn by the Commissioner to the "tax benefit rule" that exists in the United States. The United States Courts developed a tax benefit rule treating recoveries of previously deducted amounts as income in the year of the recovery, providing that there was a tax saving in respect of the deduction. The rule was clearly established by the 1940s: see *Dodson v Commissioner* 320 US 489 (1943) and Plumb "The Tax Benefit Rule Today" (1943) 57 Harv L R 129. The rule emerged because of a judicial concern with fairness in the tax system. The precise scope of the tax benefit rule created difficulties in the United States. One difficulty arose where tax rates changed between the year of deduction and the year of recovery. Eventually, *Alice Phelan Sullivan Corp v US* 381 F 2d 399 (1967) held:

> To ensure the vitality of the single-year concept, it is essential that not only the annual income be ascertained without reference to losses experienced in an earlier accounting period, but also that income be taxed without reference to earlier tax rates.

The tax benefit rule has also been developed statutorily, by enabling regulations to be promulgated by the Commissioner addressing a number of specific factual contexts.

The minority of the Court, with whom the majority agreed, rejected any analogy to the tax benefit rule. The reason for rejecting the rule was that it is largely based on the specific provisions of the Internal Revenue Code which do not have an equivalent in Australia. The minority also noted that the tax benefit rule would not necessarily operate on the same basis as the general principle propounded by the Commissioner.

## TREATMENT OF THE PAYMENT

Having rejected the applicability of the asserted general principle, the Court went on to consider whether the reimbursement was income according to ordinary concepts. The Court was divided on this point also.

The majority held that the reimbursement payments were not of an income nature. They agreed with the majority of the Federal Court which held that the payment was not a reward for the services rendered by the taxpayer during his employment. Rather, the payment was a reparation for the wrong he had suffered and also for having to participate in an inquiry undertaken by the Government for public purposes.

The minority, after considering all of the circumstances, held that the payment was of an income nature. The Government inquiry was established to investigate allegations relating to the taxpayer's employment. In the circumstances, the minority of the Court held that the payment was "really incidental" to the taxpayer's employment. That the payment was actually made by the Government, and not the taxpayer's employer, was not determinative.

## SYMMETRY OF TREATMENT

The decision of the Court was not influenced by the Commissioner's argument that it would be "fundamentally wrong" if non-business taxpayers could obtain a deduction without the corresponding obligation to include any refund received in their assessable income. This argument, if accepted, would in effect mean that the goal of achieving a symmetrical tax treatment would determine the assessability or otherwise of a reimbursement payment.

The majority of the Court rejected this argument, citing the decision of *Warner Music Australia Pty Ltd v FCT* 96 ATC 5,046 where Hill J stated: (at p 5,051)

> It is difficult to see, as a matter of principle, why a payment which has the character of capital becomes income in ordinary concept, just because the payment has its origin in the refund of a previous amount which had attracted a deduction. The symmetry which such a rule suggests ignores the fact that deductions may be available for amounts which have capital character. Not all deductions are on revenue account.

The minority of the Court also considered the potential lack of symmetry between s 25(1) and s 51(1). These respective sections are the general assessability and deductibility provisions contained in the Australian tax legislation. The minority observed that this lack of symmetry was caused by the nature of the inquiry required by the Income Tax Assessment Act 1936 (Aust). They commented: (at p 4,328)

> To a significant degree the operation of the Act turns upon the identification of income by the imprecise criterion of the ordinary concepts and usages of mankind. Whilst that state of affairs remains, it is not to be expected that there will be the symmetry between s 25(1) and s 51(1) for which the Commissioner contends with the proposition that payment is income in the hands of the recipient if, whether made voluntarily or not, it is a reimbursement or a reparation for an amount allowable as a deduction under s 51(1).

Both the majority and minority judgments of the Court therefore concluded that a symmetrical treatment of expenditure and any corresponding compensation or reimbursement payment is not mandated by the Australian tax legislation. This conclusion is consistent with previous conclusions of Australian Courts regarding the desirability of achieving symmetrical treatments. Where only a single payment is being considered, the taxation of the payment in the respective hands of the recipient and the payer does not necessarily need to be symmetrical. *GP International Pipe Coaters Pty Ltd v FCT* 90 ATC 4,413 demonstrates that a payment can be income to the recipient regardless of whether the payment is revenue or capital expenditure to the person making the payment.

Both *Rowe* and *GP International Pipecoaters* clearly demonstrate that symmetry does not provide a conceptual basis upon which to determine whether a receipt is income according to ordinary concepts. What is required, both in New Zealand and Australia, is an assessment of the particular circumstances of each case in light of the respective requirements of the income tax legislation.

## *ROWE* IN NEW ZEALAND

As *Rowe* is a decision of the High Court of Australia, it is unlikely to be ignored by New Zealand Courts. The rejection of the asserted general principle corresponds with the likely treatment of such payments in New Zealand. Section BB 4(d), the provision of the Income Tax Act 1994 which includes within a taxpayer's gross income receipts which are not otherwise included by the Act, has been interpreted in a similar way to its Australian equivalent. To determine whether a receipt is income according to ordinary concepts,

New Zealand Courts have consistently sought to ascertain the underlying nature of the payment. An obvious recent example in the context of compensation payments is the Court of Appeal's decision in *Egmont Co-operative Dairies*. New Zealand Courts have not sought to determine whether a receipt which reimburses a taxpayer for prior expenditure is income on the basis of whether a deduction has been allowed for this expenditure in the past.

The approach of the Court in *Rowe* is also consistent with the general principles used to interpret the Income Tax Act 1994 that have been developed by the Court of Appeal in cases such as *CIR v James Bull Ltd* (1993) 15 NZTC 10,337 and, more recently, *CIR v Alcan New Zealand Ltd* (1994) 16 NZTC 11175. The Court of Appeal has consistently sought to determine the legislative intent behind the Income Tax Act by examining the "scheme and purpose" of the legislation. As Richardson J observed in *CIR v Challenge Corporation Ltd* [1986] 2 NZLR 513: (at p 549)

> Consideration of the scheme of the legislation requires a careful reading in its historical context of the whole statute, analysing its structure and examining the relationships between the various provisions and recognising any discernible themes and patterns and underlying policy considerations.

Although ensuring tax neutrality where a taxpayer receives a payment which reimburses the taxpayer for an expenditure which he or she has incurred may be a desirable outcome, this is not required by the Income Tax Act. There is no express link between the assessability of receipts and the deductibility of expenditure, even where the payments are closely related. The "scheme and purpose" analysis first developed in *Challenge* therefore reinforces the likelihood that New Zealand Courts will follow the decision in *Rowe*.

Whether compensation and reimbursement payments are income according to ordinary concepts in New Zealand should be determined using the principles stated in *Egmont Co-operative Dairies*. These principles are consistent with the "scheme and purpose" approach to interpreting the Act. There is no specific provision in the Income Tax Act 1994 which provides for the assessability of these kinds of payments. The only relevant provision is s DJ 1(c), which prevents taxpayers claiming a deduction for "any expenditure or loss recoverable under any insurance or right of indemnity". The precise ambit of s DJ 1(c) is unclear as it has not yet been judicially considered. However, there is the clear possibility that a compensation payment may be included in the income of a taxpayer in circumstances where the taxpayer is prevented by s DJ 1(c) from claiming a deduction for the original loss or expenditure. Such a payment is therefore not tax neutral.

## TIMING OF THE RECEIPT

An issue that did not need to be considered in *Rowe* was the year in which the receipt should have been included in the taxpayer's assessable income. The receipt was included in the taxpayer's assessable income in an income year after the expenditure had been originally deducted.

This timing question has however been recently considered in two New Zealand decisions concerning the assessability of insurance payments. Both cases considered the nature of the insurance compensation received by the taxpayer and also whether the compensation payments should be deemed to be derived at the time when the income for which they compensate would have been derived.

*CIR v Soma President Textiles Ltd* (1994) 16 NZTC 11,313 considered the years in which loss of profits insurance payments should be included in the taxpayer's assessable income. McGechan J rejected the Commissioner of Inland Revenue's argument that an insurance receipt should be deemed to be derived in the years in which the loss for which it compensates occurs. His Honour stated that an "item can compensate for an earlier loss without necessarily being regarded as going back in time". The payments were held not to have been derived until agreement between insurer and insured of the amounts payable, except that interim payments were derived upon receipt.

This approach can be contrasted with the approach of the Court of Appeal in *Egmont Co-operative Dairies Ltd* This case concerned the assessability of payments made under a "loss of profits" insurance policy. The Court first considered whether the insurance recovery was income according to ordinary concepts. After considering the principle stated in *Wade*, Richardson P held that the insurance moneys were received on revenue account. The receipt had the same character as the loss that it replaced.

The Court then considered the issue of when the income was derived. The Court recognised that in determining when income is derived depends upon the facts of each case. Richardson P commented that: (at 426-7)

> The crucial and differentiating feature in this case is that the insurance recovery replaces income that would have been derived over a particular period had the event insured against not occurred.

The income earning process was complete. The insurance recovery related to income that would have been earned in the 1988 year. Even though the insurance payment was received in a later year, the income was derived in the year which the lost profits would have been derived. Although this decision was of assistance to Egmont because its income was tax exempt in 1988, most taxpayers who receive compensation payments are unlikely to be in the same situation. Given the divergence in approach from that of McGechan J in *Soma*, it is strange that the Court did not comment on that decision. *Soma's* status is now unclear.

The Court in *Rowe* seemed to accept that the compensation payment would be assessable to the taxpayer in the year in which it was received. *Egmont Co-operative Dairies* raises the possibility that this kind of payment could be derived by the taxpayer when the expenditure for which the payment was compensating was incurred. Whether a Court would accept that the interpretation in *Egmont Co-operative Dairies* can appropriately apply to a payment reimbursing expenditure incurred by the taxpayer, as opposed to an insurable loss, is yet to be seen.

## CONCLUSION

The capital/income distinction was described by Templeman J in *Tucker v Granada Motorway Services Ltd* [1977] 3 All ER 865 as "an intellectual minefield in which the principles are elusive ... [and] analogies treacherous". *Rowe*, like the recent Privy Council decision in *Rangatira Ltd v CIR* [1997] 1 NZLR 129, demonstrates that the Courts will not look favourably on "shortcut" solutions to the capital/income distinction. Even though the Court of Appeal rejected an Australian case law development in relation to lease inducement payments in *Wattie v CIR* (31 July 1997, CA244/96) *Rowe* is relevant in New Zealand. The traditional tests, although often difficult to apply, should be used to determine whether a receipt is income according to ordinary concepts. ❑

# CRIME IN NEW ZEALAND

*Professor Warren Young, Victoria University of Wellington*

*introduces the findings of the National Survey of Crime Victims on the nature, extent and distribution of crime in New Zealand*

## BACKGROUND

In mid August the Government released the findings of the first comprehensive national survey in New Zealand of crime victimisation and related issues (see Warren Young et al, *New Zealand National Survey of Crime Victims 1996*, Ministry of Justice, 1997). The survey was commissioned and funded by the New Zealand Police, the Ministry of Justice, the Crime Prevention Unit of the Department of the Prime Minister and Cabinet, the Department of Social Welfare, Te Puni Kokiri, the Ministry of Women's Affairs and the Ministry of Youth Affairs. It was undertaken by Victoria Link Ltd (the research company of Victoria University) in conjunction with the market research company AC Nielsen McNair Ltd and Massey University's Statistics Research and Consulting Centre.

The survey was commissioned because of the recognition that existing sources of information about crime and its effects – primarily the official police and Court statistics – are limited in two significant respects. First, they measure only what comes to official notice and thus fail to tell us anything about the range of offending that for one reason or another remains hidden – what is commonly called the "dark figure" of crime. Secondly, they are offender-oriented and incorporate few details about the broader circumstances and context of the offence, the characteristics of victims or the impact of the offence upon them. They thus provide a poor basis for the development of crime prevention measures or for putting in place strategies for meeting the needs of victims. In contrast, victim surveys provide a more complete picture of the sorts of offences upon which they focus by identifying both recorded and unrecorded crime and by collecting contextual information both about the offence and its impact and about the victim. They also provide the opportunity to collect a range of other information about people's perceptions and fears about crime, their use of crime prevention strategies and so on.

This article is the first in a series of four which will outline some of the major findings from the survey and discuss their implications. It will examine in particular the nature, extent and distribution of victimisation. Subsequent articles will examine the needs of victims and the extent to which those needs are being met; people's fears of and concerns about crime and the extent to which those fears and concerns are related to victimisation, risk and vulnerability; and key findings from the women's safety survey (a sub-set of the main survey) about the nature and extent of violence by male partners.

## THE DESIGN AND LIMITATIONS OF THE SURVEY

The survey comprised a random sample of 4,500 respondents aged 15 and over and a further 500 Maori respondents, giving a total of 5,000 households in total. As noted above, one of its key objectives was to explore the nature, extent and distribution of the type of offending to which households and individuals are subject in their private capacity. To this end, respondents were asked to report on, and provide detailed information about, particular forms of criminal victimisation experienced by members of their household, or by themselves personally, since 1 January 1995. The household offences which the survey focused on were residential burglary and vehicle offences, while the individual offences comprised sexual offending, all forms of assault, threats, robbery, arson and wilful damage, and other forms of theft.

Before considering the findings of the survey in this respect, a few cautionary observations should be made. The most important is that the survey does not, and is not intended to, provide a complete count of crime. In particular, it excludes offences occurring in the course of business and employment and offences for which there are no direct victims. This is not to suggest that such offences are unimportant; it is just that they do not lend themselves so readily to the type of survey methodology employed here. In surveys of this sort, there may also be problems with the truthfulness of the respondents or the accuracy of their recall; and there may also be sampling error, particularly where the number of offences being disclosed is quite small. However, while these problems are real, they are unlikely to have affected the validity of the broad findings of the survey or the conclusions which can be drawn from them.

## THE NATURE AND EXTENT OF CRIME

In general, the survey found that there were an estimated two million offences (including attempts but excluding commercial and business offences) against households and against individuals aged 15 and over in New Zealand during the 1995 calendar year and that only a small proportion of the offences disclosed in the survey (less than 13 per cent) were recorded by the police.

Violent offending and sexual offending, including threats, made up almost two-thirds of the total offences disclosed in the survey. However, many of the violent offences involved threats of violence or threats of damage to property, which clearly vary enormously in seriousness and significance; and many were sexual offences which had a large sampling error. If we exclude threats and sexual offences from our count, assaults, wounding and robbery make up about a quarter of the total offences, only slightly above the figure reported in the 1996 British Crime Survey.

For grievous assaults, other assaults and threats, we distinguished between violence by those known well to the victim (including family violence) and violence inflicted by

casual acquaintances or strangers. Grievous assaults were roughly evenly divided between the two groups. Other assaults and threats, on the other hand, were almost three times more likely to be committed by those known well to the victim than by strangers or casual acquaintances, a finding which provides clear support for the priority attached to family violence in current Government policy.

There are essentially two reasons for the gap between police statistics and the number of offences disclosed in the survey: not all offences come to the notice of the police; and of those that do, not all are recorded by them. In this survey only a little over 40 per cent of the cases in which we were able to collect information on reporting came to the notice of the police. There was considerable variability in reporting rates between one offence and another, with nearly 90 per cent of theft or unlawful taking of motor vehicles being reported, and only a quarter of damage offences and a third of assault offences. The willingness of victims to report crime was primarily dictated by the seriousness of the offence in question – its intrusiveness, the degree of threat involved, the extent of injury, damage or loss and, to some extent, its emotional consequences for the victim. However, other factors – in particular, the relationship between the victim and the offender – also influenced the reporting decision. It is also clear that some social groups were less willing to report offences than others: males and young people were less likely to report all offences, and Pacific Island respondents were less likely to report violence.

Of those that did come to the notice of the police, a considerable number were not recorded by them. Again, the pattern varied between offences. Approximately 80 per cent of reported burglaries appeared to get recorded as such, by comparison with less than half of the reported damage offences and less than one third of reported thefts from inside or outside the home. There are a number of possible reasons for the fact that some reported offences were not recorded: the police may have regarded the complaint as fabricated or mistaken; they may have thought the evidence insufficient to substantiate an offence; they may have regarded it as too trivial to warrant the paperwork; or the incident may have been coded as one type of offence in our survey but recorded by the police as a different offence.

Although the survey findings indicate that there is much more offending than is disclosed by the official statistics, it would be wrong to jump to the conclusion that it is desirable that a greater proportion of offending be reported to the police. It is true that a considerable number of apparently serious offences – including wounding and sexual violation – went unreported to or unrecorded by the police. It is also noteworthy that some groups appeared more reluctant to report than others. In at least some of these cases, reporting may have resulted in the detection of a serious or persistent offender, or at least the provision of much needed support for the victim. However, the offending which needs to come to the notice of the criminal justice system is in fact only a small proportion of the range of behaviour which could potentially do so, and the fact is that the vast majority of the offences which go unreported or unrecorded are perceived by victims to be relatively trivial or otherwise not to require referral to the formal criminal justice process and they are thus handled in other ways. In other words, victims are often realistic about the limitations of the formal process and are willing to consider alternative ways of responding to offending where these seem to be more appropriate.

Of course, victims' perceptions about what should be brought to the notice of the police and police decisions about what to record can and do change over time. Perhaps the most important implication of our data on the amount of unrecorded crime, therefore, is that overall trends in official crime statistics should be regarded with great caution, since they are highly susceptible to changes in reporting and recording practices. For example, if the proportion of offences reported increased from one-quarter to one-third and the proportion of those recorded remained constant, the official statistics would increase by over 20 per cent without any change at all in the actual volume of crime. One of the advantages of victim surveys is that, if they are repeated over time, they can detect such shifts in reporting and recording practices and thus provide a more accurate measure of changes in the volume of specific types of crime.

## THE DISTRIBUTION OF VICTIMISATION

The total offences disclosed in the survey amounted to an average of 0.74 offences per person per year. For specific offences, the survey suggests that on average 1 in 14 households will be burgled each year; 1 in 16 women will be sexually assaulted; and 1 in 5 persons will be assaulted.

These average incidence figures, however, are highly misleading: they grossly inflate the risks to which the majority of the population are exposed and substantially understate the amount of crime suffered by some groups. The reason for this, of course, is that crime is not evenly distributed: it is much more likely to occur within some socio-demographic groups than others; and within each of those groups some individuals are much more likely to be victimised than others.

### (i) Differences in the risk of victimisation between socio-demographic groups

In our survey, there were not surprisingly differences in the overall victimisation rates of different age groups, with a general pattern of decreasing victimisation with increasing age. In fact, with the exception of arson/wilful damage, this pattern was observed for every offence category. However, the differences did not always reach statistical significance. The main statistical effects were observed in relation to violent and sexual offending, general theft and individual property offending in aggregate.

In relation to gender, about the same proportion of women as men were subject to some form of violent or sexual offending on one or more occasions (the prevalence rate). Moreover, while the average number of such offences to which women were subject (the incidence rate) was much greater, this gender difference did not reach statistical significance. The reason for this is that the higher incidence rate amongst women resulted almost solely from the fact that a small number of women were subject to a large number of repeated sexual attacks; because the sample of such multiple victims was small, the sampling error was very large. Nevertheless, it seems likely that, given the greater risk of sexual violence to which women are exposed, the pattern we have observed would be repeated and would reach statistical significance in a larger sample. In relation to other assaults, there were no significant gender differences, although it appeared that the nature of the assaults differed: the inci-

dence and prevalence rates for assaults by strangers and casual acquaintances against men were much higher than those against women; conversely, women were much more likely than men to be assaulted by those they knew well.

There were differences in the rate of victimisation between ethnic groups. Maori were significantly more likely to be victims of assaults and threats than New Zealand European/European. Pacific Island respondents also had a higher rate of violent victimisation than New Zealand European/European, although given their small sample size this did not reach statistical significance. The same trends did not emerge in respect of individual property offences. While the incidence of general theft was roughly the same amongst New Zealand European/European as Maori, it was lower amongst Pacific Island respondents, and, when individual property offences were taken as a whole, both the prevalence rate and the incidence rate were higher amongst New Zealand European/European, with the difference between New Zealand European/European and Pacific Island respondents being statistically significant. In general, then, it can be concluded that Maori, and probably Pacific Island, groups are more at risk from violence than New Zealand European/European, but that the latter are just as likely to be the victim of an individual property offence such as theft.

There was a slight tendency for the prevalence (but not the incidence) of violence to be inversely related to socio-economic status – that is, lower socio-economic groups were more likely to be the victim of a violent offence. However, the relationship between socio-economic status and both the prevalence and the incidence of individual property offences was in the opposite direction. Although these differences did not reach levels of statistical significance, one would expect that if the sample size were increased they would, since both of these relationships are broadly in line with other surveys.

In relation to the household offence of burglary, only the frequency of going out at night turned out to be significantly associated with the risk of victimisation, with those who never went out at night, not surprisingly, being less at risk. There was also a marginal trend for the prevalence of burglary to increase with household size. Other factors – such as socio-economic status, the nature of the household, whether the house was owned or rented, and respondents' perceptions of their neighbourhood – were not significantly related to risk.

### (ii) Multiple victimisation

Just as some socio-demographic groups are more at risk of victimisation, so are some individuals. Indeed, the phenomenon of multiple victimisation (which went virtually unrecognised until the advent of victim surveys) is now well-established. For example, an analysis of the 1992 British Crime Survey has shown that, of those suffering property victimisation, 4 per cent were victims of such offences five or more times within the year and between them they accounted for 24 per cent of such offences. The distribution of offences against the person was even more skewed: 9 per cent of victims were victimised five or more times but accounted for 55 per cent of the offences (Ellingworth, D et al (1995) "A Victim is a Victim is a Victim" *British Journal of Criminology* 35(3): 360-365). Moreover, it is generally the case that those with a higher risk of one type of victimisation are also more likely than others to be the victim of a different type of crime (Farrell, G (1992) "Multiple Victimisation: Its Extent and Significance" *International Review of Victimology* 2:85-102).

Our data generally confirm this picture. In relation to property offences, multiple victimisation within the 1995 year was evident but relatively limited. For example, household offence victims who were victimised only once comprised 67 per cent of such victims and accounted for 44 per cent of offences, while those victimised five or more times comprised 4 per cent of such victims and accounted for only 16 per cent of such offences. A similar trend emerged in relation to individual property offences.

In contrast, when it came to offences against the person (assault, sexual offending, threats, and abduction/kidnapping), a much more dramatic picture emerged. A small number of individuals who were heavily victimised accounted for the vast majority of offending. Thus only 0.5 per cent of the total sample (or 6 per cent of those who were victimised) were victimised five or more times, but they accounted for a massive 68 per cent of the offences. Amongst such victims, the average number of offences was 12.

The official crime statistics, and indeed our own average incidence data presented earlier in this article, give no hint of the nature and frequency of the violence suffered by this small number of victims, treating each offence as a discrete event occurring in isolation and distributed at random across the population. The reality is very different. Most people have little exposure to even minor violence or threats at all. For a small minority of multiple victims, on the other hand, violence would seem to be so common as to be virtually a normal part of everyday life. Indeed, it was evident from some of our interviews that, especially where family violence and sexual offending were concerned, the violence disclosed by the respondents was such an ongoing and routine experience that they simply could not distinguish one individual offence from another. This pattern of multiple victimisation occurred across every socio-demographic group. However, there was some tentative evidence that, in relation to violence, the problem was particularly pronounced amongst women and Pacific Island respondents.

These findings have profound implications for crime prevention. If victimisation, especially violent victimisation, is concentrated in small pockets of the population, then substantial crime reductions are likely to be achieved by focusing crime prevention efforts on those who are particularly at risk of multiple victimisation. Even if some crime is displaced to other people who would not otherwise have been victims, which is unlikely at least in relation to violent victimisation, the consequence of crime prevention efforts targeted at repeat victimisation is at least to spread crime more evenly throughout the population and thus to dilute its impact on any one individual.

A good starting point for a crime prevention strategy of this sort would be the targeting of crime prevention resources at those who have already been victimised, not only because this group has the greatest risk of future victimisation but also because such selective targeting is the most cost effective and least contentious means of providing crime protection for vulnerable social groups. Even then, the success of such a strategy depends upon its effectiveness in tackling the factors which produce multiple victimisation. Further research on what those factors are is clearly warranted. ❑

*In future articles Professor Young will examine some specific issues raised by the survey.*

# TOBACCO LITIGATION

*Kate Tokeley, Victoria University of Wellington*

*assesses the chances of successful litigation in New Zealand against tobacco companies for harm caused by smoking*

## INTRODUCTION

It is estimated that globally three million deaths each year are attributable to smoking while in New Zealand 4500 people die yearly from the effects of smoking (See R Peto et al *Mortality from Smoking in Developed Countries 1950-2000*, OUP 1994 and *Tobacco Statistics 1996* Ministry of Health and Cancer Society of New Zealand (Inc), 1996). Almost seventeen times as many New Zealanders will die from tobacco-related illnesses than are killed by murder, suicide, AIDS, road crashes and drowning combined (See M Laugesen "Smokers Run Enormous Risk: New Evidence" (1995) 108 NZ Med J 419-21). Cigarette smoking eventually causes one in two continuing smokers to die, on average, 14 years early. There is no other product on the market which year after year causes so much harm to so many people. This article considers the likelihood of a successful negligence action in New Zealand by tobacco consumers against tobacco manufacturers for harm caused by smoking. Although there are several bases on which to argue that tobacco manufacturers have been negligent, this article focuses on a claim based on a negligent failure to warn.

## UNITED STATES LITIGATION

In the United States, tobacco consumers have sought recovery against tobacco manufacturers for harm caused by smoking for the previous four decades. So far the tobacco industry has only once paid damages for harm caused by its product. That was in 1988 when a jury awarded US$400,000 to the family of Rose Cipollone who died in 1984 of lung cancer caused by smoking (*Cipollone v Liggett Group Inc* 693 F Supp 208 (DNJ 1988). Recent developments, however, including new studies on the ability of tar to cause cancer, new evidence concerning the tobacco industry's knowledge of the dangers of tobacco and concealment of this knowledge, and the teaming together of plaintiff lawyers, mean that the current wave of United States' tobacco litigation is much more likely to succeed (see GE Kelder Jr and RA Daynard "SYMPOSIUM: The Role of Litigation in the Effective Control of the Sale and Use of Tobacco" (1997) 8 Stanford Law & Policy Review, 63, 33190 and P J Hilts *Smoke screen: the Truth behind the Tobacco Industry Cover-Up*, Reading Mass, 1996, 195).

The United States' tobacco industry is facing mounting lawsuits, including a class action brought on the behalf of 60,000 non-smoking flight attendants who claim to have become ill from breathing second-hand smoke. This case, known as *Broin v Philip Morris et al* is currently being heard in Miami. The industry faces hundreds of other individual and class action lawsuits in the United States Civil Courts. In May 1996 a nation-wide class action lawsuit, which threatened to allow millions of tobacco consumers to claim damages from tobacco manufacturers was thrown out by the federal Appeal Courts who decided that the cases should be tried individually (*Castano v American Tobacco Co* 84 F.3d 734 (1996)). Despite this set-back, tobacco consumers almost immediately began filing separate state class actions (see C MacLachlan "More RICO Counts for Tobacco" Jan 6 (1997) National Law Journal, A7). As a result of this mounting pressure, the tobacco industry reached a settlement deal with the United States legal and public health authorities on the 20th of June this year. The tobacco companies agreed to pay US$368.5 billion, admitted that tobacco is addictive, and accepted extensive federal regulation of their products and their advertising. In return, the companies are granted immunity from any further punitive liability for deception, fraud or conspiracy that may have occurred in the past. This historic settlement marks a significant defeat for an industry that has been denying for years that their product is harmful.

## PROPOSED LITIGATION IN NEW ZEALAND

New Zealand has no history of tobacco litigation between tobacco manufacturers and tobacco consumers. Currently the anti-smoking lobby group, Action on Smoking and Health (ASH), and a number of individual smokers are preparing the first lawsuit against tobacco manufacturers for harm caused by smoking. How will the New Zealand Courts react to such a claim? If the action is successful it will pave the way for other New Zealanders wishing to sue tobacco manufacturers for harm caused by smoking.

## ACC AND SMOKERS' ACTIONS

The Accident Rehabilitation Compensation and Insurance Act 1992 (ARCIA) does not pose a problem for smokers suing for harm caused by cigarettes. Section 14 of ARCIA bars proceedings for damages arising directly or indirectly out of personal injury to which the Act applies, and s 8(2) provides that cover under the Act extends to personal injury caused by an accident to the person concerned. Section 10(1) of the Act, however, states that personal injury caused wholly or substantially by a gradual process, disease or infection is not covered by the Act unless it arises out of and in the course of employment, or as the result of medical misadventure, or is a consequence of personal injury or treatment for personal injury covered by the Act.

Smoking related conditions are generally caused by a gradual process or disease and they are not within the specified areas of coverage. Moreover, even if they were personal injuries, they are not caused by "accident" as defined in the Act. Section 3(a) defines accident as a specific event or series of events that involve the application of a

force or resistance external to the human body, and that results in personal injury but does not include any gradual process. The conditions caused by smoking are all caused by a gradual process. Section 3(b) provides that an accident includes inhalation of a gas where inhalation occurs on a specific occasion. Smokers' diseases are caused by inhalation of tobacco smoke but it occurs on more than one specific occasion. ARCIA clearly does not cover harm caused to smokers by tobacco smoking, actions for damages arising out of this harm are, therefore, still available.

## NEGLIGENCE

A tort action in negligence against a tobacco company is the most promising for the injured tobacco consumer. Since *Donoghue v Stevenson* [1932] AC 562 there has been no doubt that a manufacturer of a product owes a duty of care to the eventual consumer of that product. The duty is imposed on the basis that it is reasonable for the manufacturer to foresee that failure to take reasonable care is likely to injure the consumer.

The tobacco consumer must then establish that there has been a breach of that duty by a failure to take reasonable care. The fact that selling tobacco is an act likely to cause death and disease is relevant in determining the standard of care reasonably expected of a tobacco manufacturer. It is a commonsense principle that the more dangerous the act the greater the care that must be taken in performing it (*Jull v Wilson and Horton* [1968] NZLR 88, 97).

This article focuses on the claim that tobacco manufacturers have breached their duty of care by negligently failing to warn. This option probably has the most potential for smokers suing for harm caused by cigarettes, particularly if the smoker began smoking before 1973 when the first health warnings on cigarette packages were introduced. However, there are two other ways in which it could be argued that tobacco manufacturers have breached their duty of care. These are worth mentioning in brief. First, the tobacco consumer could argue that the tobacco manufacturer has failed to take reasonable care by failing to withdraw its product from sale. No reasonable manufacturer would continue to knowingly produce such a lethal product. Alternatively it could be argued that the tobacco manufacturers have failed to take reasonable care by failing to improve the product to make it safer. This is the basis of a class action suit currently in progress in Britain against Imperial Tobacco and Gallagher Group. A reasonable tobacco company would thoroughly research the feasibility of producing a safe cigarette. If it found there was no way of producing a safe cigarette it would be reasonable to withdraw the product from sale because it is unreasonably dangerous.

### Negligent failure to warn - pre-1973

For tobacco consumers who began smoking before 1973, the most promising argument is that the tobacco manufacturer has failed to take reasonable care by failing to give warning of the dangers of tobacco. Manufacturers have a duty to take reasonable care to warn consumers of the dangers inherent in the use of a product (eg *Buchan v Ortho Pharmaceutical (Canada) Ltd* (1986) 25 DLR (4th) 658). Of course, since the duty is to take reasonable care, there can be no liability where the danger is scientifically unknown or where the manufacturer could not reasonably have known about the danger.

The tobacco industry gave no health warnings about cigarettes until 1973 when the industry and the government entered a voluntary agreement which provided for health warnings to be on cigarette packages. Yet since the publication of the first Surgeon General's Report in 1964, there has certainly been sufficient information about the dangers of tobacco for it to have been reasonable for tobacco manufacturers to have known about the dangers and to warn consumers accordingly. In the United States previously secret documents have recently been discovered which indicate that the tobacco industry has for years been covering up the degree of knowledge it had about the dangers of tobacco (see above P J Hilts). In the case of *Cipollone v Ligget Group Inc* 789 F 2d 181 (3rd Cir, 1986), evidence was produced which showed that as far back the early 1950s the tobacco manufacturers knew that cigarette smoke caused cancer and failed to warn consumers of these dangers. Subsequent health warnings came too late because by that time these smokers were already addicted to the lethal product. Smokers who began smoking between the early 1950s and 1973, and particularly those who started between 1964 and 1973, have a good chance of succeeding in suing the tobacco industry for negligent failure to warn.

### Negligent failure adequately to warn - post-1973

Smokers who began smoking after 1973 would find it far more difficult to claim successfully against a tobacco manufacturer for negligent failure to warn. It is, however, possible that the manufacturers have been negligent in failing to give *adequate* warning about the specific risks of smoking and the magnitude of those risks. Adequate warning allows consumers to make an informed judgment about encountering the product risks. Tobacco manufacturers may argue that the dangers of tobacco are now so obvious and well known that they have no tort law duty to provide any warnings. There is no liability on a manufacturer who fails to warn of a danger which is obvious or is a matter of common knowledge (*Farr v Butters Bros & Co* [1932] 2 KB 606). For example, knife manufacturers do not have to warn consumers that their products are capable of cutting fingers as well as potatoes. A formal warning would only duplicate what is already known by purchasers of knives.

Tobacco consumers these days are generally aware that tobacco is a hazard to their health, they may not, however, be aware of the specific risks of smoking and the magnitude of these risks. In a 1987 Cancer Society survey of 2000 New Zealanders, only 48 per cent cited lung cancer as a disease caused by smoking. Although it is probable that most New Zealanders are now aware that smoking causes lung cancer they may not be aware of specific risks of smoking such as asthma, bronchial diseases, heart disease and pregnancy complications. They may also be unaware of the magnitude of these risks. Even if the tobacco manufacturers conceded that this was the case they are likely to argue that compliance with the requirements of the voluntary agreements, and later the 1990 Act, is sufficient to absolve them of liability in negligence for a failure to adequately warn from 1973 onwards. The Courts, however, have long recognised that manufacturers who comply with industry standards are not automatically immune from liability in negligence (see *McLaren Maycroft & Co v Fletcher Development Co Ltd* [1973] 2 NZLR 100). The tobacco manufacturers' argument is stronger in the case of compliance with a statute. Nevertheless, it is still up to the Courts to determine whether the tobacco manufacturer has taken reasonable care. One factor to be taken into account when assessing whether the tobacco

industry has failed to take reasonable care in giving adequate warnings is the degree to which advertising weakens any health warnings that the industry has provided. For years tobacco manufacturers vigorously promoted tobacco in a positive way by associating smoking with sport, vitality, health and youth. This form of advertising reassured people that smoking is not hazardous to health.

Since 1973 voluntary agreements have required various health warnings on cigarette packages. The warnings have generally increased in strength with each new voluntary agreement. The fifth voluntary agreement was replaced by the labelling requirements of s 32 of the Smoke-free Environments Act 1990. The current warnings are more comprehensive than those required under previous voluntary agreements. Yet it can still be argued that these warnings are inadequate. The four current rotating warnings are:

1. Smoking causes lung cancer
2. Smoking causes heart disease
3. Smoking damages your lungs
4. Smoking causes fatal diseases

(First Schedule, Smoke-free Environment Regulations (No 2) 1990).

These warnings may be inadequate because they fail to state the gravity of the specified dangers. For example, the first warning does not tell the smoker that contracting lung cancer is likely to lead to death or that 95 per cent of all lung cancer is caused by smoking (The United States Surgeon General *The Health Consequences of Smoking – Cancer*, 1982). Even though the fourth warning potentially alerts smokers to the fact that smoking could kill them, the use of the word "fatal" may not be fully understood by many poor readers or young people. The warnings may also be inadequate in that they fail to identify many specific risks of smoking such as cancer of the cervix, larynx, and oesophagus (see *Reducing the Health Consequences of Smoking: 25 Years of Progress* United States Department of Health and Human Services, 1989). The warnings also lack visual impact because they cover only 15 per cent of the package (s 32 Smoke-free Environments Act 1990).

The fact that the tobacco manufacturers have complied with the voluntary and statutory warning requirements poses a significant barrier to tobacco consumers who started smoking after 1973 and wish to sue for negligent failure to warn. Those smokers who began smoking after the tobacco industry was aware of the dangers of its product and before it began warning consumers of these dangers are more likely to succeed in a negligent failure to warn claim.

### Causation, voluntary assumption of risk and contributory negligence

Plaintiffs who succeed in establishing that a manufacturer owes a duty of care and has breached that duty will still has to prove causation. The plaintiff will have to show that on the balance of probabilities, the negligent act was responsible for his or her illness.

Proof of causation will vary with each particular plaintiff. For example, a plaintiff who has worked with asbestos will find it harder to prove that smoking caused his or her lung cancer. Generally, however, proving that smoking causes disease is not an insurmountable hurdle particularly in cases where the plaintiff suffers from a disease such as lung cancer for which there is scientific proof that tobacco is the main cause. In *Cipollone*, causation posed no problems. Both the plaintiff and the defendant accepted that Mrs Cipollone's lung cancer was caused by smoking.

Plaintiffs must also successfully defeat any defences raised by the manufacturer. The two likely defences which will be raised by a manufacturer in tobacco litigation are voluntary assumption of risk and contributory negligence.

For a voluntary assumption of risk defence to succeed the tobacco manufacturer must prove that the plaintiff was fully aware of the risk he or she faced and that he or she voluntarily decided to run that risk (see *Heard v New Zealand Forest Products Ltd* [1960] NZLR 329). Many smokers are unaware of the specific risks of smoking and seriousness of these risks. A young person in particular is unable to assess competently the risks of smoking and may become addicted before becoming aware of the risks. In addition, plaintiffs can argue that the addictive quality of tobacco removes the element of free will necessary for a voluntary assumption of risk. The majority of smokers start smoking when they are too young to be fully aware of the risks of smoking and cannot be held to have assumed those risks. If they do subsequently become aware of the risks of smoking, they are then addicted to tobacco so cannot then be said to have *voluntarily* assumed the risks of smoking.

Tobacco manufacturers may also attempt to use the defence of contributory negligence by showing that the plaintiff contributed to his or her own illness. In New Zealand contributory negligence does not bar recovery. Section 3 Contributory Negligence Act 1947 provides that where damage has been caused by fault on the part of the defendant and the plaintiff, the Court may in its discretion apportion responsibility between them. Therefore, even if the Court believes a smoker is partly at fault for his or her illness, they will not be barred from recovery but will merely receive a reduction to the damages they would otherwise have recovered.

## CONCLUSION

It is difficult to predict the likely success of a tobacco liability action in New Zealand. Certainly the strongest cause of action is a negligent failure to warn claim bought by a tobacco consumer who began smoking between the early 1950s and 1973. If a plaintiff does succeed in convincing a Court that the various requirements of a tort action are satisfied then there is no reason why tobacco manufacturers should not be held liable for the harm they cause to others. Such liability is not new, it derives from established principles of common law. Successful tobacco litigation would serve the important purposes of increasing public awareness of the dangers of tobacco and providing redress to individual smokers harmed by tobacco.

Tobacco litigation is unlikely to provide a solution to the overall problem of smoking. Not every smoker will sue. The time and cost of suing tobacco manufacturers is likely to deter many affected smokers. Tobacco litigation alone will not significantly discourage young people from taking up the fatal habit of smoking. There is still a need for a continued focus on education about the dangers of smoking. Unfortunately, though, even if the percentage of smokers continues to decline in New Zealand and other developed countries, the tobacco industry will simply turn more of their attention to the developing world. It is estimated that if current smoking patterns continue, seven million of the world's ten million annual deaths from tobacco in the year 2025 will occur in developing countries (see Mackay J; Crofton J, "Tobacco and the Developing World" (1996) Jan 52 (1) Br Med Bull, 206-21). ❑

LITIGATION

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# COURT OF APPEAL RULES

As from 1 October 1997, civil appeals to the Court of Appeal are governed by a new set of rules, the Court of Appeal (Civil) Rules 1997 (SR1997/180). The Rules have been simplified, evidenced by the fact that there are a mere 27 rules, as opposed to the 71 which existed at one time in the Court of Appeal Rules 1955. For the most part, however, there has been a consolidation of the former rules rather than a completely new approach.

Some attempts have been made towards a much-needed updating, bringing the terminology into line with the High Court Rules, and the rules into line with practice. The revision has, however, been rather half-hearted, retaining some anachronisms and failing to bring about consistency with provisions for appeals from other Courts.

The one area in which there have been significant changes is time limits; it is also of some interest to note that the rules are clearly designed to be complemented by practice notes, such as the one which has been current in the Court of Appeal for the past year.

## COMMENCING APPEALS

An appeal is now commenced by filing a "notice of appeal" (R 4). No form is provided, so this will presumably follow the current practice whereby the respondent is advised only that an appeal is being brought. There are, however, two important changes. One is that filing of the notice in the Court of Appeal, rather than the High Court, within the specified time limit is a requirement for bringing the appeal. The cumbersome "duplicate notice" of appeal for the High Court has been replaced by the requirement that a copy be served on the Registrar of that Court. The heading of the notice is the same as before, although R 15 continues to call this the "intitulement" rather than adopting the more modern approach of the High Court Rules.

***As from 1 October 1997, civil appeals to the Court of Appeal are governed by a new set of rules, the Court of Appeal (Civil) Rules 1997 (SR1997/180)***

The second important change is that the time for bringing all appeals has been standardised at 28 days (R 5).

For some reason, R 6 continues to calculate time for most appeals from when the judgment is "signed, entered or otherwise perfected" rather than simply the date of sealing, as in appeals from the District Courts. Time continues to run from the date of decision where an action or application is dismissed, or a non-suit is pronounced (R 6(1)).

There has therefore been no change in the starting point from which time is calculated.

It seems unfortunate that the opportunity was not taken to remove the archaic language, to introduce a uniform method of calculating time, and to bring the procedure for appeals from the District Courts and the High Court into line. The retention of the peculiar wording of R 6(1) is unjustifiable, particularly as this has already given rise to litigation: *Nimmo v Westpac Banking Corporation* [1994] 1 NZLR 472.

The Rules Committee finally gave up – understandably – on the intractable problem of distinguishing interlocutory from final orders, and therefore adopted a uniform time for appeal. This is a commendable step, and will obviate the need for useless litigation, illustrated by *Matthews Corporation Ltd v Edward Lumley & Sons (NZ) Ltd* (1995) 8 PRNZ 388 (CA).

It must be noted, however, that the time for appeal from final orders has been shortened significantly, and prompt decisions will be required from appellants. As the Court retains its discretion to allow appeals out of time (R 5(1)), there is no reason why this should cause injustice.

The time for filing a notice of cross-appeal has also been altered significantly. In all cases, the notice may not be filed more than 28 days after service of the notice of appeal except with the leave of the Court. Oddly enough, no time for service is provided, although R 8(1) requires that the notice be served on all affected parties.

## WANT OF PROSECUTION

In line with the general trend of case management, the rules now contain specific provisions requiring appellants to progress appeals to a hearing.

Rule 10 deems an appeal to be abandoned unless an appellant within six months of bringing an appeal applies for a fixture and files the case on appeal, or applies for an extension of time.

It must be noted that an application for extension of time has to be brought within the six month period. Although non-compliance with the rules is generally able to be remedied in the Court's discretion under R 27, non-compliance with R 10 is expressly excluded from that general power.

The intention of the rule is clearly to provide a strong incentive to appellants

to be pro-active, and they will have to ensure that time does not pass without action. The Court has no discretion to revive such an appeal; although it would be possible to apply for leave to appeal out of time, good reason would need to be shown if R 10 is to have any meaning.

The serious intention of the legislature is further demonstrated by the fact that this rule only applies to appeals brought after 1 October 1997. It is likely that it will have significant impact on the conduct of appeals generally. It will, however, be interesting to see whether the Court adopts the same "soft" approach to this rule as it has to R 426A of the High Court Rules in *McEvoy v Dallison* (1997) 10 PRNZ 291.

There is a further general power to strike out an appeal for want of prosecution under R 26. The need for this is presumably reduced by the introduction of R 10, but it may have some application where a fixture has already been applied for.

## SECURITY FOR COSTS

The rules relating to security are essentially the same as under the 1955 rules. The quantum of security remains in the discretion of the Registrar of the High Court; it is unfortunate that no standard practice was introduced for the ascertaining of this. Rule 11(1)(b) simply provides that the Registrar must "be satisfied with the security".

There is no requirement for a formal application to the Registrar, and this wording suggests that that is not envisaged. Some Registrars will, no doubt, continue to insist on this.

It would have been altogether simpler to specify a fixed amount of security to be paid; the rules are easily changed to allow for any change in policy over time, and this would have brought a measure of uniformity across the country. It would also have removed one of the stresses involved in noting an appeal.

A new obligation has been placed on the Registrar to advise the Registrar of the Court of Appeal that security has been given: R 11(1). This should obviate the need for the inclusion of a certificate in the case on appeal.

As in the case of failure to prosecute, an appeal is deemed abandoned if security is not provided within 14 days of its being brought. This rule, too, is not subject to the remedial powers of R 27. Unlike R 10, however, R 11 specifically provides that a fresh appeal may be brought if the time limits can be complied with.

In recent times the Courts have considered excuses for failure to provide security sympathetically: see eg *Thomas v Bradford Construction Ltd* (1996) 9 PRNZ 481 (CA). There is no reason for this to be different under the new rules.

## CASE ON APPEAL

The 1955 rules spelt out in some detail what had to be included in the case on appeal. Rule 13 now simply leaves the form of documents to be filed to the discretion of the Court. The rule is presumably a way of retaining some flexibility so as to cater for different types of appeals, and seems to be a clear indication that the matter will be regulated by practice notes.

***The revision has, however, been rather half-hearted, retaining some anachronisms and failing to bring about consistency with provisions for appeals from other Courts***

Procedure in the Court of Appeal has for some time been regulated by the Provisional Practice Note put out by the Court on 5 August 1996, and the Court has intimated that a final version will shortly be put in place.

While there may be some elements of uncertainty in relying on Practice Notes to a great extent, they do have the advantage of being less rigid than rules – compliance is a matter for the Judge – and of being adaptable without formal legislative intervention to deal with changes in practice.

There are always dangers for the unwary, but the recent practice of the Court of Appeal has been to send a copy of the Practice Note to every appellant filing a notice of appeal. While that may involve some duplication, it ensures that every litigant in the Court of Appeal knows what is required; to that extent it must be seen as an aid to efficient disposal of proceedings.

Rule 14 provides that four copies of the case on appeal are to be filed; this brings the rule into line with practice (and reality – unlike the 15 copies required by the 1955 rules).

## POWERS OF COURT

The powers of the Court to dispose of appeals are essentially the same as before, although there are a number of additional rules.

Rule 25 allows the Court to make any orders and give any directions it considers necessary for the just resolution of the case.

Rule 22 confers specific powers to order repayment of any judgment sum already paid together with interest. While this is a useful power for the Court to have, it may be questioned whether this is purely a procedural matter suitable for regulation by rules of Court. The power to award interest as part of a judgment is conferred by statute, and one would have expected this power to be dealt with similarly.

Judgments are required to be pronounced in open Court: R 20. This reflects the existing practice of the Court, but it is difficult to see any need for such a rule.

Rule 24 deals with fresh evidence in the Court of Appeal, and is in essentially the same terms as the 1955 rules.

## COSTS

Rule 21 confers on the Court a general discretion as to costs, retaining the rule that they may be ordered to be taxed, despite the comments of Lord Cooke that there is "no known precedent for taxation of costs on any basis in the New Zealand Court of Appeal in living memory" (*Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* (1991) 3 PRNZ 571 at 572).

The unrealistic scale of the 1955 rules has not been retained, which leaves the tariff entirely up to the Court. Once again, this brings the Rules in line with the existing practice of the Court. It will be of interest to note whether this foreshadows an abandonment of scale in the High Court.

## PRACTICAL CONSEQUENCES

One of the aims of the new rules has apparently been to bring them into line with the Court's practice; to that extent there will be little change to the conduct of appeals, particularly since this has been governed by the Practice Note. The one matter which will affect every appellant is the new time limits and the requirement to ensure that there is no undue delay before application is made for a fixture. Case management has hit appeals with a vengeance!

# RECENT CASES

## AFFIDAVITS BY CORPORATIONS

A little-used rule was invoked to thwart a summary judgment application in *Spiers Group Ltd v Harlen* unreported, Hammond J, 18 July 1997, HC Hamilton AP 57/97. The affidavits filed by the plaintiff were sworn by the office manager, who deposed that she was authorised to make affidavits on the plaintiff's behalf. An authorisation signed by two directors was annexed.

In the District Court, an objection was taken that the affidavit did not comply with R 515 of the District Courts Rules 1992, which provides that affidavits on behalf of corporations may be made by officers or members, or by persons authorised by the Court. The objection was upheld, and the Judge refused to authorise the office manager to make the affidavit. This resulted in the failure of the summary judgment application.

The plaintiff applied for leave to appeal against the order, and it was that application which came before Hammond J. He refused leave to appeal, holding that the decision of the District Court Judge was correct, and that the proper course in such circumstances is to bring an application for authorisation together with the summary judgment application.

It is suggested that this approach is an incorrect interpretation of both the rules and the law. Rule 515 (like its counterpart in the High Court Rules, R 517) is a rule to provide a simple means of naming persons who may depose on behalf of corporations. It is phrased permissively, and it does not specify that it is the only way in which affidavits may be made. It cannot be suggested that other persons are legally unable to speak for a corporation. Where evidence is provided of authorisation, and the deponent clearly has personal knowledge of the facts, it does not appear to be in anyone's interests to refuse to admit an affidavit.

If the rule is to be seen as purporting to limit those who may make affidavits on behalf of corporations, it is going beyond the proper scope of a procedural rule and encroaching on substantive law. That raises possible issues of ultra vires, and such an interpretation cannot be a preferred one.

Even if the rule is construed as limiting the persons who may depose on behalf of corporations, there are objections to interpreting it narrowly. In the first place, "officer" is not defined. The District Court Judge interpreted the word as limited to directors or secretaries, which is presumably a reference to the definition in the Companies Act 1955. There is no definition in the Companies Act 1993, nor is there any reason why that definition should be imported into the wider law. An officer is a person holding office, and this is quite apt to describe an office manager.

Secondly, there does not seem to be any reason to require the added expense and formality of an application for authorisation. The rule does not require an application, and the Court could easily have accorded authority in response to an oral approach.

Finally, R 4 makes it clear that the rules are to be interpreted so as to secure the just, speedy and inexpensive determination of any proceeding. All of those objectives appear to have been defeated by the construction adopted of R 515, and it is a pity that the High Court did not take the opportunity to rectify the matter instead of occasioning further costs and delays.

## BRIEFS OF EVIDENCE

Rulings concerning evidence rarely reach the Court of Appeal, which makes the decision in *Harrison v Banks* unreported, 27 June 1997, CA124/97 of some interest. The proceeding was a defamation claim in which the trial Judge had made several pretrial rulings. One of these was that each party was limited to one expert witness on any topic. The plaintiff appealed.

The Court of Appeal accepted that a Judge may, in the interests of justice, limit the number of expert witnesses to be called. They did not agree that there was any rule of practice to the effect that only one expert should be called on any topic, and held that there might well be cases where the nature of the controversy is such that additional expert evidence may be appropriate.

The Court commented that the task of the trial Judge had been complicated by the fact that the briefs of evidence provided contained a quantity of material which was inadmissible and irrelevant. There were also difficulties surrounding what constituted expert evidence and what did not. In the end the Court of Appeal examined each brief and stated what evidence it considered could legitimately be tendered by each witness. The net result was a conclusion that expert evidence could be tendered by a number of witnesses on limited aspects of the case. The Court also pointed out a number of respects in which evidence contained in the briefs would be inadmissible.

The Court concluded by observing the difficulties facing any Court other than the one conducting the trial in making final rulings as to admissibility of evidence, and stated that its conclusions on such matters were not to be seen as final. This is undoubtedly an important observation, and one which makes it even less likely that such matters will be considered by the Court of Appeal. The decision is useful in elucidating the practice concerning expert evidence, and also in highlighting one of the difficulties of briefs, namely how to deal with inadmissible evidence. In a jury trial (such as this one) it may well be necessary to obtain pretrial rulings. Where no jury is involved, there is at least the advantage of knowing when inadmissible evidence is likely to arise, and being prepared for it.

## BARRISTERIAL IMMUNITY

An interesting point concerning barristers' immunity from liability where a case is settled came up before the English Court of Appeal in *Kelly v Corston*, The Times 20 August 1997.

The three members of the Court were agreed that there are two instances where a barrister will be protected even though there has not been a trial. One is where the hearing has begun in the sense that the Judge has started to consider the claim. The protection will operate even where the Judge is not involved in the settlement. The New Zealand Court of Appeal adopted this line of reasoning in *Biggar v McLeod* [1978] 2 NZLR 9.

The second situation is where there is direct participation by the Judge in the approval of settlement terms. Judge LJ considered that the case before the Court fell into this category, and that disposed of the issue.

Where there was disagreement between the members of the Court was in relation to consent orders which are made on the basis of an agreement reached by the parties without any judicial involvement, and where settlements are concluded "at the door of the Court". Judge LJ considered that nei-

ther of these cases would allow the barrister to claim immunity. The other two law lords disagreed.

Pill LJ recognised that there was a public interest in keeping the scope of the immunity narrow. He nevertheless held that a settlement at the door of the Court is so intimately connected with the conduct of the case in Court that the situation could not sensibly be distinguished from one where the trial had begun. He also held that immunity would enure where a Court approved agreed terms, and disapproved the decision to the contrary in *B v Miller & Co* [1996] 2 FLR 23. Butler-Sloss LJ agreed with the conclusions of Pill LJ.

In terms of principle, the decision of the majority has much to commend it: it is hard to see why there should be a different result simply because settlement occurs after the plaintiff has opened its case. On a broader level, however, one may ask why the notion of barristerial immunity still exists at all. There does not appear to be any reason in principle why a barrister should not be called to account for performing his or her duty properly.

While there has not been much recent judicial discussion of the matter in New Zealand, there does not seem to be any sign of the immunity being seriously called into question. There was some consideration of the issue on a striking out application in *Crowley v Ennor* unreported, Hansen J, 23 May 1995, HC Auckland CP 616/94, but that case has apparently gone no further.

Interestingly enough, *Crowley* also involved a settlement on the morning of the trial. Hansen J refused to strike out the claim, holding that evidence would be required to show the capacity in which the lawyer was acting and that there would have to be a consideration of policy matters as to the extent of the immunity. He also raised the point that there is no difference in principle between a settlement immediately before trial and one which occurs much earlier.

The policy considerations involved in barristerial immunity are said be twofold: to ensure that barristers present the case fearlessly, even where they are required to raise matters inimical to their client's interests; and to prevent the relitigation of matters which would be required if a barrister were found to have conducted a trial negligently: *Rondel v Worsley* [1969] 1 AC 191 (HL); *Rees v Sinclair* [1974] 1 NZLR 180 (CA).

Neither of these considerations actually amounts to a proper justification. There is no reason to suppose that a barrister would not discharge his or her duties properly because a vexatious claim might be made by a client who did not understand the nature of ethical duties: any professional faces the same risk. And relitigation of a case is not an option merely because there has been negligence in its presentation. The decision must stand, although a Court may subsequently have to decide that the result might have been different had there been no negligence. But that is a task frequently confronted by Courts in the assessment of damages; it does not necessitate a special policy rule. The Court in *Rees* also pointed out the peculiar difficulties faced in New Zealand in determining whether a practitioner is acting as a barrister or a solicitor at any given time. That tends to suggest that a rather arbitrary distinction has been drawn.

The refusal to strike out the claim in *Crowley* is some evidence that there may be a shift in thinking on the issue of immunity. No doubt its abolition would be strenuously opposed by the Bar, and would require a decision from the Court of Appeal. It is perhaps something which needs to be addressed together with the justification for the continuation of two classes of practitioners.

## SUMMARY JUDGMENT: ONUS OF PROOF

In *MacLean v Stewart* unreported, 20 August 1997, CA288/96, the Court of Appeal confirmed an important principle of the summary judgment procedure: the onus remains on the plaintiff throughout to establish that the defendant has no defence. If the Court is not finally satisfied on this point, the application must be dismissed.

The statement is of particular importance in cases where there are substantial disputes of fact. The case before the Court concerned a building dispute where there had been ongoing disputes as to the quality of workmanship, and where a number of matters had been referred to arbitration. Despite the fact that the defendant had produced expert evidence on the question of workmanship, summary judgment was granted in the District Court and upheld on appeal. Interestingly enough, leave was granted for a further appeal. The Court of Appeal commented that it would be unusual for leave to be granted in such circumstances, but held that the leave decision had clearly been correct.

The Court of Appeal reversed the High Court decision, and stated that the Courts below had become embroiled in deciding the merits of the claim rather than confining themselves to the pertinent issue of whether there was an arguable defence. In the light of the evidence, the Court held that it could not be shown that there was no defence and that a full hearing was required.

The decision is a reminder that the defendant does not have to prove its case on a summary judgment application. If credible evidence is tendered by the defendant, there will have to be a particularly strong case for the plaintiff in order for the Court to be able to be satisfied that there is no defence.

## JURISDICTION OF DISPUTES TRIBUNALS

Disputes whose subject matter is beyond the jurisdiction of Disputes Tribunals have given rise to High Court litigation in a number of recent instances. In *Earthquake Commission v Disputes Tribunal* (1996) 10 PRNZ 317, Eichelbaum CJ held that the Tribunal has no jurisdiction to hear a claim for compensation under the Earthquake and War Damage Act 1944. The claim could not be described as "contractual", and any possibility of a "quasi-contractual" claim was prevented by s 11, which precludes claims for money due under enactments.

In like fashion, Hammond J set aside a declaration of non-liability for a penalty made by a Disputes Tribunal under the Rating Powers Act 1988 in *Auckland City Council v District Court at Henderson* unreported, 12 August 1997, HC Auckland M614/97.

It is difficult to fault the reasoning in these decisions. What does give rise to concern, however, is that the only way of challenging wrongly assumed jurisdiction is by way of an application for judicial review to the High Court; s 50 of the Disputes Tribunals Act only allows appeals on grounds of procedural unfairness. Under the Statutes Amendment Bill (No 2) 1997, the jurisdiction of the Disputes Tribunals is to be increased to $7,500, and $12,000 with the agreement of the parties. It seems likely that there will be an increasing number of jurisdictional disputes, and it may well be appropriate to reconsider the scope of permitted appeals. ❑

# PERSONAL RELATIONSHIPS AND CONFLICT OF INTEREST

*Graham Rossiter, Massey University*

*examines an increasingly difficult problem in employment law*

It is trite law that the effect of the statutory personal grievance procedures is that an employer must be able to discharge the burden upon it of justifying the dismissal of an employee. If called upon to do so, the Employment Tribunal or Employment Court will ask itself "whether the decision to dismiss was one which a reasonable and fair employer would have taken in the particular circumstances". *Northern Distribution Union v BP Oil NZ Ltd* [1992] 3 ERNZ 483, 487.

Although it has in some respects become judicially unfashionable to do so, this basic question has been examined in terms of substantive justification and procedural fairness. Reasons under the former heading have, essentially for reasons of convenience, been categorised as relating to the employee's misconduct, non-performance or incapacity or the employer's commercial judgment that the employee is surplus to requirements. The subject of this article ie termination where there is a perceived conflict of interest arising out of an employee's relationship with someone employed by a competitor of the employee does not fit easily into the foregoing categorisation of substantive justification. The employee will, in such cases, have been dismissed for reasons that have nothing to do with his or her behaviour in the workplace or capacity. To some extent, this class of case has parallels with the redundancy situation where the law acknowledges the right of an employer to make a commercial judgment as long as that is made for proper motives and is arrived at in a procedurally fair manner. At the heart of these cases is a focus on the circumstances or, one might say, "status" of the employee. As such, these issues should be considered in the light of not just the personal grievance provisions of the Employment Contracts Act 1991 but also the Human Rights Act 1993.

The relevant industrial jurisprudence is quite limited. It primarily comprises a leading judgment of the Labour Court decided under the Labour Relations Act 1987, two decisions of the Employment Tribunal in 1993 as well as a third Tribunal judgment in which the finding at first instance that the employer's decision to dismiss was justified was upheld on appeal by the Employment Court.

In what must still be regarded as the leading case of *Northern Clerical Workers Union v Printpac UEB Carton*, [1989] 2 NZILR 644, the grievant (a Ms Krueger) entered into a stable de facto relationship with her employer's marketing manager. As a result of restructuring, her partner was made redundant and subsequently became employed by a trade competitor.

The employer discussed the matter with Ms Krueger who was then suspended on pay. The company explored the possibility of an internal transfer and an offer was made of a substantially equivalent position as a customer service officer. The alternative position would, however, have meant slightly longer hours per week and a somewhat lower level of responsibility. A counter-proposal from the employee was not accepted by the company which thereupon dismissed her with a payment of four weeks' salary in lieu of notice.

The Labour Court (Judge Travis) found that –

(a) the grievant was a valued employee and the sole reason for the termination was the company's belief that there was a risk of disclosure of confidential information which arose from her close personal relationship with an employee of a competitor.
(b) the decision to dismiss Ms Krueger was a genuine one made with proper motives. This was by way of analogy with the position in the case of redundancy dismissal. Reference was here made to the then leading judgment of the Arbitration Court on redundancy terminations of *Canterbury Hotel Workers IUW v Fabiola Fashions Ltd* [1981] ACJ 439.
(c) the employee had not "acted in a manner incompatible with the true and faithful discharge of her duty". In other words, there was no evidence that any actual disclosure of confidential information had occurred.

Judge Travis referred to the decision of the English Employment Appeal Tribunal in *Skyrail Oceanic Ltd v Coleman* [1980] IRLR 226 where the facts that –

(a) the grievant and her husband both held low-level positions (as booking clerks with travel agencies) and
(b) there was no evidence of any leakage of confidential information

were held to not constitute a bar to a dismissal on those grounds being substantively justified.

It was held that Ms Krueger's dismissal was procedurally unfair in that there was an inconsistency between the employer's treatment of her and its approach to other employees who were married to employees of competing firms who were not dismissed, even though they were in possession of confidential information of interest to their spouses' employers. However, this case is most often cited as being an authority for the proposition that in the circumstances established in evidence, if an employer considers on reasonable grounds that there is a risk of disclosure (even if inadvertent) of confidential information by an employee to another with whom he or she has a relationship, then that may constitute a justifiable ground for a dismissal, regardless of the nature of that relationship. The substantive justification for the dismissal will arise from the assessment by the employer of a commercial risk arising from:

(a) the employee's access to sensitive information and
(b) his or her relationship with the other party.

The two unreported 1993 Employment Tribunal decisions had opposite results for the respective applicants.

In *Meeuwsen v NZ Rail Ltd* AT 212/93, AET 990/92, 16-8-93, Adjudicator Dumbleton, the dismissal was held to be both substantively and procedurally justified. By contrast, the termination (on her first day at work) of the applicant in *Eggleston v Firestone Tire and Rubber Co Ltd* CT119/93, CET 485/92, 6-9-93, Adjudicator Teen, was found to be unjustified under both headings with the result that an award of lost wages and compensation pursuant to s 40(1)c ECA was ordered.

An examination of the decision in *Eggleston* discloses several reasons for the applicant's success in her personal grievance action. In so far as substantive justification was concerned, the Tribunal found that upon a consideration of the nature of the respective positions of Mrs Eggleston and her husband, there was insufficient risk to the respondent as a prominent international corporation in employing a storeperson whose husband was operating in a management role in a single retail outlet in Canterbury to justify the action ultimately taken. Further, there were held to be significant procedural errors. The applicant was not given an opportunity to be heard by those who had decided her fate, that decision had been predetermined and she had been summarily dismissed in circumstances where she "had done no wrong, committed no indiscretion, shown no fault".

*Meeuwsen* involved somewhat different circumstances. The applicant was employed as a telesales representative and had, not long before her employment was terminated resumed cohabitation with her de facto partner who had previously been employed by NZ Rail but who had left to work for a road transport operator who was regarded as a major competitor of Railfreight.

On the 30th March 1992 the applicant's superior spoke to her and asked her to confirm the fact of her relationship with her partner. Another meeting took place on the 14th April at which the applicant was told that her employer considered that the situation presented a risk that she might inadvertently disclose to her partner commercially sensitive information about Railfreight's business operations. Ms Meeuwsen did not accept the respondent's view of the matter and maintained "that she did not discuss her work at home".

At the end of what was described by the Tribunal as being a "lengthy" meeting, the respondent gave its conclusion that there was a risk that its commercial position could be jeopardised by the relationship between the applicant and her partner. The applicant had been advised during the meeting that the respondent had already made inquiries throughout its organisation to see whether there were any alternative positions available for her to be transferred to. She was advised that none had been found. Ms Meeuwsen was accordingly told that her employment was being terminated. A settlement agreement was executed the same day which provided for ten weeks' salary in lieu of notice to be paid to her. (This was held not to operate as a bar to the personal grievance action.)

The Tribunal referred to and relied on the judgment of the Labour Court in *Printpac UEB Carton* (supra). It was held that the Tribunal may go only so far in reviewing the exercise of judgment by an employer as to whether any competitor is linked in the relationship of the employee and whether there was any appreciable risk arising from that. The good faith of the decision made by the employer was considered to be the key factor. It was found that there was nothing in the evidence placed before the Tribunal "to show that NZ Rail did anything other than make a genuine appraisal of the effects that (the competitor) might have on the respondent's business". Reference was made to certain evidence that a "lucrative account" had been lost to that other company. The Tribunal's analysis of procedural issues was somewhat light and stands in marked contrast to that of the adjudicator who dealt with *Eggleston*. There was, for example, some basis for contending that the respondent had not given any sufficient indication to its staff that domestic relationships with employees of competitors would not be acceptable. This was a point that was argued (although not successfully) on behalf of the applicant with reference to NZ Rail's written disciplinary code. The Tribunal conceded that "ideally" there might have been more communication between the parties as to any options other than dismissal which the applicant might have been prepared to accept such as ending her relationship. However, it was suggested that "in this difficult area of interface between employment and private life", the adjudicator could "not agree that NZ Rail was necessarily responsible for proposing any such options for consideration". It was finally noted that the respondent had looked at relocation or redeployment as a means of removing the applicant from the reach of confidential information. The company had not been able to find any available position for the applicant.

Despite the Tribunal's apparent comfort with the respondent's handling of its process, some concerns might be raised with regard to procedural issues. Although the grievant's domestic situation had been previously raised, no prior indication (before her termination interview) had been given that her employment was at risk. Also, the decision to dismiss had quite clearly been made by the time of that interview without, it might be suggested, a genuine prior opportunity being given to the applicant to be heard.

## THE KOTZIKAS CASE

*Kotzikas v LEP Freightways International Ltd* CEC 31/96, C47/95, 18-10-96, Judge Palmer.

This is the only one of this block of cases to have reached the Employment Court. Judge Palmer upheld the finding of the Employment Tribunal (by the same adjudicator who heard *Eggleston*) that the dismissal was substantively and procedurally justified. The Court's analysis of the issues is unfortunately somewhat sparse. (Approximately 13 of the 24 pages of Judge Palmer's judgment comprises extracts from the decision of the Employment Tribunal.) Briefly, the facts were that the applicant had a domestic relationship with someone who had been the Christchurch branch manager of the respondent for nine years but who left in August 1993 to establish a directly competing company. (Evidence on behalf of the respondent referred to various impacts on it of these events.) The applicant's personal relationship with this other person began in January 1994 and they began living together in March that year. The meeting at which the applicant was dismissed took place with two representatives of the respondent (including its General Manager) on 27 July 1994. The respondent believed that as a result of the applicant's domestic situation, it had legitimate and reasonable concerns as to a conflict of interest and her loyalty. However, there were, in addition, two specific matters that troubled the respondent; these being remarks of a disparaging nature that the applicant had made about the company to co-workers and also allegations that she had encouraged other staff to go and work for the competitor headed by her de facto partner. The applicant had denied the substance of these allegations. Nevertheless, the respondent believed that it had

good reason to dismiss the applicant and gave its decision to that effect at the end of the meeting. The Tribunal found that the employer was justified in concluding that its allegations had not been satisfactorily answered. It was held that "a pattern of behaviour (was) disclosed indicating that the applicant had gone beyond what was acceptable in canvassing the respondent's affairs with other members of *its* staff and unfavourably comparing the respondent's operation with that of (its competitor)".

Judge Palmer held that the Tribunal had correctly applied the relevant law and that as a Judge on appeal, he did not feel inclined to disturb the findings at first instance.

The following points may, perhaps, be made with respect to this case –

(a) There were features that distinguished *Kotzikas* from the other cases referred to in this article. Certainly, there was in the behaviour of the applicant more alleged than simply the fact of her domestic situation.

(b) Despite the Tribunal's findings to the contrary, one might see room for contending that the applicant's personal relationship was the fundamental cause of dismissal.

(c) As with *Meeuwsen*, there was a limited application of generally accepted procedural principles. For example, the applicant was not informed prior to the meeting at which she was dismissed that disciplinary action or possibly termination might result. In this regard, the Tribunal found (and the Employment Court accepted) that it was not envisaged by the respondent prior to the interview that it might lead to dismissal.

## DISCRIMINATION

This was, in part, addressed in all the post 1991 cases. It will be recalled that the (now repealed) Human Rights Commission Act 1977 prohibited discrimination by reason of, inter alia, "marital status". Section 28 ECA was enacted to like effect. In *Eggleston*, a breach of the latter provision was held to have occurred. It was found that the applicant was dismissed by the respondent because and only because she was married to Mr Eggleston. The causal connection between the termination and the fact of the applicant's marital status was considered by the Tribunal to be absolutely clear.

By contrast, the opposite finding was made by the Tribunal in *Meeuwsen* in what was a disappointingly short analysis of this issue.

Adjudicator Dumbleton concluded that marital status was not the reason for the termination of the applicant's employment. It was Ms Meeuwsen's close personal association with her partner "whether inside or outside of wedlock" that was of significance to her employer (A conclusion to substantially the same effect was made in *Kotzikas*. The Tribunal held that applying the "but for" test formulated in previous cases, discrimination on the ground of marital status could not be said to have been made out.)

With respect, there may be some concerns with this approach. On the one hand other kinds of close personal relationship (than husband and wife) might give rise to a conflict of interest. On the other hand, however, it was in *Meeuwsen* the (obviously) special closeness of a relationship in the nature of a marriage that was at the heart of the employer's concerns. An employer's response to an employee's personal relationship with someone who works for a competitor might or might not (depending on the circumstances) be justified. However, discrimination as a personal grievance does not definitionally provide for a consideration of whether the conduct of the employer was justified. This is by contrast to the first two categories of personal grievance, namely (a) unjustified dismissal and (b) unjustified action to the employee's disadvantage. The burden is on the employee to establish the constituent elements of a discrimination personal grievance. Once that has been done, the grievance is deemed to be sustained. That being the case, findings that unlawful discrimination has not occurred often depend in this context on somewhat artificial conclusions of the absence of a causal link between the employer's conduct against the employee and the latter's domestic status.

It might be noted that s 32(b) Human Rights Act 1993 allows for restrictions to be imposed by an employer "on the employment of any person who is married to or living in a relationship in the nature of a marriage or who is a relative of an employee of another employer if there is a risk of collusion between them to the detriment of that person's employer". Two points may be noted with respect to this provision. First, it is unclear what legitimately may be the nature and scope of the "restrictions" that might be imposed by an employer in these circumstances. Can these "restrictions" go beyond a mere transfer or redeployment of the employee to a position where there is not a risk of "collusion"? Secondly, the exception is not found in the parallel provision, s 28 ECA to which no consequential amendment was made when the Human Rights Act was passed. This might possibly be borne in mind by employees electing pursuant to s 39 of the ECA whether to proceed with a discrimination complaint under that statute or the Human Rights Act.

## SUMMARY/CONCLUSIONS

A conflict of interest arising from a personal relationship between an employee and someone working for a competitor of that person's employer may afford a ground for a justifiable termination of an employment contract. That will be the case where the employer has reasonable grounds for believing that that relationship gives rise to an unacceptable commercial risk that confidential information will, even inadvertently, be disclosed by the employee.

Evidence that an unauthorised disclosure of confidential information has actually occurred is not necessary. The focus will rather be on whether the employer is able to reach a business judgment that the possibility of a disclosure taking place is such that the employment cannot be continued. However, the right of the employer to make a judgment about these matters will not be totally unfettered. In the context of the kind of review of the employer's actions that will occur in a personal grievance action, consideration may be given to the nature and level of the employee's position, the kind of information that he or she had access to and the employment position of the employee's partner.

In the somewhat sparse jurisprudence, a lighter standard of procedural fairness has, by and large, been expected of the employer than might be expected in other classes of employment termination. In some cases, account has been taken of the employer's consideration of the options, if any, for the redeployment of the employee. An analogy might therefore be drawn to the laying-off of an employee who is redundant. If anything, an employer's obligations in this regard are possibly less even than where the employee is surplus to its requirements. The implications of the Human Rights Act 1993 need to be borne in mind in this context. ❑

# SEARCH AND SEIZURE

*Janet November, Research Counsel, Wellington District Court*

## *updates us on the Courts' handling of* Grayson

The Court of Appeal has confirmed that *R v Grayson & Taylor* (CA 255 &256/96, 28 November 1996) sets out the relevant principles and is intended to provide general guidelines for trial Courts in their approach to s 21 New Zealand Bill of Rights Act, in *R v Loh* (CA 33/97, 20 March 1997) at 6. Section 21 guarantees the right to be free from unreasonable search and seizure. In recent warrantless search decisions, *McRobie* [1997] BCL 500 and *Amo v Police* [1997] BCL 489, the High Court has followed *Grayson & Taylor* and *Loh*.

The *Grayson & Taylor* principles derive mainly from the leading case of *Jefferies* [1994] 1 NZLR 290. They confirm that entry and search of private property by officers of state without permission of the owner or occupier is an actionable trespass unless authorised by the common law or under specific statutory provision. An illegal search is not necessarily unreasonable as *Jefferies* had held. Reasonableness depends on the subject matter, the time, place and other relevant circumstances. A s 21 inquiry involves a utilitarian weighing of protection of privacy and other individual values against public interests, including law enforcement considerations. Reasonable expectations of privacy are lower in public places than on private property, on farmland than in the home. (In *Grayson* police trespassed on the boundaries of a kiwifruit plantation to observe cannabis growing in order to obtain sufficient information to apply for a s 198 SPA search warrant.) The urgency of the moment or a reasonable misapprehension as to the authority to search or excusable non-compliance with precise statutory requirements may diminish the significance otherwise attaching to non-compliance with the search laws. The legality of the search and whether a search warrant could quite easily have been obtained are highly relevant but not decisive. It is ordinarily unreasonable to conduct a warrantless search where those searching could not meet the statutory test for issue of a warrant. Finally the Court noted that the Bill of Rights is to be applied "realistically". (*Grayson* 8-14)

In *Loh* the police received information about a fight between Asian youths armed with weapons and likely to be driving to the area in modern Japanese cars. There had been a fight between two groups of Asian youths the night before in the same area. The police stopped a Honda Civic with two Asian youths inside. After they had stopped the car they noticed a stick on the back seat, and also saw on the window a sticker which was the mark of one of the Asian groups involved in the fight the previous evening. They proceeded to search the car and found two metal chair legs. The Court held the police could not have formed a reasonable belief in the existence of the weapons in terms of s 202B of the Arms Act at the time before they stopped the car. So the search was unauthorised. But, following *Jefferies* and *Grayson*, it was not necessarily unreasonable. If the car had been allowed to drive on the police could have lawfully stopped it a few second later and searched pursuant to s 202B. As the requirements of s 202B were met almost immediately after the car was stopped, and in the light of the violence of the night before and the interests of the safety of the public, it was not unreasonable in the circumstances to carry out a search.

In *McRobie* Chisholm J heard an appeal based on s 18(3) Misuse of Drugs Act. The appellant was searched inside a prison and Temazepam pills found in her clothes. To protect the informant the police would not provide the "reasonable grounds for belief" that the appellant was in possession of a controlled drug. So the Court concluded that the search was unlawful. But the Judge said there was a necessity for immediate police action where the obtaining of a warrant was not feasible, the physical search was not objectionable, and it was also highly relevant that the search took place in a prison and the unauthorised entry of drugs into prisons is a risk to the effective operation of such institutions. It was therefore not an unreasonable search in terms of s 21 Bill of Rights Act in the circumstances.

*Amo v Police* was another search of a car. A farmer noticed an old blue Cortina pass his farm and on return found signs that a vehicle had visited his premises and that his implement shed had been burgled. He phoned the police and a constable intercepted the old blue Cortina, noticed an unlicensed driver at the wheel and asked if he could look in the boot. The driver agreed and the boot was opened quite amicably with the help of a screwdriver. Again the Court found the search was unlawful as there was no informed consent; the defendants were not told that they had a choice in the matter. Williams J cited passages from *Jefferies* (which had involved a search of a car boot) and noted that the President had held that the inviolability of a person's home did not extend to motor vehicles (297-8). His Honour then cited the ten propositions from *Grayson* which he said was currently the last word on breaches of s 21. Applying these factors he noted that there was agreement to the search (if not consent in law) and there had been courtesy by the constable and no complaint by the defendants at the time. Also it was not possible for police to obtain a warrant in the circumstances, and members of the public may well have regarded it to be unreasonable if the car was allowed to go on its way without the search, which located the farmer's tools. So Williams J agreed with McKegg DCJ that the search of the car boot was not unreasonable.

The presumption that an unlawful search is prima facie unreasonable unless in extreme circumstances (*Wojcik* (1994) 11 CRNZ 463, 465) needs reconsideration: *Loh*, at 6. So it will not be necessary for Judges to find that a fairly ordinary sort of case where the police have acted "reasonably" is "one of those rare cases where the unlawfulness of the seizure did not constitute a breach of the accused's rights under s 21 Bill of Rights Act". (*Taito*, CA 161 -3/95, 2 June 1995, p 5)

***continued on p 360***

# CRIMINAL JUSTICE IN NEW ZEALAND

*Hon Phil Goff MP, Labour spokesperson on Justice*

*opens discussion on the future of the justice system concentrating on criminal justice*

## INTRODUCTION

The criminal justice system in New Zealand approaches the millennium in poor shape. The criminal law, the police, the Courts, and the corrections system have not been able to stem or effectively respond to an ever-increasing rate of criminal offending. The police appear chronically underfunded. The Courts are clogged and subject to long delays. Access to money and smart lawyers too often seem more important than the truth in determining Court outcomes. Prisons and police cells are overflowing. The corrections system does little to change criminal attitudes and recidivism rates of former inmates are as high as 65 per cent.

The failure of the system to contain crime is not simply an illusion created by the media and politicians anxious to sensationalise the issue. Empirical evidence reveals an alarming picture. From 1878 when records were first kept until the mid 1950s, the rate of reported crime remained stable. Since that time it has risen dramatically. The offence rate in 1995 of 141 per 1000 people is more than seven times the rate in 1950. Over the last decade reported crime increased by 22.5 per cent, almost twice the rate of the previous three decades. Less than half of the offences reported, 42 per cent, are cleared.

The cost of that crime is huge. The New Zealand Institute of Economic Research report for the Department of Justice estimated the annual total cost of crime in financial terms at $5 billion. The personal impact, trauma and loss of sense of security add further, unquantifiable, human costs.

In this article, I want to focus on three areas where change is needed to create a more effective criminal justice system. The first is the need for more emphasis on prevention of crime. Unless we tackle the causes of our increasing crime rate, there will never be enough police, Courts or prisons to contain the problem. Secondly, changes in the Court system are needed to reduce delay and to improve the ability of the Court to determine the truth. Finally, the last stage of the justice system, our prisons, need not only to secure those placed within them but also to reduce the rate of reoffending by inmates when released.

## CRIME PREVENTION

The first solution to improving the effectiveness of the criminal justice system lies in a proactive stance in preventing people from entering the system rather than our traditional reactive response of addressing the problem after it has arisen.

Prevention of crime is too far down our hierarchy of priorities. Politicians look to the short term, the three yearly parliamentary and electoral cycle, while prevention policies have a medium and long-term effect.

If we want to "get tough" on crime, getting tough on the causes of crime is most effective.

The best investment we can make is in early intervention to deal with the problems of at-risk families and at-risk children.

Important research has been done in New Zealand, which tells us about the causes of crime and other anti-social behaviour.

Professor David Fergusson at the Christchurch School of Medicine and Dr Phil Silva at Otago University have each done studies following samples of 1000 children – one group born in Christchurch in 1977 and the other in Dunedin in 1974.

Both conclude that it is the early years of a child's life, which determine his or her later social development and behaviour. Silva says at age three years, it was possible to tell which of the children would become delinquent and exhibit anti-social behaviour.

Fergusson says that the five per cent of his sample from the least secure and least stable family environments were 100 times more likely than others in the sample to become criminal offenders, to be truants, to have failed in education, to be unemployed, and disproportionately represented in youth suicide, alcohol abuse and teenage pregnancy statistics.

The New Zealand studies are backed up by overseas expert opinion.

Professor Bruce Perry, a US psychiatrist and expert in neuroscience points out that 85 per cent of the brain develops in the first three years of life. A child's future behaviour and his or her IQ are fundamentally determined at this time.

Yet rather than building a fence at the top of the cliff, we put most of our money into providing an ambulance at the bottom.

We spend huge amounts of money on dysfunctional children and adults after they are set in their ways and are hard, if not impossible, to change.

If we know what causes a person to become criminal, anti-social and a long term dependent on welfare, it makes sense to intervene early to prevent this rather than waiting for it to happen and trying to patch up problems afterwards.

The Hawaiian Healthy Start programme offers a successful model for responding to this problem.

Under the programme, at the time of their children's birth, mothers are screened against a risk indicator list, which indicates the danger of the children being at risk.

Those families are offered participation in a voluntary support programme. Around 95 per cent agree to participate.

The programme works through family support workers who make regular home visits to the families.

The support workers are generally middle-aged women with experience in raising families of their own and with para-professional training. They work with families to provide role models and to help with parenting and parenting skills.

They help families through any crises. They put families in contact with other social support agencies such as housing. They make families aware of family planning. They check that children are immunised and getting health care. They help ensure that children and their learning are developing properly.

The results are impressive.

The programme has dramatically reduced child abuse and child neglect, major causal factors, which lead to multiple-problem teenagers, likely to commit criminal offences.

Early intervention is far more effective, and comes at a fraction of the price, of trying to deal with problems after they emerge. It is estimated for every dollar invested at the start of a child's life that $10 is saved in dealing later on with social problems which were avoidable.

In New Zealand, there are around 30,000 cases of neglect and abuse of children reported to the Children and Young Persons Service each year.

That's an appalling indictment on our society. We owe it to all of our children to give them decent start in life. Our failure to address this problem as a priority will lead us further down the path to increased juvenile offending and a crime-ridden society.

Labour's policy is to implement a comprehensive "good start" early intervention programme, strengthening universal services such as Plunket but targeting specifically dysfunctional families for wider assistance.

We also need other programmes to address problems of older children.

An increasing number of children with behavioural problems are being suspended from school – over 10,000 in the last year, 110 per cent more than in 1990. Schools with limited resources and wanting to focus on the needs of the majority of their students, have a powerful incentive simply to get rid of disruptive students. That action solves the school's problem, but not the community's. Too often the students with behavioural problems end up being dumped out in the community, and left to their own devices. Suspension and truancy from school correlate strongly with juvenile delinquency and criminal behaviour. It is essential that children and young people with behavioural problems are placed into alternative education and training or work. Where appropriate, a structured environment like the army can also be effective in turning a young person's life around.

Instead of dealing with dysfunctional families in an ad hoc way and through a multitude of different government departments, we need an holistic approach. The Mt Roskill Community Approach led by Constable Nic Tuitasi has taken huge steps in targeting dysfunctional families, coordinating the work of different agencies and dealing comprehensively with the families' problems. This approach has significantly reduced the social problems and criminal offending associated with such families.

## COURT REFORM

While prevention is the most effective way of keeping people out of the criminal justice system and relieving pressure on it in the medium term, immediate changes in the Court system are needed to deal with the increased pressures on the Courts.

Our current Court system falls well short of desirable standards of efficiency and timeliness. Backlogs, especially in District Court jury trials, have reached serious levels. Latest levels show that 877 jury criminal trials are waiting to be heard. Nearly one in five defendants waits more than a year before their case can be heard. Over the last several years grave injustices have occurred when defendants, many facing serious charges, have had those charges dropped without being heard in Court because undue delay breached the provisions of the Bill of Rights Act. This is still occurring. In June a man before the Hamilton District Court on drug trafficking charges had the charges dropped without going to trial because he had waited more than 27 months without his case coming to trial.

Belated measures are being taken to try to address the Courts' workload. Additional District Court Judges are being appointed. With up to 40 per cent of Court work not requiring the skills of a Judge, more can also be done to devolve such work. Registrars and Court managers have taken over a number of administrative responsibilities. The Community Magistrates Bill recently introduced will allow further routine work to be dealt with by lay Magistrates. Another option, not adopted by the current minister, would be to trial a legally qualified magistracy to deal with summary cases, thus freeing up District Court Judges for more important jury trial work.

Status hearings are another useful initiative which merit more comprehensive introduction across the country. Trialled in Auckland, they have been successful in reducing Court delays and costs. More than 70 per cent of initial not-guilty pleas in the District Court system are reversed when the matter comes to a hearing. Status hearings enable these cases to be disposed of more quickly, efficiently and cheaply. The Judge has the chance informally to discuss the charge with the defendant after looking at the police summary. An opportunity is provided to reach a conclusion on what actually occurred rather than to engage in an adversarial contest.

The victim can also be given the ability to have an input into how best to resolve the matter and there is an opportunity to seek agreement on a constructive sentence.

Innovations such as status hearings, police diversion and changes in youth justice and in the Family Court acknowledge the significant limitations of a purely Court-based and adversarial system. We have however yet to debate whether there should be fundamental reform of the adversarial system itself. To those who work in the current system, that will certainly sound like heresy. The present system is so much a part of our legal culture that it has rarely been challenged.

If we had set out to design a Court system for our country rather than simply having inherited the English system of law, it is however highly questionable whether we would have chosen the adversarial system over the West European based inquisitorial system. Under the former system, the object of the exercise is to find a winner whereas in the inquisitorial system the object is to find the truth.

The theory under our system is that the strong advocacy by two adversaries will see the merits of the case fully canvassed and the truth will be revealed. In practice however,

there is no guarantee that this will be the outcome. To the contrary, the result of an adversarial trial may depend more on the comparative skill of the defence and prosecution which in turn may depend on the ability of the defendant to employ highly paid counsel. Cross-examination may on occasion be effective in testing the reliability of evidence. It may equally be effective in destroying the evidence of an honest but nervous or hesitant witness while leaving intact the evidence of a defendant whose skill is criminal deceit.

Defendants have the advantage of not having to disclose their case. They may "ambush" their opponents by presenting surprise evidence when the prosecution has closed its case and is unable to search for and present evidence in rebuttal.

The consequence of the right of both sides to tender only that evidence which supports its case and leave out what is inconvenient may be to deny the Court the evidence it needs to determine the real facts and establish the truth.

The jury system itself is under challenge, particularly with the increased number of hung juries. Our jury system has the traditional strength of a defendant being judged by his/her peers and involving the wider population in the justice process. However, the requirement of unanimous verdicts can place the verdict in the hands of the most mercurial and least rational member of the jury. The adversarial system and the role of the jury, also promote drama emotion and ambush as important components determining the trial outcome rather than simply the search for truth.

The inquisitorial system places much more emphasis on ascertaining the truth. Judges have a more active investigating role while the role of lawyers by contrast with our system is diminished. Oral evidence and the contest and drama associated with our form of courtroom trial is less important. Under the inquisitorial system inquiry may be sustained over a longer period of time. The gathering of evidence is practically complete by the time of the formal trial and the Judge will already have a transcript of most of the evidence. There are relatively fewer rules limiting the admissibility of evidence and full disclosure is the norm. While the defendant is not obliged to give evidence, silence can be expected to count against them in Court.

The comparative strengths of the inquisitorial system may be judged by the much higher levels of public confidence in Court decisions in the countries where it operates than is the case in our own system. Tradition, vested interest and the entrenched nature of New Zealand's present system make a sudden or radical change to the inquisitorial model unlikely. What is more likely is a gradual change toward a system where greater emphasis is placed on adopting rules and procedures likely to elicit the truth.

One change meriting closer examination is developing greater application of the principles of restorative justice. Our current system focuses on determining guilt when the offender breaks the laws of the state. The offender is then sentenced and punished.

Restorative justice looks at the need for the victim of the offence to be empowered and for the offender to set right the wrong done to the victim. It also emphasises accountability. The offender is expected to acknowledge responsibility which is seen as a key step towards developing more socially acceptable behaviour.

Restorative justice is an important principle in our youth justice system. Most people involved in the system, including the police, regard the Family Group Conference as a major advance on the previous system. It is credited with stopping many juvenile offenders progressing into the criminal justice system. Its weakness is in the area of the hard core recidivist offender, and in the poor resourcing of follow-up action.

Restorative justice is not a panacea. Nor will it in the foreseeable future replace the current criminal justice system. We should nevertheless seek to realise its considerable potential by building on its strengths and expanding its coverage to appropriate cases in the adult criminal system.

## PENAL REFORM

Also in need of reform within our criminal justice system is the patent failure of our system of corrections to achieve what its title suggests.

New Zealand has one of the highest rates of imprisonment in the western world and that is continuing to increase rapidly. In 1986 we imprisoned 84 persons per 100,000 population. A decade later in 1996 the rate had risen to 135 per 100,000.

Imprisonment is a necessary response by society to protect itself against those who pose a threat to the community and to keep recidivist offenders from reoffending.

Where the nature of the crime committed is serious, a punitive response by society is also justified. However, for most inmates who serve relatively short sentences, and who will be released back into the community, habilitation or rehabilitation must be regarded as an important objective.

The futility of current efforts in this direction can be judged from the fact that nearly two thirds of those released from prison are reconvicted of a further offence within two years. Prisons too seldom succeed in changing the attitudes and behaviour of inmates.

They don't confront the causes of a person's criminal offending. Often they have the reverse effect. Inmates are unlikely to change in an environment in which criminal behaviour is the norm. Prisons take away responsibility and institutionalise people.

For a young offender, prison is a school for crime where opportunities exist to make wider criminal contacts and acquire new criminal skills.

Following their prison sentence, offenders are dumped back into the community often with less prospects and inclinations to go straight than when they went into prison.

There are nevertheless positive programmes in New Zealand and overseas prisons which should serve as models for future development.

Therapeutic programmes such as Kia Marama which confronts sex offenders with the wrongness of their actions and teaches inmates skills in avoiding risk situations have been successful in dramatically reducing recidivism.

Prisons can provide a unique opportunity with a system of sanctions and rewards to address the causes of criminal offending. Around 80 per cent of convicted inmates at the time of their conviction suffer from drug and alcohol abuse and addiction. Until recently, this abuse continued with minimal response from authorities within the prison system. There is now a more conscious effort to reduce drug and alcohol use by inmates. Yet there has been no corresponding effort or resourcing applied to rehabilitative programmes.

The theory prevalent in the 1970s that "nothing works" is now under challenge. Programmes such as the therapeutic community, an example of which is the "Stay'n Out" programme in New York, have demonstrated impressive success rates in reforming drug addicts.

"Stay'n Out" has now operated for 20 years and manages to prevent reoffending by up to 77 per cent of those who participate in its pre- and post-release programme. We would do well to develop such a programme along the same lines here.

Work programmes in prisons are also an essential part of rehabilitation. The majority of inmates were habitually unemployed prior to conviction and lacked the work habits, skill and experience to find employment. In prisons today, inmates work on average only 17 hours a week, most of that on basic tasks such as cleaning and kitchen work.

In New South Wales by contrast, most prisoners are involved full time in work and therapy programmes. Much of the work is real production work provided in partnership with the private sector. Inmates working a standard work week in prisons are much better prepared for life outside. After costs such as board are deducted, savings from wages enhance the prospect of success in the transition to post-prison life. Constructive activity reduces tension and boredom. It also reduces the demand for drugs, and makes management of prisons easier.

The concept of habilitation centres proposed by the Roper Committee also needs proper trialling. As currently being operated, pilot programmes seem almost designed for failure. Habilitation options need to be available much earlier in the prison sentence. The sanction of return to prison and the incentive of a less restricted environment if inmates make a determined effort towards change are at that point much more likely to produce positive results.

Where there is minimal risk of offending, alternatives to prison sentences should be adopted. There seems to be, for example, little sense in compounding the costs to the taxpayer of locking up offenders such as fraudsters for token prison sentences. In line with the philosophy of restorative justice, righting the wrongs done to victims through reparation payments should be the priority. Repayment at a rate reasonable in relation to the offender's income should continue as long as is necessary for the money to be repaid.

## CONCLUSION

In conclusion, basic reforms in all areas of the criminal justice system are necessary and long overdue. Tackling the cause of crime and the associated challenge of preventing the entrenchment of a social underclass in New Zealand is essential for turning around our long-term increase in crime rates

Dealing with the overload on our Court system is an immediate need which must be addressed. A wider challenge is to determine whether we are still best served by our adversarial Court system or whether we should move towards an inquisitorial system. We should also be looking at the implementation of a process of restorative justice in areas where this is appropriate.

Finally, with projections of ongoing increases in our prison population, we need urgently to examine ways in which our penal system can be made more effective. Before releasing inmates back into the community, steps need to have been taken to reduce the prospect of reoffending. Addressing the causes of offending such as drug and alcohol abuse and unemployability needs greater priority within the prison system. Alternatives to prison for those not at risk of reoffending need also to be developed.

No one suggests there is a panacea to criminal offending. It is nevertheless clear that our criminal justice system has not changed sufficiently with the times and is in need of radical reform. ❑

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*continued from p 356*

But what does it mean to say that the police have acted reasonably? "Illegality is not the touchstone of unreasonableness" as the Court of Appeal said in *Grayson*. Legality of the search is only one (albeit important) factor. The test of an unreasonable search in terms of s 21 is one of subject matter, time, place and circumstances and to what extent it was feasible to obtain a warrant. A weighing of individual values (notably the right to privacy) and public interests (especially the interests of the community in detecting and prosecuting crime) is required, as Thomas J put it in *Jefferies* (at 320). Community expectations go to the reasonableness of police behaviour (see Hardie Boys J and Thomas J in *Jefferies*, at 315, 318) as illustrated in *Amo*.

Police bona fides should be another factor (see Mason "Four Factors in Search and Seizure" [1995] 6 *Bill of Rights Bulletin* 93) as in *Taito* (at 4). Also, whether a search warrant was readily obtainable has to be considered: compare *Laugalis* (1993) 10 CRNZ, 350, where the car which was searched was in the custody of the police so there was no justification for a warrantless search, and *Smith* (1996) 13 CRNZ 481, another search for drugs, where it was held that to apply for a search warrant would have involved the risk of losing the evidence.

Application of the reasonableness test will not stem the tide of appeals (referred to in *Grayson* 6) to the Court of Appeal on s 21, as what is reasonable requires a case by case analysis, although in time a body of law will be built which should give guidelines to the lower Courts (see forthcoming article by this author). As Richardson J said in *Jefferies*: "Reasonableness is a different and wider test than lawfulness. It is an elastic word." (at 304) However, the Court's proposal in *Grayson* to re-examine the prima facie exclusion of evidence obtained consequent on a breach of the Bill of Rights may have an effect". A reversion to the common law position in respect of real evidence found as a result of unlawful searches (admission of the evidence unless unfairness: *Coombs* [1985] 1 NZLR 318) may act as an effective King Canute to stem the tide ❑

# COMMERCE, CERTAINTY AND THE COURTS

*Roger Kerr, Executive Director, New Zealand Business Roundtable*

*focuses on commercial litigation*

The question of abolishing appeals to the Privy Council seems to be off the agenda for the time being. But this should not mean that the question of the structure and the performance of the legal system is similarly off the agenda. When the Business Roundtable made its response to the Solicitor-General's paper on the Privy Council issue, we said that consideration of the option of abolishing appeals to the Privy Council should logically follow a broader examination of options for improving the quality of decision making in our resident Courts. That is the issue addressed in this paper.

No general review of the Court structure seems currently to be contemplated. Yet, in the last year or so

- the abolition of appeals to the Privy Council has been debated;
- the new President of the Court of Appeal has introduced major changes to its manner of operation;
- the jurisdictional boundary between the High Court and the District Courts has been moved upwards;
- the Minister has announced that he wishes to create "Community Magistrates";
- the Courts Consultative Committee is discussing a proposal by a High Court Judge to turn the entire Court system into a system for alternative dispute resolution; and
- the future of the Employment Court is under review.

Despite all this we are told a comprehensive review of the Court system, on which outside interest groups would have the opportunity to comment, is unnecessary. The Business Roundtable disagrees. It considers that the time has come to look at the operation of the entire Court system, not from a blank slate but against the established values of the common law.

The Law Commission's 1989 proposals should not be taken as a starting point for such a review. The Chief Justice expressed some well-founded reservations about those proposals in his *Report of the Judiciary* for 1996. Just one example is that it is not appropriate to have a single Court of original jurisdiction, in which cases such as *Equiticorp* are dealt with by the same kind of Judges as deal with the daily grind of minor cases.

Such a review should focus on is what is required of Judges and Courts; once that is determined, they should be held to it. This is not to call for any substantive change, but rather to lay down what was once taken for granted but which apparently no longer can be.

The Business Roundtable's submission on the Solicitor-General's report focused on commercial law (in which we included employment law). We summarised the position by saying that, for perhaps a decade, the Court of Appeal in New Zealand has been inconsistent (at best) in observing restraint and predictability as cardinal virtues of decision making in critical cases. That inconsistency has a real economic cost, and adds unnecessary risk to future business decisions and activities. In particular, there is a risk that any transaction may be litigated. That being the case, we said, the commercial community could not be expected to support the abolition of appeals to the Privy Council at least until there had been a significant period of consistent and predictable decision making on commercial law issues by the Court of Appeal.

The response to our contribution to the debate was to draw attacks from quarters in the judiciary, most notably the outburst by the Chief Justice about which enough has by now been said. Equally revealing, but much less commented upon at the time, was an aside by the Chief District Court Judge, who in addressing the New Zealand Law Society Conference in Dunedin referred (in the printed paper) to "Roger Kerr's and the Business Roundtable's treasured certainty!".

Some measure of the problem can be gained by examining New Zealand cases before the Privy Council. The Solicitor-General suggested that the rate of successful appeals from the Court of Appeal showed that good Judges could disagree over hard cases. Of course, this can occur and a New Zealand case, *The Eurymedon*, in which both the Court of Appeal and the Privy Council were divided, is a classic example. But such an explanation for recent reversals does not survive a cursory reading of the cases, as we shall see in a moment.

The President of the Court of Appeal, in his contribution to the 1996 *Report of the Judiciary*, states that only a small number of cases get appealed, and that last year only two out of nine appeals resulted in reversals of the Court of Appeal. By and large, therefore, the President concluded, the Court of Appeal is doing a good job. But this reasoning is not acceptable for two reasons. First, the figure itself is dubious since in *Goss v Chilcott* at least, the Privy Council rejected the Court of Appeal's approach altogether and upheld the Court of Appeal's decision only in the sense that the same side won.

Secondly, when a procedure in the business world has a failure rate the failures are examined to see why they occurred and how the problem can be rectified. We argued in

our submission that there are consistent faults in the Court system, that in the Court of Appeal too much depends upon the composition of the Court, and that there has been a trend towards judicial "activism" rather than restraint. A review of a few recent cases decided by the Privy Council will make the point. It does not matter whether they are representative; what matters is whether there has been any effort to tackle the problems revealed.

### The *Goldcorp* case

In this case, [1994] 3 NZLR 385, the Court of Appeal reversed a perfectly orthodox decision by the High Court. The majority in the Court of Appeal sought unorthodox methods to rank individual investors in the Goldcorp scheme ahead of secured creditors.

This was an important case. The Court of Appeal's decision would have undermined conventional secured lending arrangements, which are fundamental to the needs of the New Zealand commercial community. The judgments made no acknowledgment (perhaps reflecting a lack of understanding) that that was the effect of the approach taken.

The suggestion that the Privy Council should uphold the Court of Appeal judgment by discovering a concept known as a "floating bailment" was given short shrift by the Privy Council. In the judgment Their Lordships (including Sir Thomas Eichelbaum) said that "they found it impossible to construct such a contorted legal relationship from the contracts of sale and the collateral promises". Commenting on one of the Court of Appeal's favourite devices the Privy Council said that, "to describe someone as a fiduciary, without more, is meaningless".

This hardly sounds like narrow differences over marginal points.

### *Downsview*

In *Downsview Nominees v First City Corporation* [1993] 1 NZLR 513 the Privy Council rejected the views of the Court of Appeal in robust terms:

> The general duty of a receiver and manager ... leaves no room for the imposition of a general duty to use reasonable care in dealing with the assets of the company.
>
> If the defined equitable duties ... are replaced by a liability in negligence the result will be confusion and injustice.

The Privy Council added a comment which all Courts should take to heart, and which applies not just to insolvency but to business dealings generally:

> A receiver who is brave enough to manage will run the risk of being sued if the financial position of the company deteriorates, whether that deterioration be due to imperfect knowledge or bad advice or insufficient time or other circumstances. There will always be expert witnesses ready to testify with the benefit of hindsight that they would have acted differently or fared better.

### *Urban Maori Authorities* case

*Treaty Tribes Coalition v Urban Maori Authorities* [1997] 1 NZLR 513 was the dispute over whether urban Maori organisations should get a share of the fisheries settlement. The Privy Council accepted a complaint that:

> ... the Court of Appeal did not answer the question posed on appeal. The parties did not know what question the Court of Appeal in fact posed for itself. ... neither issue was raised, nor discussed, and the parties had no notice of what the Court of Appeal had in mind. ... what the Court of Appeal did was to pre-empt the function of the Commission on the point.

In case it might be thought that this is a personal attack on Lord Cooke it is instructive to look at some more recent cases.

### *Rangatira*

In *Rangatira Ltd v Commissioner of Inland Revenue* [1997] 1 NZLR 139 a Privy Council including Lord Cooke upbraided the Court of Appeal for overturning the decision of a High Court Judge because it differed from him on a matter of fact. The Privy Council said that the proposition that an appeal Court should not overturn trial Judges on matters of fact unless the decision was shown to be wrong was "amply supported by authority".

### *Z v Z*

Recently, we have the well-publicised family law case of *Z v Z*. Again, the Court of Appeal completely changed the direction of the case and wrote a judgment largely on issues on which it had heard neither oral submissions nor evidence. The Court then adjourned an application for leave to appeal to the Privy Council, a decision which it is hard not to view with cynicism.

Now, when a business takes a case to Court and on to the Court of Appeal it assumes that the Court will deal with the issues brought before it and not deal instead with issues which the Judges regard as more interesting or important. If cases are to be regarded as merely a trigger for the Judges' social activism then litigation will become a far riskier enterprise than it already is.

## THE DEBATE CONTINUES

After the Business Roundtable made its submission on the Solicitor-General's report, the Attorney-General advised us of some changes that he felt should allay our concerns about quality assurance: They included proposals that:

- important cases in the Court of Appeal would be heard by five Judges, excluding retired Judges; and
- expert advice would be made available to the Court of Appeal by having advisers with economic or commercial expertise sit with the Court during hearings, but not participate in decision making.

The first of these suggestions would appear to have been implemented. But neither meets our concerns for some obvious reasons:

- the problem is not one of skill or expertise, but of misunderstanding of the judicial role. As *Z v Z*, a five-Judge case, shows, it does not matter how many Judges sit on the Bench if they share, or at any rate acquiesce, in a frolic beyond the proper judicial role.
- five-Judge Courts must necessarily reduce the productivity of the Court of Appeal. It is true that the operational efficiency of the Court enormously improved in 1996, but it cannot be argued that five-Judge Courts have helped that. There seems today to be a proliferation of five-Judge Courts with results such as a delay until

February 1998 before the *Equiticorp* case can be heard, with interest costing a $1 million a day. It is hard to understand why it is necessary to have a five-Judge Court merely because there are conflicting decisions in the Courts below on an issue. Sorting out such problems is one of the basic tasks of an appeal Court and it should not have to be augmented for the purpose.

- High Court Judges regularly sit in the Court of Appeal including, occasionally, in five-Judge cases. This means that the composition of the Court is still open to manipulation, that the work of the High Court is disrupted, and that there is a danger that three-Judge Benches will come to be regarded as second class – in other words that the Court of Appeal is implementing the system the government proposed as a replacement for appeals to the Privy Council.

One might think that in certain areas the business community could be confident of an improvement. Let us look, for example, at the case of *Brighouse v Bilderbeck*. The full story behind that case remains to be told. There can be little doubt that the Court of Appeal, by a majority, consciously snubbed Parliament's intentions and that the Privy Council would have reversed the decision, had an appeal been possible. In effect the Court decided that failure to make redundancy payments rendered a dismissal unfair, even when the contract of employment made no provision for redundancy. The majority consisted of Sir Robin Cooke (as he was then), Justice Casey and Sir Gordon Bisson (brought in from retirement). The minority consisted of Sir Ivor Richardson and Justice Gault. Only the dissenters are left on the Court of Appeal today.

Likewise on Bill of Rights Act issues, the current Court of Appeal has indicated a willingness to reconsider some of the decisions of the past few years, decisions which have done much to increase the expense and reduce the effectiveness of the criminal justice system.

But these points illustrate the very problem, that decisions have become dependent not on consistent application of the pre-existing law, but on the composition of the Bench. Business is not interested in periodic judicial U-turns, whatever direction they might take us in. Business is interested in stability of legal relations and the ability to plan for the future with confidence.

It would be a particular concern if the Court were not directly to overturn *Brighouse*, but rather gradually to resile from it as it has done from some of its own strange decisions in the past (such as *Conlon v Ozolins*). If that were to happen then no employers or employees with a similar contract would know where they stood until their redundancy decisions had been approved by the Court.

## The *Hamlin* decision

Some might ask why the business community should worry about preserving appeals to the Privy Council, given the decision in *Hamlin v Invercargill City Council*. That case was concerned with negligence and it was an example of the "deep pockets" approach – if someone has suffered a loss, then look round for someone with a deep pocket to compensate for it. In this case it was a local authority, but the same attitude affects directors and auditors of companies.

The particular issues in *Hamlin* were:

- whether a local council is under a duty of care to a homeowner when inspecting the foundations of a house under construction; and
- the point at which time begins to run for the purposes of the usual 6-year limitation period within which Court proceedings must be commenced.

As a leading commentator has observed, this area of law is largely judge-made law and:

> ... over the last 25 years or so, it has been a shambles, principally due to the efforts of many Judges (our own at the forefront) to avoid the perceived injustice of leaving houseowners without a remedy in such circumstances. However, the last 5 years have seen a stricter approach adopted in the House of Lords (the senior English appellate Court), most notably in the *Murphy* case [1991] 1 AC 398. (*The Capital Letter*, 20 February 1996)

But in *Hamlin*, the Privy Council did not follow the *Murphy* approach, on the argument that this was a "developing" area of law, with a high policy content and no single "current" answer. Further, the Privy Council suggested that as the New Zealand Parliament had not – in the Building Act 1991 – sought to revise the Court of Appeal's consistently liberal approach, it was not appropriate for the Law Lords to do so by judicial decision.

This is bound to prompt some questions. As the same commentator in *The Capital Letter* asked: "what is New Zealand law, if not what the highest appellate Court decrees it to be?".

Another commentator writing in the May 1996 issue of the *New Zealand Law Journal* raised a further and disturbingly familiar problem with the *Hamlin* decision. On the issue of when the 6-year limitation period begins, the Privy Council seemed to think that it was applying settled New Zealand law and practice. The judgments of the majority of the Court of Appeal also take that line. But what they were treating as "settled law" was no more than a habit into which High Court Judges had fallen after some obiter remarks by Sir Robin Cooke.

Worst of all, perhaps, this "established New Zealand law" refers only to domestic homes and not to commercial premises, so that, once again, the Court has left an area in confusion and invited further litigation.

As the article in the *Law Journal* concluded, quoting the words of an English Judge:

> ... the whole history of this particular cause of action has been what I may call a history of well-meaning sloppiness of thought.

This kind of bootstrapping by the Courts – the frequent repetition of comments on unargued matters until they are regarded as representing the law – is not acceptable and it is the job of the highest appellate Court to correct that kind of tendency, not lead it.

Another remarkable example of bootstrapping was the use as self-justification in *Z v Z* of a passage in the Chief Justice's Report for 1995 on statutory interpretation. This passage said that:

> Judges may take cultural, family, economic and international matters into account in order to give effect to the fairest outcome.

This is followed in the Report for 1996 by a statement that one of the purposes of the (stillborn) Institute of Judicial Studies is to ensure that Judges are "fully briefed on the implications of contemporary social issues".

Many in the business community would find such a statement baffling. In the last ten years the executive and

legislative branches of government have generally come to accept that, with all the resources at their command, they cannot know enough to accurately plan the economy or the structure of society. The history of the twentieth century is one of demonstrable and repeated failure in those respects. It should be all the more obvious that Courts, with their restricted procedures and evidence, cannot hope to succeed where governments have failed. Merely to hope that one can be "fully briefed on social issues" is to succumb to a fatal conceit.

So the Business Roundtable's position is that, pending steps to address problems in the resident Courts, appeals to the Privy Council should remain. Additionally, in our view:

- appeals in employment cases should be allowed to go to the Privy Council; since the passing of the Employment Contracts Act the historical reasons for not allowing such appeals no longer apply;
- the Privy Council should apply its critical faculties to New Zealand cases and not allow a divergent approach to the common law to appear here; and
- the Privy Council should not fall for any argument that the laws of economic gravity somehow cause some objects to fall upwards rather than downwards in "New Zealand conditions", whatever they might be.

## The quality of the debate

The recent debate on the retention or abolition of appeals to the Privy Council and, indeed, on most matters to do with the legal system has been disappointing. The remarks from Judges referred to above seem to be an example of "playing the man" rather than the "ball". And I am shocked by the number of leading lawyers, including academics, who have privately contacted me with support but have not been prepared to make their criticisms of the current state of affairs public. Of the dozens of legal scholars in New Zealand's law schools, only a handful were prepared to raise their heads above the parapet during Lord Cooke's presidency of the Court of Appeal and say plainly that his activist approach was (at best) expensive and confusing and (at worst) illegitimate.

This point may simply remind us that we live in a small country. If that is so, we might remember the comments of the American Judge Felix Frankfurter. Asked what were the three most important "judicial qualities", he replied: *First, detachment, second detachment and third detachment.* Clearly, many lawyers do not believe that this detachment is to be found in the New Zealand legal establishment. This in itself confirms the need in present circumstances for appeals to the Privy Council to continue.

The same applies to academics, but the universities themselves have not helped. In any remotely politicised area of the law, recitation of mantra on radio and television criticising economic restructuring or advocating judicial activism seems to have been as sure a path to promotion as rigorous analysis or refereed publication.

There is a need for a proper debate on issues which go to the heart of the judicial system. It seems extraordinary that there is so little agreement on what a large part of the machinery of government is for. The function of the judiciary was once taken for granted. It was accepted that the point of the common law was that it was stable and predictable and immune from passing political influences. For the last generation, however, students have been taught that the genius of the common law is its flexibility and its ability to respond to changing conditions.

It was once clear that judicial independence was vital to enable Judges to apply pre-existing law to current cases without regard not only to politicians but also to influence from the media, demonstrations in the street outside or even the Judges' assessment of majority opinion. Today judicial independence is apparently regarded by some as a licence for Judges to remake the law the way they personally see fit. It is notable, for example, that Justice Thomas was appointed to the Court of Appeal after writing a lengthy personal manifesto putting forward the view that the doctrine of precedent should be severely diluted and Judges given freer rein to decide cases according to "principles" discerned by each Judge.

Evidently, therefore, there is no consensus as to the role of the Judge. This is all quite at variance with the restructuring of the public sector, which is based on the premise that public authorities have clearly defined and accountable roles.

In our submission on the Solicitor-General's report, we said that, at least in relation to commercial law:

> ...the virtues of judicial restraint and orthodoxy require conscious reinforcement. In so doing, there is a need to seek a greater degree of judicial accountability without undermining the traditional and valuable independence of Judges from political influences.
>
> This last point – judicial independence – is a major limiting factor and, in the NZBR's present view, leaves room only for a collection of modest changes which cumulatively may reinforce accountability.

The Chief Justice has recently proposed a judicial appointments board and a judicial commission, the latter to hear complaints. Such changes should be considered and the Business Roundtable would like to see discussion of some other ideas such as:

- term limits for Judges;
- referenda for the "recall" of Judges;
- parliamentary supervision of the appointment process;
- the structure of the Court system.

The Business Roundtable currently has no formed view on those issues but would like to see them being discussed and researched. More straightforward and "modest" proposals might include:

- expert advisers in the Court of Appeal;
- drafting legislation in a way which does not give wide discretion to Judges. The worst example is s 9 State Owned Enterprises Act which led to judicial invention of the "principles" of the Treaty of Waitangi. But this is also a criticism properly levelled at the 1993 company law reform package, at the Resource Management Act and much other legislation.
- amendment of the judicial oath, or the promulgation of a new judicial charter, to highlight respect for the rule of law rather than the rule of lawyers;
- judicial appointments – the process should explicitly recognise the role for Judges discussed above. It follows that those who do not agree with this role for Judges should not seek appointment, nor be appointed. The consultation process, and perhaps the recruiting pool, should be widened to include those who are expert in or regular customers of the commercial law system.

These issues matter, whether appeals to the Privy Council stay or go. ❑

# EFFICIENCY IN THE LEGAL SYSTEM

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*ask whether and how the legal system could better achieve its aims*

## A SERVICE PROVIDER

The legal system provides a mechanism for the resolution of disputes and the means by which much of the regulation of activity is implemented. It is producing a service.

There have been major changes in the approach to parts of the public sector in New Zealand in recent years. For example, the health sector has seen the purchaser-provider split, the move from Area Health Boards to Regional Health Authorities (RHAs), hospitals changed to Crown Health Enterprises (CHEs), capped budgets for RHAs, the contracting out of health care services, the use of branches of cost-utility analysis (CUA), attempts at defining core health services as well as a review of the system regulating the behaviour of health professions. These changes have been introduced to improve efficiency. Is the legal system efficient, or is it also in need of major reforms?

This paper will focus primarily on issues within the legal system, rather than alternative approaches. From an economist's perspective, the system should be evaluated and monitored to assess whether it is operating efficiently. On occasion, other alternative methods of intervention should be considered, although little will be said about that here. It may be that the evaluative criteria set by lawyers do not coincide with the criteria which economists would select and alternative approaches may not get due consideration by the profession.

There are several components which could be included in an economic evaluation of an activity or policy, but we will concentrate on the concept of efficiency. All assessments require some specification of objectives, plus consideration of the processes involved in their achievement.

Studies of efficiency can be done at various levels. Efficient production involves achieving the maximum output for a given cost or achieving a given output at a minimum cost. This is the sort of efficiency considered in cost-effectiveness analysis (CEA). Alternatively we could consider the processes, as with an analysis of market structure. Here we combine these two approaches.

We shall break down the production process into three components: (1) What outcomes is the government trying to achieve? (2) What is the structure for achieving those outcomes? (3) What controls are applied to ensure the structure works as intended?

Applying this perspective to the legal system, we are concerned with the following areas:

(1) The existing laws are what have to be applied. Are the laws efficiently framed? A law is designed to give a particular outcome, but is the law framed to do this at the least possible cost?

(2) The legal system is the structure we have for applying the laws. Given existing laws, does the system work as intended, assuming that participants follow the rules? Monitoring systems are needed to provide information to answer this question.

(3) Incentives and sanctions are the procedures to ensure that people behave appropriately within the structure. Are there suitable incentives and/or control mechanisms (monitoring and sanctions) to ensure that participants follow the rules?

## THE LEGAL SYSTEM

This section considers the economic nature of service provision in the legal sector. The three aspects above will be considered following a general introduction. We will focus on the family law area because issues of cost and time are likely to be particularly crucial there, and because of the greater "informality" of the approach. Nevertheless, many of the issues and questions apply equally in other areas of law, as with the Resource Management Act, for example.

### Service provision in the legal sector

Workers in the legal system collectively provide a service. For example we could consider the output of the Family Court as the resolution of a dispute between the parties. From this perspective we can consider such things as the nature of the product, how it is produced, whether there is competition, how demand is determined, and so on. There are several interesting aspects to this. Production involves the participation of several service suppliers independently appointed, some funded privately and some publicly, with production being on the instructions of parties who may not be very cooperative. The decision to purchase can be determined by one party, then requiring outlays by another. When someone initially decides to purchase, it is unclear what the end product will be or what the total cost will be (similarly to some health care purchases). The benefits of an outlay may not even be clear after purchase, as with "credence goods". While a party has some choice of counsel, there is relatively little say afforded in the choice of other professionals involved, including the Judge.

Consumers are infrequent purchasers of the services of the legal sector and often have limited information about what is being purchased. As with doctors, there are principal-agent problems; people are buying the expertise of professionals and are not themselves fully informed. There is limited scope to insure against the costs of legal services, and limited redress in most cases of "legal misadventure".

If we consider the specification of laws as the governmental implementation of policy in the legal sector, then the government does not have full control over outcomes. A

parallel can be drawn with other areas of policy. For example with open market operations in monetary policy, a change can be made in the volume of high powered money (or primary liquidity), but the impact on money supply or interest rates will depend on the response of the trading banks and others.

Considering the legal sector as a whole, there is limited monitoring and there is little in the way of formal economic evaluation of the legal system. Monitoring and evaluation should ideally also extend to the broader implications, including enforcement issues and incentive and disincentive effects on others. These matters are not discussed here.

## Efficiency of the laws

The way a law is specified may have an impact on the efficiency of the legal system. Consider, for example, the Matrimonial Property Act 1976 (MPA).

The title of the Act includes the statement that it is intended "to recognise the equal contribution of husband and wife to the marriage partnership".

This is the basis for the presumption of a 50-50 split of matrimonial property. However there are circumstances under which the contributions might not be considered equal, in which case an unequal division is possible. Difficulties can also arise in relation to the definition of matrimonial property.

In the parliamentary debate prior to the passing of the Act, Mr McLay (*NZPD* v 408 p 4721) strenuously denied "an irresponsible suggestion is that the Bill in some way represents a 'confiscation of property'". He went on to say (p 4722) that the purpose of the legislation was to give:

> a just and proper apportionment ... of ... the working capital of the marriage partnership ... and I underline the words "marriage partnership", in contrast, for example, with formal gifts or investments brought to the marriage by one partner or the other, or achieved by incomes ranging well outside normal family needs.

This is not how the MPA has been interpreted in practice. For example, superannuation entitlements arising from contributions made before marriage are considered to be matrimonial property and are commonly equally split. There has also been confusion as to whether s 8c of the MPA prevails over s 10. Matrimonial property according to s 8 (c) includes "All property owned jointly or in common in equal shares by the husband and the wife". Section 10 states that it is separate property if, for example, it is "acquired by succession or by survivorship or as a beneficiary under a trust or by gift from a third person".

Section 10 is consistent with Mr McLay's statement above and elsewhere (ibid v 408 p 4109), but the ambiguity in the wording of the legislation itself has led to several Court cases. *Z v Z* (1988) 5 NZFLR 111 and *Cawte v Cawte* (1989) 5 FRNZ 773 resulted in decisions in favour of disputed assets being separate property, but Williams J ruled otherwise in *Lewis v Lewis* [1993] 1 NZLR 569.

These examples are to illustrate that the law may not always be applied as intended, and that ambiguities in the law can lead to expensive disputes.

Further, dissatisfaction with the interpretation of sections of the MPA are resulting in a demand for pre-nuptial agreements or the establishment of trusts. One family lawyer stated ("About the Law – Tie the Knot Securely" *Evening Standard* 3 Feb 1977), that pre-nuptial agreements or trusts are a wise investment when one or both prospective partners have substantial assets of different amounts, own houses, expect a large inheritance, etc.

Costs are involved in setting up and managing these arrangements, but there is no guarantee that the outcomes will be as desired. Pre-nuptial agreements can be set aside under s 21(8)(b) of the MPA and trusts can result in unwanted restrictions or obligations.

An alternative approach is taken in the Ontario legislation (see s 4 Family Law Act 1986 Ontario). To simplify, it is based on a concept of "net matrimonial property". This consists of matrimonial property at the end of the marriage, less what each person brought in to the marriage from outside, such as at the start of the marriage, or later through gifts and inheritance. This approach appears to fit with the intent of the New Zealand legislation, while greatly reducing the need for people to protect themselves with agreements and trusts. By resolving many of the situations where contributions are clearly unequal, it also reduces the scope for expensive legal disputes. It would appear that this approach is likely to lead to a more efficient resolution of matrimonial property disputes both in terms of lower litigation costs and of quality of outcome.

To summarise, by considering the costs of dispute resolution and monitoring the areas of dispute, it may be possible to devise more efficient laws.

## If the system works as planned

This section is concerned with how the legal system might operate if participants act according to the rules laid down.

### *A principal-agent relationship?*

The purchasers buy legal services directly from lawyers. As the purchase is essentially of expertise, there are principal-agent issues with the principal relying on the agent for information to guide the purchase decision. The efficiency of the relationship and the advice given will depend partly on the ability of the principal to monitor the agent and to understand the process overall, and partly on the incentive structure faced by the agent. The latter would depend on professional ethics and the agent's accurate understanding of the principal's wishes. The Law Commission's Women's Access to Justice project provides examples of lack of communication and poor understanding, many of which could apply equally to men.

Is there effective competition in the supply of legal advice? People can choose which lawyer to use. However, purchases of legal services are infrequent and there can be costs involved in transferring from one lawyer to another. There is limited information available about which lawyer would be most suitable.

### *The prisoners' dilemma*

The production of the legal service generally requires more than just a trade between a legal professional and a client. There are commonly two, and sometimes several participants purchasing the service. The purchase of the entire service (such as a dispute resolution in the Family Court) is a joint purchase with other parties. However the parties are in conflict with each other and so they may well be uncooperative. One game-theoretic example of this sort of scenario is known as the prisoners' dilemma.

Assume that the two parties in dispute each have the option of being aggressive (uncooperative) or non-aggressive (cooperative). Assume that the outcome of the dispute is the same when both parties act in the same way (aggressive or non-aggressive). The preferable strategy for both would

therefore be the non-aggressive one, as this gives resolution at lower cost. However, there are gains for one party to be aggressive if the other is not; losses are then incurred by the non-aggressive party. Therefore there are incentives for each party to be aggressive. If either party cannot be trusted, both will be aggressive.

Furthermore, unless otherwise constrained, legal professionals may feel pressured to operate aggressively. By acting in this way, they are safeguarding their clients against possible aggressive behaviour from the other party. If a lawyer tries to reduce a client's costs by proposing a conciliatory strategy, this might give the impression that he/she is unwilling to fight, thus increasing the possible gains of an aggressive strategy by the other party. While it is better if all parties are reasonable, there is an incentive to be unreasonable.

### *Objectives of the participants*

Economic theory is commonly based on the assumptions of profit-maximising firms and utility-maximising consumers in the private sector. Writers such as Niskanen (*Bureaucracy and Representative Government* (1971)) and Downs (*An Economic Theory of Democracy* (1957)) suggest that we should assume that individuals in the public sector are also self-interested. They explore the implications of assumptions that bureaucrats are budget maximisers and politicians are vote maximisers. Posner (s 22.5 of *Economic Analysis of Law* (1992) 4th ed) touches on some of these ideas in relation to the legal sector.

It might be appropriate to assume that lawyers in private practice are income or profit maximisers. Cotter and Roper (*Report on a Project on Education and Training in Legal Ethics and Professional Responsibility for the Council of Legal Education and the New Zealand Law Society* [released 1997]) speculate on whether the legal profession should be considered a profession or a business.

Given imperfect information by clients, lawyers have some discretion in the advice they give. The issue of "supplier-induced demand" is discussed in literature on health economics (see Feldstein, *Health Care Economics* p 187). The suggestion is that, as the supplier also advises on what should be purchased, there is scope to advise more, or more expensive, actions. Section 8 Family Proceedings Act 1980 would, if enforced, serve as a partial constraint on "supplier induced demand". That this provision has been made is itself an acknowledgement of a problem. Given the added complication that actions of other parties can influence the amount of legal services required, there may be scope for lawyers to create work for each other while apparently acting to protect their clients. Lawyers cannot consistently propose expensive, unsuccessful strategies as this would lose fewer clients, but low cost strategies may also not give satisfactory results in terms of profits.

As for other paid participants in the legal system, there is scope for the development of theories based on various assumptions about their objectives. What, for example, do self-interested Judges try to achieve?

### *The nature of costs*

Often the cost of a good or service is measured by the price paid. However economists recognise other costs which can be associated with a legal action. These include monetary costs such as pay forgone due to lawyers' visits and Court appearances, and costs of time spent by clients gathering information. These latter may reduce legal fees by passing on parts of the work to clients. Fees charged will not then fully describe the costs incurred. We could also consider psychological and other costs arising from stress and uncertainty. These can be significant, and have achieved publicity in some recent cases, but they are hard to measure.

This section focuses on the costs arising from the time required to achieve a resolution. Posner (*op cit* sect 21.12) discusses time; stating that Court delay is a "figurative" as distinct from a "literal" queue. Literal queues (waiting in line for a table at a restaurant) impose an opportunity cost measured by the value of the customer's time (p 578). While this is correct, time delays may not be costless to the parties involved in litigation. Assets can be tied up, restricting options or requiring borrowing in the meantime. Delays may even affect the outcome, as with interim custody arrangements affecting final custody decisions. Time costs are unlikely to be evenly spread over the parties; hence delaying tactics may be advantageous to one side.

Posner (*ibid* p 579) states that people queue up to buy litigation but not goods which are rationed by price. For litigation, there is time-based rationing through queuing. He claims that reducing time delays will increase the demand for litigation, based on a single purchaser model. Litigation involves more than one person and only one of these needs to express a demand: time delays may even be advantageous for that person. Hence the magnitude of the deterrent effect of queues on demand may be complex.

We cannot currently pay for a Judge's time. Interesting questions arise such as how much would they buy if they could, and would the supply be the same? Currently the supply of judiciary services and the nature of the product are largely set by government. There may be good reasons for government involvement, but an economist would suggest that economic aspects must still be considered to determine an appropriate level and form of provision. These include consideration of externalities (such as the effect of decisions on the actions of others), equity (people's differing abilities to pay), judicial independence (so no payment from a party would influence outcomes), and state supervision (appointment of Judges), for example. Posner (p 581) mentions both income distribution and externality factors.

Given that the government sets the supply of judicial services, the only conclusion we might be able to draw from the existence of queues is that supply is less than demand at zero price. If there are other factors to consider, we cannot determine whether supply is too low or too high.

Posner (p 579) also argues that the main response to the growth in demand for litigation has been to add Judges and support personnel. He contends that this only has a very short run effect because more Judges induce more Court use by those previously deterred by queues.

The effect on Court delay depends on the extent to which demand increases. Also cases are not resolved in zero time. There can be delays in processing because of time required for specialist reports or other preparation, or waiting for availability of key personnel. Rather than a simple queuing problem, the issue is one of complex scheduling. Queues are likely to exist under the best of circumstances.

As a specific example of time influencing outcomes, consider the following quote by Principal Family Court Judge Patrick Mahony (*Sixty Minutes*, 5 Jan 1997):

> Young children need routine. Their sense of security is often built around familiarity of environment, familiarity and consistency of caregiving. Those are very important factors for young children. Their bonding is very closely tied to their sense of security.

In practice, the Family Court puts great weight on the status quo when considering custody issues. Whichever parent was the "primary caregiver" before separation, or has the children for most nights after separation (if the mother), is greatly favoured on the basis that this provides continuity for the children. Delays in resolving custody matters therefore favour the parent with effective custody.

This also limits options available if a party is not satisfied with an initial decision. While a decision can be appealed, appropriate remedies at that time may not be the same as appropriate decisions in the first instance.

### *Monitoring: custody and access*

One component of policy implementation and evaluation is monitoring. If the laws are intended to achieve certain outcomes, the system should include appropriate data gathering to see how well those outcomes are being met. Lawmakers have no way of knowing if laws are being applied as intended unless they monitor the Courts. In the following two areas at least, this does not happen.

Subsection 23(1)(a) Guardianship Act 1968 includes the statement that, "regardless of the age of a child, there shall be no presumption that the placing of a child in the custody of a particular person will, because of the sex of that person, best serve the welfare of that child".

However, in 1990 the Department of Statistics ceased collecting information on the award of custody by gender of parent, and the then Department of Justice took no decision about collecting it (*NZPD: Question Supplement* [1996] v 23 written answer 204).

On the issue of denial or obstruction of access, in February 1996 the Minister stated (written answer 203):

> Under the Guardianship Act 1968 it is an offence punishable by a maximum fine of $1000 to hinder or prevent access to a child by a person entitled to access. Custodial parents who deny or obstruct access may also be found in contempt of Court. There is no data available on how often penalties in relation to the denial or obstruction of access have been imposed in the last 5 years.

### *Mediation as an alternative approach*

The Legal Services Board is attempting to promote mediation as an alternative method of dispute resolution, but is meeting some resistance from the legal profession. Objections appear to arise from a perception that mediation is a second-rate solution and a feeling that a client is lost when handed over to mediation. Nevertheless, the Board is funding legal aid for some mediation services.

## Efficiency of the control mechanisms

Complaints are considered according to the *Rules of Professional Conduct for Barristers and Solicitors* under a complaints process specified by the Law Practitioners Act 1982. If a complainant is not satisfied with a District Law Society's handling of a complaint, the matter can be referred on to a Lay Observer.

### *Report of the Lay Observers*

In the *Report of the Lay Observers for the year ended 30 June 1994* several Observers noted that the District Law Societies are not able to do as much in relation to complaints as many complainants would wish. One stated, "The public perception of lawyers is not good and there is certainly a need for people's faith in lawyers to be restored".

There appears to be a view that someone dissatisfied with an outcome could, and possibly should, pursue further legal avenues. The general comment by another Lay Observer is telling; "Many complainants have the expectation that the Lay Observer is able to direct a Law Society to take particular action in respect of their complaint and are disappointed to find that this in not the case. ... It appears that economic considerations often militate against civil legal action being undertaken, and complainants often expect that the Law Society will take on the role of the Courts."

This suggests that the expected procedure for complainants is to go to Court. For those who already feel that they have grounds for complaint about their experience in the legal system, this may not appear a satisfactory option.

### *Report by Cotter and Roper*

More recently the report on legal ethics by Cotter and Roper identifies numerous problems with the Rules including: (1) ignorance of them; (2) a conscious risk-taking to get around them; (3) perceived inconsistencies in the Rules; (4) the lack of rigour in enforcing them; (5) different application according to district; (6) application with different degrees of rigour over parts of the profession.

This is a concern, given Judge Mahony's reference to a "heavy professional onus" on members of the legal profession to act appropriately and present fair and balanced evidence (Patrick J, Foster H and Taper T (eds) *Successful Practice in Domestic Violence in New Zealand* (1997) p 64).

### *Posner on controls*

Posner *(op cit* pp 421-2) states that:

> An important question about the social responsibility of corporations is whether the corporation should always obey the law or just do so when the expected punishment costs outweigh the expected benefits of violation .... One resolution is for the corporation to proceed on the assumption that it is not its business to correct the shortcomings of the politico-legal system; its business is to maximise profits ... if instead it takes the ethical approach, this will have the perverse result of concentrating resources in the hands of the least ethical.

Similar reasoning could be applied to professionals in the legal sector, raising further questions about behaviour in the context of the issues of principal-agent, prisoners' dilemma and supplier-induced demand discussed above.

## CONCLUSIONS/SUGGESTIONS

Assessment, evaluation of service delivery, etc, are increasingly being applied in numerous areas of the public sector (eg health and education). How well would the legal system stand up to such scrutiny?

From an economics perspective, there are several areas where efficiency gains might be achievable. In many cases this simply involves awareness and consideration of the economic implications of the approaches taken. From the discussion in this paper, the following areas can be identified:

- clearer laws – the removal of identified ambiguities;
- more appropriate laws – suitable for a wide range of situations, with less need for special arrangements;
- greater awareness of costs of all kinds;
- more concern for time factors – acknowledging the costs and distortions which may arise;
- assessment and monitoring;
- complaints procedures, quality control.

Clearly there is need for further research and funding. ❑