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# E-DEC REPORT

There can be no doubt that the Law Practitioners Act 1982 is need of change. Its date is sufficient to tell one that it is a voice from another age. It allocates to the New Zealand Law Society the traditional but potentially conflicting roles of representative body and regulator; and it allows the NZLS, a statutory monopoly, to provide services of a commercial nature to practitioners.

The effect of the latter provision is as counterproductive as any legislative intervention in the market usually is. *LawTalk* actually prevents periodicals becoming available to the profession. The only monthly platform for independent comment on the affairs of the profession is this *Journal*. There are no independent "newspapers" for the profession as there are in other countries. The reason for this is simple: media interests have examined the idea of setting up newspapers aimed at the profession and concluded that there is no prospect of breaking *LawTalk's* stranglehold on the advertising market. The same goes for continuing education. Whereas in other professions private providers are able to run seminars at a profit, they are crowded out from the legal profession by a monopoly provider which seems only able to survive with substantial sponsorship. If, therefore, the Law Society proves unable to tear itself away from its statutory monopoly, the least that must be done is for it to be deprived of the right to provide services to members. Only voluntary associations should be allowed to do that.

The key recommendation of the E-DEC Report is that membership of the Law Societies should become voluntary and that the regulatory function should be separated out. This is entirely to be applauded. The same body cannot carry out the roles of representative and regulator. The mere fact that Presidency of a District Law Society is a recognised route to the High Court Bench should be enough to indicate that Law Society hierarchies will seldom rock the establishment boat; and the recent vote of the membership of the Auckland District Law Society over the position of Judge Beattie indicates the distance that has opened up between the Presidents of the largest Law Society and of the national Law Society and their memberships.

The consequences of this separation, however, do not seem to have been fully thought through. It is only membership of the Law Society and subjection to its rules which distinguishes a barrister or solicitor from anyone else. It is the Law Society Rules, for example, which forbid partnership with anyone else. With voluntary membership it will therefore become increasingly unclear who is a lawyer and what the practice of law entails, and hence, who should be subject to the jurisdiction of the proposed Law Council.

It has subsequently become clearer from Mr Hudson's article in the *National Business Review*, 24 October 1997, that the intention is to regulate only those who wish to use the label "lawyer" or some such. At this point it becomes apparent that the section of the Report recommending the abolition of the distinction between barristers and solicitors has been excised without some of the consequential thinking needed having been done.

The Report argues that some regulation is needed, to compensate for certain market failures which the Report identifies without any attempt at substantiating (p 6). These alleged failures seem highly questionable. The supposed information asymmetry is a characteristic of all markets. All that is required is that some consumers know what they are doing. Differences in quality of service will soon start to be reflected in differences in price.

Completely unexplained is the assertion that "market forces" do not compel lawyers to protect the rule of law (a concept which is not defined) or the rights of the individual (likewise). Since the Report does not define these concepts it is impossible to discuss this assertion. Suffice to observe however that the regulated legal profession has not been notable in recent decades for its defence of the rule of law, in fact it has enthusiastically participated in the increasing tendency of legislation and case law to pander to special interests. The Law Society has accepted with equanimity the fact that an increasing proportion of the legal profession have been rendered clients of the state by the legal aid system. Nor, according to the Report, do "market forces" ensure the efficient use of the justice system or efficiency in legal transactions, a comment which seems bizarre.

There are, in fact, only two legal monopolies. These are the conveyancing monopoly, which has been discussed in a previous issue, and rights in relation to Court, to be the solicitor on the record and of audience. Whatever arrangements are made for regulating the profession, the Courts are going to retain control over who may appear before them, although it is notable that they seem to be becoming more and more relaxed about allowing non-lawyers to appear, sometimes without argument on the point. The Report seems to assume that the Courts will allow onto their roll all those, and only those, who submit to the jurisdiction of the Law Council. But why should this be?

The definition of "lawyer" might be determined by Blanchard J's criterion of someone "doing work of a kind ordinarily done by a solicitor": *Auckland District Law Society v Dempster* [1995] 1 NZLR 210, 214. But if the Law Council were to use this definition then it would appear not as a regulator but as a protector against competition. If the intention is merely to protect certain labels, then the Law

Council is going to have to be extremely careful not to impose too heavily on those it regulates, otherwise they will soon question the value of the label. In that case, the Law Council will be in the same position as a purely voluntary regulator and it may be questioned whether this is the best option. If there is to be a "light handed" regulator, a hierarchy of voluntary regulators will probably arise, in which case why bother to legislate for the bottom of the scale?

It is easily predictable that voluntary societies will, to some extent, make up for the fact that the Report proposes to replace the current crude one level qualification system only with a crude two level qualification system. This proposal would give the customer little real guide to quality, and resort might be had to making some rough assessment of the quality of the firm in which the lawyer works. If there is to be a compulsory registration system of some sort, its designers should be careful to ensure that it does not obstruct the creation of a finer tuned voluntary system.

At least as feasible a route would be as follows: there should be a licensing system for conveyancing, owing to the special practical problems posed by land transactions, and the Courts should maintain a roll of those qualified and wishing to appear before them. Everything else could be done by voluntary associations, of which a hierarchy would rapidly emerge. This would avoid the problem of having to define terms such as "lawyer".

**Law reform:** one can only react with cynicism to the suggestion that the legal profession benefits from improvements in the operating efficiency of government. It is quite clear that many lawyers benefit from legislation which is vague and creates opportunities for litigation. Especially beneficial to the profession is legislation which creates special benefits or privileges for defined classes of the population (contrary to the rule of law) since that creates opportunity for argument about whether a client falls within the definition. It would be interesting to know what examples the authors had in mind of recent reforms that lawyers had played a leading role in which demonstrated an understanding of the requirements of efficiency and the rule of law. ACC? The company law package as it eventually appeared? The Resource Management Act?

**The Law Foundation:** under the heading "Protecting the rights of the individual" the Report suggests that the Law Foundation take a leading role in trying "to resist the tendency of governments steadily to increase their power, even at the expense of the individual". But, the Law Society, of which the Law Foundation operates as a wholly owned subsidiary, has enthusiastically embraced the regulatory state.

The authors of the Report would also appear to be unfamiliar with the track record of the Law Foundation. That might be summarised as follows: first, the Foundation's dealings with libraries, including university libraries, have been paralysed for years by some review of law library provision, a review which has never seen the light of day and would appear to be pre-empted by three sentences in the E-DEC Report; secondly, the Foundation has paid out large grants to the Law Society itself for various activities, including the E-DEC Report; the next largest grants have gone to a collection of politically correct causes which all have taken the form of pushing various barrows rather than upholding the rule of law; finally a few small grants have been given for more technical research, sometimes to some strange people and with mediocre results. The conduct of the Law Foundation thus far does not inspire confidence that it is fitted to carry out the role proposed for it.

**Legal education and training:** under this heading the Report is quite extraordinarily prescriptive. It recommends that the three providers of legal education, the Institute of Professional Legal Studies, the NZ Law Society CLE Committee and the Auckland District Law Society CLE Committee should be combined into a company which the Report calls Legal Education Ltd. The formation of a company is supposed to get round what the Report calls the well-meaning but counterproductive interference of Law Society members. It is to be doubted whether it would achieve that.

This recommendation seems completely misconceived on a number of grounds. First, the text of the Report makes no mention of the Council of Legal Education which is the statutory body responsible for determining the qualifications for entry into the profession. The Report effectively recommends that the provision of professional training is permanently captured by the Law Society, whereas the position presumably is that the Council (and in E-DECland the Law Council) is responsible for deciding who will provide the training.

It is amazing that the Report does not point out the potential problems in the Council of Legal Education actually running the provider of professional training. The CLE is regulator and provider of professional training and it should not be necessary any more to point out the problems to which that can lead. One would have thought that the Report would recommend that the task currently carried out by the IPLS should be contracted out to various bidders round the country and the Council should retreat to the position of a certifier and regulator. In England today, the Law Society merely sets prescriptions for the content and examination of professional training and supervises the providers only to the extent necessary to ensure that they comply with the terms of their contracts. The providers themselves determine the detailed content and set the examinations.

If the consultants thought that such recommendations were beyond their terms of reference, then it is surely equally beyond the purview of the Law Society to become the owner of the provider of professional training, a matter subject to the supervision of a separate statutory body.

**Regulation and standards:** the Report then proceeds to allocate inappropriate roles to the regulator. Again, in part this stems from a failure to understand the effect of making Law Society membership voluntary. The Report seems to assume that there will continue to be one Law Society structure, which a few eccentrics will leave. In fact it is likely that a number of different bodies will arise; much of the regulatory task should be left to them. If the punter then chooses to go to a lawyer who cannot get accepted by any reputable body, then the punter pays the money and takes the choice. The task of the regulator should be to enforce minimum standards not desirable standards.

It follows that it is quite inappropriate that the Law Council should involve itself with standards of client service. That is for law firms and voluntary associations to deal with.

Weirdest of all, however, is the Report's recitation of the mantra to do with maintaining the rule of law and the rights of the individual. The Law Council, according to the Report, should ensure that lawyers conduct themselves so as to pursue these aims. The trouble is that the Report does not

define these expressions. It will rapidly be discovered that any attempt to define them will simply lead one into a political argument. To take but one example, it is evident that the existence of export monopolies is a breach of the rule of law as classically defined, as well as a breach of individual rights, such as the right to choose one's occupation. So what is counsel for the Dairy Board to do?

In fact, the Report seems to be assuming a major change in what lawyers would currently regard as their duty. Their duty is to advance the interests of their clients, subject to the duties that they have as officers of the Court not to mislead the Court and so forth.

The Report is certainly right about one thing – that current admission procedures are cumbersome, expensive and ineffective. They should be replaced by a simple requirement of no convictions for serious offences or offences of dishonesty. The problem is that the most cumbersome requirements are not imposed by District Law Societies but by the Court.

It is worth noting in passing the Report's sensible recommendation that the disciplinary function should be centralised. The Report says that local regulation is not to be favoured as:

(i) it does not produce consistent regulation and uniform standards;

(ii) regulatory decisions (whether involving complaints, conduct, admissions or financial assurance) should be dealt with on the basis of the facts of the case, not on personal knowledge or contacts;

(iii) a local presence might be seen as facilitating contact with lawyers, but this is inappropriate for a regulator, whose need is for distance from the subject of the regulation.

This is revealing of what the authors mean when they refer to the Rule of Law. The three points above would be made by traditionalists about the Court system. But the authors assume a consensus which simply does not exist in the legal system today. In fact, if anything, it would appear to be a minority viewpoint.

It is a pity that the Report proceeds to descend into such detail about the structure and operation of the Law Council. There are two reasons for making this comment. The first is that the Report fails to come to grips with the fundamental question of how we are to decide who is a lawyer. The second is that if the authors were concerned to stick to their terms of reference, defined by what was within the control of the Law Society, then once they had made the entirely sensible recommendation that the regulatory function should be removed from the Law Society, the details ceased to be a concern of consultants contracted to the Law Society.

**Design of the Law Society:** it is arguable too, that the consultants should simply have stopped at the recommendation that membership of the Law Society should be voluntary. Instead they go on to prescribe a structure, based on the current structure of District Law Societies and specialist sections.

This goes against the grain of the whole point of voluntary membership, which is that it causes societies automatically to form and reform themselves in accordance with the wishes of the membership.

It is at least as good a guess, for example, that specialist lawyers in the large towns will not be interested in geographically based societies. Rural lawyers, who are more thinly spread and tend to be general practitioners, may indeed regard a geographically defined law society as their primary collegial body. They may be joined by general practitioners in the cities. But commercial lawyers or specialist criminal or family lawyers in Auckland may well feel that their primary interest is in relating to their colleagues in Wellington and other main centres. Litigators may be interested in a locally based body, because they meet each other in Court, but not the same body as the general practitioners. And so on.

So why should not these specialists have specialist societies and not bother with a geographically defined one? The Report has an answer to that which is that lawyers are lawyers first and specialists second or not at all. It is not clear whether this is intended as a descriptive or a normative statement. Either way it seems a wholly inappropriate one to make when recommending a structure of voluntary membership. It might turn out that the authors are right and this editorial wrong. But that is a matter for the members to decide.

This leaves the knotty problem of the assets of the District Law Societies. The Report recommends that these be bequeathed to the new local law societies. This would hand them a colossal advantage in the desirable competition to provide services to members. It seems like the worst possible recommendation.

The traditional course would be to dissolve the District Law Societies and distribute their assets to the members. This would give the current members an inequitable windfall. This could be ameliorated by distributing assets to all alive who have ever been members of Law Societies. This would reduce the inequity somewhat. However, given that the Law Societies acquired their assets while set up as statutory monopolies for specific purposes, a better suggestion might be that the money should be channelled into the same purposes.

The way to do this is to award each member a voucher equivalent in value to their share of the assets of the NZLS and their DLS. The members then expend these vouchers on setting up and joining law societies that serve their purposes, local, national or functional.

**Conclusion:** the Report is therefore a thoroughly mixed bag. Its essential recommendation, that the regulatory function should be removed from the Law Society and compulsory membership of the Law Society be ended, is almost incontrovertibly correct, to the point that it would have been astounding if it had not been recommended. Once the Report descends into detail it starts to drift.

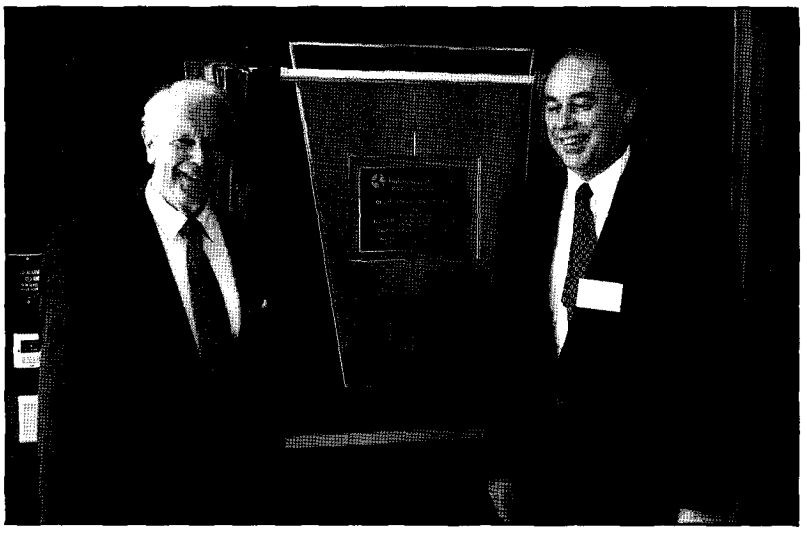
Has it been worthwhile? There are at least two grounds for saying that the time, money (including Law Foundation money) and effort have been wasted (and there is more of all to come). The first is that if the Law Society were already a voluntary association it would have avoided the need for the review, since once membership is voluntary there is no need to prescribe the purposes or structure of the societies.

The second is that the changes cannot be brought about without legislation (which fact is itself a disadvantage of being a statutory monopoly). This then assumes that the Law Society will move to have a Bill introduced into the House. This would be a Bill to deprive the Law Society of substantial role and resources. Given recent statements by politicians about the structure of the legal profession it is unlikely that a conservative Bill, based on this Report, would pass through the House without substantial amendment, perhaps along the lines above, that would further eviscerate the Law Societies. So will the turkeys vote for Christmas? ❑

# EVENTS

## OPENING OF BUTTERWORTHS HOUSE

After a nine month sojourn at the top of Plimmer Steps sharing lifts with staff of several other concerns and with dozens of car park customers and those using the lifts as a short-cut from Lambton Quay to The Terrace, Butterworths staff have moved back to a new building on the old site in Victoria Street. Thursday 30 October marked the formal opening of Butterworths House by the Governor-General, Sir Michael Hardie Boys. Sir Michael toured the new premises and then addressed staff and guests in the foyer.



*The Governor-General, Sir Michael Hardie Boys, and the Managing Director of Butterworths New Zealand, Mr Philip Kirk, by the commemorative plaque unveiled by His Excellency.*

Mr Philip Kirk, Managing Director of Butterworths New Zealand Ltd welcomed the Governor-General and the guests. Mr Kirk pointed out that for the first time in its 83 years of operation in New Zealand, Butterworths had its own purpose-built premises. He reviewed some of the premises of the past and said that the new building was designed to take Butterworths into the twenty-first century. It was completely wired for computers and was capable of accommodating an expanding editorial staff with full facilities.

The Governor-General also referred to some of Butterworths premises of the past that he remembered visiting. He had been amazed at how much scholarship had emerged from such crowded surroundings, but on reflection thought that the whole place had a certain scholarly chaos about it. His Excellency was, however, confident that similar standards of scholarship would be maintained in the new spacious surroundings.

Sir Michael recalled the distinguished legal names that have been associated with Butterworths in the recent past, starting with Professor Garrow and including Sir Alexander Turner and now Lord Cooke. He paid tribute to Pat Downey and Maurice O'Brien QC, recent and retiring editors of *New Zealand Law Journal* and *New Zealand Law Reports* respectively, both of whom he was pleased to see present.

*A collection of law librarians: Robin Anderson (Wellington District Law Society), Victor Lipski (Victoria University), Judith Hayward (Crown Law Office) and Sara Bathgate (Rudd, Watts and Stone).*

The Governor-General said that the new premises would enable Butterworths to add new forms of legal publishing to the traditional products. He thought that the electronic tools being offered to practitioners were staggering in their reach and comprehensiveness, but believed that there would always be a place for books.

His Excellency then declared the building open and unveiled a plaque commemorating the event.

After the Governor-General's departure, staff and guests assembled in a marquee put up in the basement of the building (thereby proving its versatility) and celebrated until, in a few cases, the early hours of the morning. ❑

Mark Newcombe demonstrates the electronic NZLR to (from left) Jenny Casey (Kensington Swan), Julie Clarke (KPMG Peat Marwick) and Marion Saunders (Deloitte Touche Tohmatsu) at the Auckland launch.

# LAUNCH OF ELECTRONIC NZLR

October also saw the launch of the electronic version of the New Zealand Law Reports. Messrs Philip Kirk and John Hoffman, Butterworth's Electronic Publishing Specialist, led a team of sales and marketing staff to launches in Wellington, Auckland and Christchurch.

Mr Kirk said that the Council of Law Reporting had made great efforts to ensure that the finished product was one that was capable of meeting practitioners needs now and well into the future and that Butterworths had been determined to achieve the same aims.

The launches were attended by law librarians and Butterworths authors from the three main centres. After John Hoffman had said some introductory words about the huge scale of the task of converting the NZLR to electronic format, the guests were shown the system at work by Butterworths' sales representatives. ❑

# DOUBLE FIRST FOR VUW

Ann Buckingham BCL

Catherine Callaghan LLM

Victoria University Law graduates this year scooped top places in the postgraduate programmes at both Oxford and Cambridge. Ann Buckingham gained the first place in the Oxford Bachelor of Civil Law and Catherine Callaghan in the Cambridge Master of Laws.

Ann and Catherine were friendly rivals through their VUW careers and are now back together again in Clifford Chance, one of London's largest law firms. Its size and range are exhibited by the fact that Catherine is working in the firm's Public International Law section, while Ann is in the Media, Computer and Communications section.

At Oxford Ann took papers in Restitution, Conflicts, Corporate Insolvency and Intellectual Property. In the Fens meanwhile, Catherine was tackling International Commercial Litigation, History and Theory of International Law, The European Union as a New Legal Order, and Comparative Public Law (taught by Sir Anthony Mason). ❑

# LIMITING PROFESSIONAL LIABILITY

*Peregrine W F Whalley, Northern Territory University*

*suggests how we can limit professional liability and protect the public*

## INTRODUCTION

In December 1994, the New South Wales Parliament enacted the *Professional Standards Act* (PSA). This legislation represents an unique attempt to balance two competing policy imperatives; namely, the need to limit the professional liability of certain professional groups while protecting the public interest. This Australian initiative will be of interest in New Zealand to those interested in issues of professional accountability, professional regulation and the establishment and maintenance of proper professional standards. Because solicitors are one of the occupational groups to have taken advantage of this legislation, this scheme is also likely to be of special interest to members of the legal profession in New Zealand.

The intent of this article, therefore, is to outline the features of this legislation. In describing its anticipated benefits, and the manner in which it is intended to enable members of professional groups to limit their liability, it also illustrates how it is intended to encourage the adoption of more rigorous standards of practice and benefit consumers of professional services. By way of conclusion it outlines the solicitors' limitation of liability scheme.

## THE CONCEPT

The first stated objective of the PSA is to create a more general means whereby the civil liability of professional or trade groups may be limited. (s 3(a)) Although this initiative was driven largely by the accounting profession, particularly in its early stages, the PSA is not expressed to apply to any particular professional group or groups. In essence, it contemplates two schemes which will be available as alternatives. Neither scheme is compulsory and the liability of members of any professional group choosing not to take advantage of either scheme will remain to be determined in accordance with the principles ordinarily applicable. The Act will not apply to any claim for damages arising from –

5(1)(a) the death of or personal injury to a person;

(b) any negligence or other fault of a legal practitioner in acting for a client in a personal injury claim;

(c) a breach of trust;

(d) fraud or dishonesty.

The first scheme (ss 21 and 22) limits liability to a specified amount if insurance against civil liability is held to that amount, or if business assets are retained to that amount. The second scheme (s 23) limits liability to a multiple of the cost of providing the service from which the liability accrued. These limits will vary according to the circumstances of particular professional groups involved but will be calculated in light of past claims against members of the relevant occupational group to allow the majority of claims to be paid in full. It will only be the exceptional or aberrant claims, therefore, which are capped and not paid in full.

The objectives of the Act, however, are not only concerned with limiting the liability of professional groups. The dual policy objectives are suggested initially by the Long Title:

> An Act to provide for the limitation of liability of members of occupational associations in certain circumstances and to facilitate improvement in the standards of services provided by those members

Section 3 also specifically provides that additional objectives of the Act include –

(b) to facilitate the improvement of occupational standards of professionals and others;

(c) to protect the consumers of the services provided by professionals and others;

To this end, the PSA establishes the Professional Standards Council (PSC) to supervise the preparation of limited liability schemes, and to assist in the improvement of standards and protection of consumers. (s 3(d) and Part 6)

The benefits of limited liability will generally only extend to members of occupational associations, as defined. (ss 4 and 17) No class of person will be able to benefit from either scheme until that class is brought within the operation of the Act. A professional group seeking limited liability will normally submit details of a proposed scheme to the PSC for approval. (s 7) Before a scheme can be approved, the PSC must publish a notice in a daily New South Wales newspaper explaining the nature and significance of the scheme, and inviting submissions or comments. (s 8) In deciding whether to approve a scheme, the PSC is required (s 10) to consider, *inter alia*,

- all comments and submissions made in response;
- the position of persons who may be affected;
- the nature and level of past claims made against members of the professional group concerned;
- the risk management strategies of the professional group concerned;
- the means by which those strategies are intended to be implemented;
- the cost and availability of indemnity insurance.

The PSC will also consider, therefore, such matters as –

- the group's code of ethics or other statement of professional standards;

- the qualifications for membership of the group;
- the group's disciplinary procedures and complaint resolution procedures; and
- the group's requirements for continuing education.

The PSC may also conduct public hearings (s 11), although this has not occurred so far. Upon approving a scheme, the PSC submits it to the relevant Minister (s 12) who may authorise its publication in the New South Wales Government *Gazette*. (s 13) A scheme will commence two months after its date of publication provided that it has not been successfully challenged in the Supreme Court. (ss 14 and 15)

The PSC has ongoing responsibilities to advise the relevant Minister. It has an important pro-active role in assisting professional groups in the preparation of limited liability schemes, and in the development of their risk management strategies and complaint and disciplinary processes. It also has a continuing responsibility to monitor the standards and practices of those groups covered by the legislation and to make, if necessary, further recommendations that limited liability be withdrawn. (s 43)

## ORIGINS OF THE LEGISLATION

The PSA was introduced into the New South Wales Parliament in November, 1990, originally as the *Occupational Liability Bill*. The philosophical basis for the *Occupational Liability Bill* is to be found in a discussion paper published by the New South Wales Attorney-General's Department (*Discussion Paper: Professional Liability, Regulation, Insurance and Risk Management*, Sydney, April, 1990). That document was preceded by an issues paper which explained the context of the proposal for limited liability and identified the issues and arguments for and against such a system (*Issues Paper: Limitation of Professional Liability for Financial Loss*, Sydney, August 1989). It also considered alternative ways of limiting liability and the features of an acceptable scheme. Both documents were intended to stimulate discussion and to invite responses.

The final discussion paper described the rationale of the Bill. It suggested that it was appropriate to consider limiting professional liability because of the substantial increase in the number and quantum of claims. This increased volume of litigation was having two immediate effects. Initially it affected premiums, making it harder to obtain affordable professional indemnity insurance. It also resulted in a greater emphasis on defensive practice. This was generating consequences not only for the client, but also potential third parties and the community in general. The increased claims were due to the greater size and complexity of work undertaken and rising potential liability. This was especially the case with auditors. They were also due, however, to developments in the law and to an increasingly litigious climate.

In introducing the Bill in 1990, the Attorney-General explained that its purpose was to –

> ... provide a general mechanism whereby the civil liability of professionals and others may be limited. The basic structure will allow an occupational organisation to apply for approval for a scheme for limited liability for its members, subject to such limitation being reasonable and subject to the occupational organisation meeting certain requirements regarding insurance and risk management.
>
> (*NSW Parliamentary Debates*; 29th November, 1990; p 11564.)

That Bill lapsed when Parliament was later prorogued. It was reintroduced in March 1991. However, its further implementation was hampered when it fell victim to State/Federal politics and became caught up in the discussion of wider issues of corporations, partnership and tort liability law reform. It was eventually reintroduced without substantial change in its present format into the Upper House in September, 1994. In introducing the measure, the Attorney-General succinctly confirmed its objectives explaining and emphasising that the statutory cap on damages was linked to a number of safeguards intended to protect the interests of clients –

> ... first, a threshold up to which all claims will be met in full; second, limitation of liability will not apply in relation to claims for death or personal injury or in relation to conduct involving a breach of trust, fraud or dishonesty; third, there must be full disclosure of any limit of liability; fourth, schemes for limited liability must include compulsory professional indemnity insurance; fifth, the Bill requires the introduction of risk reduction and risk management strategies; sixth, there must be a system to allow for proper redress of consumer complaints.
>
> (*NSW Parliamentary Debates*; 14th December, 1994; p 2933.)

## ADVANTAGES

In the context of auditors' campaign for limited liability, it has been suggested that *limiting liability denies the professional responsibility of an auditor* (Victorian Attorney-General: Submission to the Ministerial Council of Attorneys-General reproduced in *Business Review Weekly*, 5th June, 1987, p 136). Liability in negligence, of course, only arises where there has been a failure to observe proper professional standards. Accountants and auditors, for example, will only attract liability where it can be proved that the failure or loss was caused by their failure to observe the standard of a reasonably competent auditor carrying out his or her work in a reasonable manner. If, as has been suggested (eg Walker, B. "Why so many audits have been failing", *Business Review Weekly*, 18th January, 1991, pp 82-84.), many corporate failures and consequent losses have been caused by lax auditing procedures, why, it may be reasonably asked, should the auditors in question not be fully accountable ? Why should those who have suffered loss not be entitled to full compensation ?

Despite the initial attraction of such arguments, there are more persuasive arguments in favour of a general scheme of limiting professional liability such as that contained in the PSA. While the concept of limiting professional liability is undoubtedly attractive to those who render professional services, benefits also flow to clients, other potential litigants and to the general public. Because of the requirement for compulsory professional indemnity insurance, for example, there is greater certainty that limited liability will mean that client consumers of professional services and other potential litigants will be paid the amount of compensation awarded if they successfully establish a claim.

It is an essential feature of the Act that any limitation of liability should be set at a figure which will completely cover the general run of claims from the great majority of ordinary clients and will involve a scheme of compulsory professional indemnity insurance (*Discussion paper* p 9). It is, therefore, in the interests of potential litigants for certainty of payment to exist in the majority of claims. Because the proposed

scheme will encourage the reduction of risk and therefore a reduction in claims, and the early settlement of claims, the community interest is also served in dealing with the litigation explosion. To the extent that the threat of litigation and the consequences of liability dissuades able individuals from the practice of particular professions such as auditing, a system of limited liability will benefit the community by encouraging the retention of competent personnel thereby lifting the level of professional competency.

Limited liability, therefore, may be expected to result in increased certainty of payment and therefore afford a greater measure of protection for the majority of litigants. It will only be in exceptional cases that a full measure of compensation may not be available to a successful litigant. However, the New South Wales Government has taken the view that, on balance, this criticism is outweighed by other considerations. In this regard the anticipated role of the PSC is critical. Because of the role contemplated for the PSC, the proposed scheme may be expected to provide greater incentives for those groups affected to examine the causes of loss and liability, and to implement measures designed to minimise the risk of claims by enhancing the quality of service provided. In terms of the likely impact on the respective professional groups, limited liability is expected to result in greater professional participation, more attention to risk management, reduction in defensive practices, reduced insurance premiums, lower fees, and reduced incidence of professional insolvencies which not only impact upon those principals, employees and clients immediately involved but also bring the profession involved into disrepute.

## LIMITED LIABILITY FOR SOLICITORS

Since the commencement of this Act, a number of limited liability schemes have been submitted to the PSC for approval. Two schemes for the engineering profession have been approved, and have commenced, and schemes for surveyors and accountants were advertised in March and May 1997 respectively (*The Sydney Morning Herald*, 7th March, 1997, p 22 and 14th May, 1997, p 41 respectively).

Perhaps of most immediate interest to New Zealand practitioners, however, should be the Solicitors Limitation of Liability Scheme gazetted on 4th October, 1996 (*New South Wales Government Gazette*, no 113, pp 6840-6853). Participation in this scheme is limited to members of the New South Wales Law Society, of whom approximately 10,000 members are private practitioners. Liability is limited on the following basis –

| ***Class of Person*** | ***Limitation of Liability*** |
|---|---|
| Solicitors who practise as sole practitioners or in a firm having no more than three principals | Not less than the amount of professional indemnity cover approved under the Legal Profession Act 1987 (currently $1,500,000) |
| Solicitors who practise in a firm having more than three principals | Not less than the amount of professional indemnity cover approved under the Legal Profession Act and not more than $10 million, being $500,000 multiplied by the number of principals |
| Solicitors who select a higher amount of liability limitation than would otherwise apply | Selected amount being not less than the limitation amount otherwise applicable |

In approving this scheme, the PSC noted the risk management strategies in place, including –

- the availability of risk management education;
- other educational services including compulsory continuing education requirements;
- professional practice and conduct rules;
- guides to good practice;
- existing complaints and discipline procedures;
- counselling and advisory services;
- trust account audits.

In recommending that the Minister gazette the scheme, the PSC expressed its satisfaction that –

> the risk management strategies and the means by which they are intended to be implemented would
> (a) facilitate the improvement of occupational standards of members of the occupational association,
> (b) assist in the development of self-regulation of the occupational association, and
> (c) serve to protect the consumers of services provided by the members of the occupational association.

Participation is voluntary. However, participants must notify clients and prospective clients that their occupational liability is limited, for example on official letterhead and business cards. (s 33) They must also effect appropriate insurance. The annual fee payable to the PSC per participant is A$10 (R 5) and this is included in the annual fee of A$40 charged by the Law Society. However, the exclusions in ss 5(1)(b) and (c) may well limit the benefit of the scheme for some solicitors. Australia has not reformed its accident compensation system in the same way as New Zealand, and personal injury litigation is still a substantial part of many practices ((1997) 35 *Law Society Journal* 84).

## CONCLUSION

Members of many professional groups around the world have become increasingly aware that they operate in a changing legal climate manifested by a growing volume of litigation and record awards of damages. Citizens are increasingly aware of their rights, and of the remedies available when those rights are infringed or threatened. Correspondingly, those involved in the provision of professional services or advice are increasingly likely to be held accountable if they fail to observe some relevant professional standard or norm.

Growing awareness of this changing legal climate has caused some professional groups, particularly accountants and auditors, to explore ways in which they might limit their potential professional liability. Hitherto, most proposals for limiting professional liability have involved reducing the avenues of redress for those injured by departures from proper professional standards. They have, therefore, tended to ignore the public interest, or assume that the public interest is equated with professional self-interest.

The New South Wales initiative has been monitored closely in other parts of Australia and a similar Bill is now before the Western Australian Parliament. This initiative, therefore, may well serve as a model for similar legislation in other jurisdictions concerned to cap professional liability but not at the expense of professional accountability. This is important and relevant to New Zealand, particularly in light of the Closer Economic Relations Trade Agreement and the Trans-Tasman Mutual Recognition Arrangement which is currently in the process of being implemented in both Australia and New Zealand. ❑

# E-DEC REPORT

*A number of practitioners agreed to write comments on the E-DEC Report. Those that had appeared by the deadline are given below. Readers are invited to continue the debate.*

**By RICHARD WORTH**
**Simpson Grierson, Auckland**

With the publication of the E-DEC Report on 1 September 1997 the rulers of the New Zealand Law Society have been given the opportunity to evince real leadership.

Whether they will do so or whether the planned consultative process (following hard on the heels of the E-DEC rounds of consultation) will produce an outcome of inaction and inertia in the clash of vested interests remains to be seen.

There has been a slow recognition of the need to restructure the governance systems in the profession. If efficiency and effectiveness are appropriate benchmarks then an air of unreality pervades the present structures. The New Zealand Law Society was established by statute in 1869. Just over nine years later, Parliament permitted the establishment of district law societies based on the judicial districts. The 14 district law societies reflect historical patterns of settlement in New Zealand where travel between centres was by horse or steamer. E-DEC puts the position quite neatly today when they say:

> The present structure has major problems: Fifteen different law societies carry out regulation to 15 different standards, create 15 different cost structures to support, and create different centres of power that result in at least the occasional conflict and turf battle.

The wish for change amongst lawyers is not manifest – yet fast-moving forces are at play in the community. The distinction between accounting and law firms continues to blur; the dominant position of lawyers in the conveyancing market is now seriously under challenge; traditional client loyalty is not to be assumed and clients will shift from quite long-standing allegiances as a result of the competitive tendering process for work which is now commonplace.

So E-DEC proposes two separate bodies for the legal profession. The New Zealand Law Council to regulate lawyers' behaviour, to promote client protection and relevant public interests; and the (new) New Zealand Law Society which would pursue lawyers' interests.

The report sets out compelling arguments for voluntary membership of the occupational association (the NZLS):

- Those who do not benefit do not have to contribute whilst those who desire to participate are free to do so.
- Only those who benefit in excess of levies will join.
- Contestable revenue will create strong pressures for the Law Society to provide only those services its members want and do so in a low cost manner.

The report has major shortcomings in only one area. It is weak on issues of legal education and training which is curious and almost certainly reflects a lack of understanding of the present system. The shortcomings include:

- If (as E-DEC argue) entry standards are the single most important element in regulating the legal profession then to ignore or perhaps misunderstand the role of the Council of Legal Education is a serious flaw. The Council monitors and controls the outputs of the Institute of Professional Legal Studies and the five law schools. Its composition, which includes members of the judiciary, practising lawyers and the deans of the law schools is surely better able to set educational and training standards for admission to the practice of law than the proposed New Zealand Law Council comprising 30 elected lawyers. Indeed, there must be a case for the Council of Legal Education to take on a wider role in control of post-admission legal education programmes.
- With its increasingly unfashionable doctrinaire arguments of the regulator/provider split it is difficult to see why the report argues that pre- and post-admission *training delivery* should be confined to a single company owned by the new New Zealand Law Society. Why should there not be a range of providers including the universities if they wish to enter that market?
- The criticism of shortfalls in technical standards is not wholly sustainable. To suggest that lawyers should be fully trained in "transactions" which word is used in the report to include Court proceedings is unrealistic. It ignores the reality that legal education is a continuing process. Both lawyers and doctors learn on the job at the client's risk and expense. Building on "prior learning" is a keystone in education philosophy.
- The proposed system of practising certificates is unlikely to achieve effective outcomes. It would be better to contemplate a compulsory post-admission legal education programme in core areas of legal activity.

The E-DEC report (with the legal education and training proposals appropriately altered) has the potential to produce real benefits for the legal profession in the context of an increasing public cynicism of "the professions". We should aspire to continue in the role which Professor Flood identified in 1995 when he said:

> Through time, lawyers have formed part of a cultural and social elite in most societies .... Being part of the elite puts lawyers close to the commercial and financial centres of power which esteem them as *counsellors* as well as legal technicians. ❑

**By LAURENCE COONEY**
**Cooney & Co, Ashburton**

At the outset I record that I was surprised to find that in large measure I agree with much of what is proposed in the E-DEC report. As a self-confessed traditionalist I had expected that there would have been much in the report with which I would have wished to take issue.

The proposals for the splitting of Law Society activities into two areas – compulsory regulatory functions and voluntary services are in my view soundly based and likely will be supported by practitioners. From the point of view of an Ashburton practitioner, I can see the force of an argument which highlights an often irreconcilable tension between the representative and regulatory roles – to be your friend at one moment, to persecute you the next. Taken at its most basic, it has always seemed to me to be an odd foundation for friendship to force me to pay money for representative services I may not want and which may be no use to me in my particular area of practice. Furthermore, and I say this as a former member of an NZLS standing committee, it is hard to avoid a niggling thought that there is a degree of ineffective and inefficient duplication of effort as between the NZLS and districts under our current but dated and clumsy federal system of law society organisation.

From the regulatory standpoint, I have seen enough as a member of the NZ Law Practitioners Disciplinary Tribunal to convince me of the need for change. We are wrestling with a complaints and disciplinary system reasonably strong on the objective of lawyer punishment but weak on the provision of prompt solutions to clients' problems. To that extent, the E-DEC proposals for a code of client service and an office of client service within the proposed NZ Law Council, make good sense. The benefits to the profession in terms of public confidence and client perception are likely to be considerable.

In another respect, however, I am surprised and I share the view expressed in the *National Business Review* [August 26] that E-DEC addressed structure in the narrowest sense only, saying that to do otherwise would have taken them outside their terms of reference. This means that some key practice issues like multi-disciplinary practice and limitation of liability are not covered in the report. Furthermore the report does not address the ever present rumblings of the removal of the so-called conveyancing monopoly. Presumably they will have to be addressed separately but this was not what I was expecting. I note that Austin Forbes QC in his 1996 annual report quoted the Auckland District as insisting that there should not be any major changes to structures or legislation unless there had been a comprehensive review of the profession as well as of its future regulation and administration. We are left to guess what may have become of that.

No doubt lawyers as ever, and possibly forever, will wish to debate and haggle over the detail in the report. As my contribution to this process I have identified the following as being matters which I think warrant closer study and debate and, in my submission, change.

- The proposals:
  [i] that a panel for the hearing of disciplinary charges comprise three lawyers and two lay members arriving at a decision by a 2/3rds [query 3/5ths] majority; and
  [ii] that the hearing time be limited to three hours for each side with a further four hours for the decision. It is my very positive view that these proposals are not soundly based and ought not to be supported particularly in a case involving the potential suspension or striking off of a practitioner. In my view the present New Zealand Law Practitioners Disciplinary Tribunal procedures in relation to serious breaches have stood the test of time and should prevail.
- The proposal that in respect of the [new] New Zealand Law Society "All board positions will be up for election at the same time in a New Zealand-wide election". I question the wisdom of this proposal. It seems to me that for reasons of continuity a good argument could be made in support of the proposition that 1/3rd of the members retire by rotation each year. To avoid any suggestion of a closed shop it could be stipulated that a board member should not be eligible to serve for more than two continuous terms.

Given the modern political attitudes to occupational regulation, the report has some compelling logic about it [the Fidelity Fund proposal being a classic example] and requires careful consideration. In my view it behoves all practitioners to take the time to read the report carefully and to make a contribution to the planning process by constructively addressing the issues identified in the report and, I add, all other related issues and matters touching upon our profession which are not the subject of the report.

We each have a duty to respond to the challenge and at the very least to embrace the principles of the report which emanate from the intensive consultations which E-DEC has undertaken. We owe it to our profession to plan for change on our terms and in this context we need to be mindful of the distilled wisdom in the proposition "Those who fail to plan often unwittingly plan to fail". We also must firmly bear in mind the unpalatable option of change at the hands of politicians if we are found incapable of agreeing amongst ourselves. ❑

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**By ERROL MACDONALD**
**Cullinane Steele, Levin**

Material relating to such things as the E-DEC report do not tend to grace a general practitioner's desk for very long. That is, unless you are specifically asked to comment.

As I now know the main questions E-DEC was commissioned by the NZLS to consider were what Law Societies should do, how Law Societies should function, and how Law Societies should be organised to carry out these functions. These questions have been reflected in the NZLS publication, *LawTalk*, for the last one or two years and feature in its current objectives.

The following comments are perhaps coloured by the writer's location in the smaller town of Levin which is even at a distance from the business and social activities of one of the smaller District Law Societies, ie the Manawatu District Law Society in Palmerston North.

Some more general comments nearer to the end of the report especially in relation to District Law Societies reflect the memo of NZLS President, Ian Haynes, of 15 September 1997 that the report provides a basis for wider consultation and debate within the profession.

The introduction to the report states that E-DEC's terms of reference did not allow to include comment on the position of barristers. I think this should have been included as it has been topical over the last few years with younger practitioners going into practice on their own account as barristers when they could not gain employment in larger firms as both barristers and solicitors. As well, the barrister/solicitor dichotomy has arisen in other contexts such as application of the Rules of Professional Misconduct (reference R 11.04) and these rules are in fact referred to in para 4.2 of the report.

I can only agree that any recommendations to strengthen the effectiveness of Law Societies in achieving their objectives to make them more modern and relevant must be beneficial. The Law Society is a defining exclusive feature of this particular profession and to enhance it must help the profession generally and also its clientele and the general areas in which lawyers work.

The report gives a clear analysis of the present objectives and structure of the NZLS and with reference to the Law Practitioners Act 1982. The divergent functions of the NZLS as both a representative and regulatory body emerge from such analysis and lead to the report's final recommendations.

The first main recommendation (para 3.2) is that there is a continued need for regulatory intervention in the supply of legal services to the public. While I can only agree with this I do not think that any new system imposed on lawyers will cure this problem in that skill cannot be imposed, nor possibly honesty. Therefore I agree with the suggestion in para 3.5 that membership of the regulatory New Zealand Law Council should be compulsory.

While the report states that membership of the New Zealand Law Society (and later District Law Societies) should be voluntary and I agree with this, I agree with other comment that voluntary membership of District Law Societies could lead to their collapse. A typical agenda for a small District Law Society meeting shows that there is not much other business than disciplinary (which would be taken away) leaving the social aspect which would mainly disappear as probably has already occurred in larger jurisdictions. With voluntary membership people would opt out of contributions towards expensive law libraries (which usually consume about half the budget). So what would be left?

The report recommends in paras 3.13 and 6.8 that the new New Zealand Law Council through a separate entity, Legal Education Ltd, be responsible for legal education and training. NZLS seminars have been excellent over the last number of years and should be continued in some form. No doubt in-house training will also continue. But perhaps consideration should have been given to training of paralegal staff such as legal executives towards their particular qualifications and continued education.

The regulatory objectives in para 4.1 of the proposed new New Zealand Law Council are encapsulated nicely and simply. However the report in para 4.2 re ethics in commenting on lawyers' conduct outside the provision of service to clients seems to be ignorant of some previous High Court decisions to the contrary.

Paragraph 4.3 regarding discipline seems to unduly play down the preventative aspects of punishment.

Paragraph 4.5 regarding admission and practising certificates identifies a problem within the profession of a lack of practical experience at the time of admission. This has arisen over the last twenty five years since the old system of "qualifying on the job" stopped. From my perspective any enhancement of training would be of benefit especially to prospective employers.

The recommendation in para 4.6 and elsewhere of compulsory professional indemnity insurance is good but will not cover the situation where such insurance is found to be invalid under exclusion clauses for example dishonesty or fraud on the part of the practitioner. Perhaps there needs to be a safety net under that.

Paragraph 4.9 Protection of Client Money is of crucial importance and there has been a worrying gap since the departure of the statutory audit scheme. Some firms have already considered voluntary audit checks comprising systems reviews and peer reviews. The suggested structure in para 5.5 for a new financial assurance system is welcomed.

In the proposed structure and operation of the new Law Council one wonders how the complaint handling process referred to in para 5.3 would operate for a dishonest or an incompetent sole practitioner. The public will need to be made aware of their rights to take matters further.

I have not done any arithmetic on the governance mechanics suggested in para 5.7 or on the old fear of whether Auckland can out vote the rest of New Zealand even though it has the most practitioners. Also would the profession be happy with non-lawyers being Board members?

Paragraph 5.8 on geographic structure is well reasoned based on a need for uniformity of standards.

In paras 5.9 and 5.10 it is suggested that practising fees could decrease which would be welcomed. This year we paid to the Manawatu DLS and NZLS fees GST inclusive of $1,857.37 per practitioner (including substantial fees for a library we never use in a distant town) and also the final $2,000.00 levy for Renshaw and Edwards. So a decrease in fees combined with a re-direction of interest on trust accounts to sustain the fidelity fund as suggested in para 4.8 would be a boon to the profession and the latter benefit the public as well.

Paragraph 6 on the design of the New Zealand Law Society is fairly vague and general. Paragraph 6.4 deals with membership and one would not want the New Zealand Law Society to be hi-jacked by smaller partisan sectional interest groups speaking in the name of us all.

The suggested voluntary design of the New Zealand Law Society in a type of trade union role will probably lead to its diminution or collapse as with other similar organisations such as those of our staff. Hence suggestions of lobbying or collegiality may need to be further considered.

I cannot agree with the generalisations in para 6.3 re structure of the New Zealand Law Society and what its activities and those of the District Societies will be. I anticipate that the voluntary membership provision may present an opportunity for practitioners and firms especially in smaller towns to switch districts or leave their Societies.

Paragraph 6.9 dealing with libraries does not deal with the question of new technology. This is considered, though in its comparatively formative stages, to be the possible answer to the burgeoning cost of libraries. Again, many law firms have already taken matters into their own hands by grouping with other law firms or making bulk purchase arrangements. Nevertheless if any District Law Societies collapse then the question remains of what will supply the library function in that area.

The report analyses the present situation well and makes practical recommendations mainly regarding the New Zealand Law Society. But as Mr Haynes commented in his memo there will need to be a lot more debate and discussion. ❑

**By GRANT CROWLEY**

**General Manager,**
**Baldwin Sons and Carey, Wellington**

Some lawyers will be good managers of clients; others will not. If market forces are at work properly then those who do not manage their clients effectively will not survive as viable businesses while those who do may. There is nothing new in this proposition and it has always been a significant factor in differentiating the good from the mediocre and the unsatisfactory providers of legal services. Further, any management failings in a law firm will inevitably affect the service that firm provides for its clients – even those that only indirectly impact on the client. The drafters of the Report have not fully understood this, it seems, by proposing their set of "client entitlements" – their Code of Client Service.

Why should this important body, to be known as the Law Council, concern itself with those matters that are more properly controlled by the market and by the firms themselves? Why should client charges not be unreasonably high – if a firm wishes to position itself at that end of the market? Is this a slide back to a socialist regime of scale charges? Why should the Law Council be responsible for enforcing a mandatory set of minimum levels of service delivery? Perhaps one principle might be that every lawyer's telephone must be answered after no more than four rings by a client? Is all this a bit much and where would it end? It would end, one could foresee, in a very busy raft of complaints to the Office of Client Services – mostly by telephone, if what the Report suggests will happen turns out to be correct! By all means let's have our lawyers buy in to a professional code of conduct, but let us not regulate the style and manner of service delivery. Have faith in the customer to pick the service provider they think is giving them a good deal, with the level of service they want and are prepared to pay for. After all, for most law firms this is the only area where they can be different in the market, assuming at least adequate professional and technical skills. ❑

**By DAVID SCHNAUER**

**Schnauer & Co, Milford**

From most perspectives, structural legal reform has been long overdue in New Zealand. The major pro-market economic reforms have largely bypassed the professions. A host of issues such as incorporation; multi-disciplinary practices; and international practices remain off limits. Conveyancing monopolies and slow, expensive Courts attract criticism. The present law society structure is old fashioned and top heavy – a New Zealand Law Society (Council of 30 members and a Board of 13) and no less than 15 District Law Societies, many too small to function properly.

When the NZ Law Society commissioned a report by E-DEC Ltd two years ago, one imagined these issues would all be addressed. Unfortunately the report issued last week is a disappointing document. The limited terms of reference given to E-DEC prevented the report considering "... the position of barristers, restrictions on the supply of conveyancing services, or the forms of business organisation available to lawyers ...". Remarkably the E-DEC report manages to recommend a new structure which requires a New Zealand Law Council (consisting of a Council of 30 and a Board of six) and a New Zealand Law Society with 15 District Law Societies below it – each with their own Council of eight members. The Law Council should be centred in Wellington and the Law Society centred in Auckland. The coincidence in the report is truly remarkable. Barely one existing Law Society committee position has been rendered redundant; and the existing rivalry between Auckland and Wellington in law society affairs has somehow been preserved.

The fundamental thrust of the report, to divide the existing law society functions into two is sensible. Registration of lawyers and preservation of standards will be the function of the newly created New Zealand Law Council. Law Societies will then openly promote lawyers' interests.

The report recommends the Council maintain standards in the profession as gatekeeper. Now two gates are recommended – a Certificate for Practice under Supervision and (after three years) a Certificate for Unsupervised Practice.

Certification of experience by peers and "passing any tests set by the Council" should be required to pass from one category to another. Just how much the progression will be on merit rather than on time, is not clear. Neither does the report discuss possible loss of certification. Unlike doctors, there is no certification proposed for specialist areas of law, so a NZ Law Council Certificate will assist the public little, in making their choice of lawyer.

Generally gatekeeping is a blunt instrument to maintain legal standards. Experience suggests most people who pass their law exams will make it through both gates; and few people who are in practice, will be shown out the gate. Not the least reason for this is that loss of certification means complete loss of income.

Regular grading, say every three years, in the specialist areas of law in which a lawyer has competence is surely a better way of protecting and advising the public of individual lawyer competence than gatekeeping. If an ungraded lawyer remains free to practice (as long as they *advise* the public they are ungraded) then the Law Council becomes purely an information source. Clients can then decide whether they pay less and use an ungraded lawyer; or pay more for a highly graded one.

The role of a company prospectus is to give the public information on the risks involved – not to stop them investing in oil prospecting shares if they want to. The E-DEC report would have been better to recommend a similar philosophy and role for the Law Council. ❑

**By MIKE ROSS**

**The University of Auckland**

Reorganisation has been forced on the legal profession because non-lawyers now compete, providing legal services to the business community. Areas of practice lawyers might consider their own – tax, company, securities, insolvency and employment law – are often handled by non-lawyers.

Proposals in the E-DEC Report requiring Law Council registration for all who provide "legal services" have the potential to remove non-lawyers from the market for legal services.

Economic arguments offered up to justify control of the market for legal services by a lawyer-appointed Law Council do not bear close examination.

For over a century, lawyers in New Zealand enjoyed a privileged and protected position because there was little competition. That has changed. Now chartered accountants, consultants and para-legals offer legal services and legal advice. Presumably they have attracted custom by offering services in a more efficient manner than that provided by traditional law practices. If not, they would be unlikely to attract continued custom.

The E-DEC Report identifies that the average law practice has only 2.3 partners. Unless a specialist niche is developed, such small firms cannot hope to compete against non-lawyers providing specialist advice and expertise.

Chartered accountants, in particular, have proved very resourceful in selling a package of accounting, tax, company law services to their clients. Larger law firms have proved competitive, providing tax and commercial law advice to larger corporates.

Law is not just a profession, it is also a business. Success at law means not just being a competent lawyer, it also means providing legal services to the customer in a timely and cost effective manner.

The E-DEC Report attempts to argue the practice of law is different and hence the provision of legal services should be regulated. Economic arguments are put up to justify regulation and protection.

Three areas of market failure are described as justifying further regulation: information failure, presence of externalities and "public good" arguments.

Information failure arises in many markets for professional services, including legal services. Consumers lack the knowledge to discriminate between alternative suppliers and having made a choice are insufficiently well informed to monitor and control the services provided.

The anti-competitive response is to regulate in order to "protect" the consumer. Then only members of the regulated club can provide services to the public. The club becomes a cartel; setting excessive or inappropriate entry standards, suppressing new ideas and controlling fee levels – either directly or indirectly. The competitive response is to accept open entry into the market but have skilled practitioners join a voluntary association, develop a "brand" and use that brand to attract valuable custom.

The anti-competitive approach protects below average performers, at a cost to both consumers and their more competent colleagues. The competitive approach enables good performers to reap higher rewards. The poor performers improve, or sink. The E-DEC Report recommends an anti-competitive approach; any person providing legal services will be required to register with a lawyer-controlled club – the NZ Law Council.

The E-DEC Report also states the existence of externalities and transaction costs justify intervention in the market for legal services. Externalities arise when one person bears the cost whilst another enjoys the benefit. Transaction costs are excessive when there are more efficient means of achieving an intended goal.

The externalities and transaction costs quoted by the Report are primarily under the control of lawyers – failure to do the job properly or performing a lower quality service than possible – not costs forced on lawyers and clients by external events or agencies. This is not an example of market failure justifying regulation as the Report asserts. It is an example of inefficiencies to be improved by greater competition.

The report further states there is a "public good" element in the practice of law. In economics, public goods are those which when supplied to one are used by all – the cost accordingly is borne by all. National defence is the classic example. The rule of law with its provision of a judicial system is another.

Taxpayers fund the judicial system. Not lawyers. The E-DEC Report implies legal practice has a public good element because lawyers practice in the Courts.

In fact lawyers enjoy a private benefit; they have privileged access as advocates in the Courts. Taxpayers are forced to pay a premium to have a lawyer represent them in Court because lawyers enjoy a monopoly right of advocacy.

The Courts may wish to regulate who appears before them as advocates, but that is no justification for regulation of the market for legal services in general.

The Report proceeds to discuss who would bear the costs of regulation. Increased costs might be borne by the customer or absorbed by the lawyer. Someone pays. The Report detours into an inconclusive discussion about elasticities of demand for legal services and elasticities of supply of legal services before reaching the obvious answer – the customer pays. When provision of legal services is the sole preserve of a self-perpetuating cartel, it is inevitable costs of regulation will be passed on to customers.

The organisational model recommended for structure of the legal profession bears a close similarity to that presently used by the medical profession; registration controlled by a statutory body with voluntary member societies providing professional support. Medical practitioners have been very effective in protecting their sources of income. Not surprising, lawyers wish to emulate them.

Establishing a new Law Council by statute and carefully drafting the definition of "legal services" enables the profession to get statutory backing for restrictive trade practices which would otherwise be in breach of the Commerce Act. The Privy Council ruling in *NZ Apple and Pear Marketing Board v Apple Fields Ltd* [1991] 1 NZLR 257 emphasises the need to clearly delineate practices which are to be exempt from Commerce Act scrutiny. ❑

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**By BRIAN KEENE**
**Barrister, Auckland**

The E-DEC Report to NZLS will be both hailed and condemned as revolutionary. It is pro-change; that disturbing activity which often solves today's problems by transmogrifying them into new ones. In the meantime, there is the inevitable chaos of change.

Para 3.4 of the E-DEC Report defines the eight outputs of this new direction. What is striking is that formerly the Law Society managed or contributed to no fewer than seven out of the eight. Included were public benefit issues such as "better legal processes", "public knowledge" and "protection of rights". All are now to pass away from the New Zealand and local Law Societies. What is to be left? What public good are they asked to contribute? Nothing beyond the narrow, introspective and selfish task of protecting and promoting "lawyers' interests".

The corollary is that Law Societies should become voluntary – indeed, the new narrowed horizons of the Law Society are said to be consistent only with voluntary membership (Report para 3.5).

*continued on p 384*

# MEETING VICTIMS' NEEDS

*Professor Warren Young, Victoria University of Wellington*

*discusses more findings of the New Zealand National Survey of Crime Victims*

## INTRODUCTION

New Zealand's criminal justice system has traditionally been offender-oriented: it has been concerned primarily with the conviction and punishment of offenders for "public" wrongs. For the most part, victims have been limited to acting as a witness for the prosecution; their own needs and views have been subservient to the perceived interests of the wider community in the conviction and punishment of the guilty. Provisions existed for the payment of compensation to the victims of crime, some dating back to the early 1900s, but a comprehensive victim assistance strategy has been lacking.

Recent years have seen a significant shift in this respect, with an increasing recognition of the rights and needs of victims of crime and the development of a wide range of measures designed to ensure that the needs of victims are a more central focus of the criminal justice process. This has been reflected in a number of measures in the Criminal Justice Act 1985 to encourage and facilitate reparation to victims for loss, damage or emotional harm; the passage of the Victims of Offences Act 1987, designed to articulate some of the basic rights of victims of crime and to increase their ability to participate in the criminal justice process; efforts by the police to develop a more explicit "customer service" focus; and the dramatic growth over the last ten years in the number of victim support services.

Despite this, there has been little systematic research on the impact of some of these changes. The Ministry of Justice has undertaken a number of projects on the use of the sentence of reparation. There have also been a number of surveys examining the extent to which victims who report offences to the police are satisfied with the way in which the police handle their cases (Robinson, J, Young, W, and Haslett, S (1989) *Surveying Crime*; MRL Research Group (1995), *Public Attitudes Towards Policing*). But there is little available information on what the needs of victims actually are; on the extent to which victims are aware of, are referred to or refer themselves to victim support services; or on the extent to which, when victims are referred, the services in fact address their needs.

This article addresses some of these issues. It is the second in a series outlining some of the major findings of the first comprehensive national survey in New Zealand of crime victimisation and related issues (see Warren Young et al (1997) *New Zealand National Survey of Crime Victims 1996*). It begins by examining the experiences, attitudes and level of satisfaction of victims who reported offences to the police during the survey period. It then discusses the extent to which victims had access to victim support services and whether those services met their needs.

## VICTIMS' SATISFACTION WITH POLICE

Measures of satisfaction with the police are generally thought to be significant for at least two rather different reasons. First, since policing is heavily dependent on the public to report offences to them, and since police handling of such offences depends heavily on the willingness of the public to provide evidence, turn up at Court and assist in informal resolutions, public attitudes towards police are critical to the effective performance of any sort of police role. Secondly, the advent of community oriented policing, increasing emphasis on a consumer orientation in modern police organisations, and increased concern with transparency and public accountability, have elevated the satisfaction of the public with the performance of police to a central position as a measure of their effectiveness. For this reason that periodic "client satisfaction" surveys are a requirement of the Police Corporate Plan.

In the National Survey of Crime Victims for 1995, 59 per cent of victims who reported offences to the police were "satisfied" or "very satisfied" with the way in which the police handled their case. By and large, these victims found the police to be polite and pleasant in their dealings with them, and believed that they had been given adequate support.

This finding is not as encouraging as it might seem at first sight. Although a majority were satisfied, 12 per cent expressed themselves to be "dissatisfied" with the service they received and as many as seven per cent said that they were "very dissatisfied", with the remainder being non-committal. Moreover, levels of satisfaction with police were somewhat lower than in previous surveys: fewer victims were satisfied; more were non-committal; and fairly similar proportions were dissatisfied. Despite police initiatives aimed at enhancing "customer service" focus in front-line policing, almost 20 per cent of victims still said that they were either dissatisfied or very dissatisfied with the service provided. This suggests that the concerns of victims still do not receive the attention they deserve in police response to crime.

### Reasons for dissatisfaction

The most significant reasons for dissatisfaction revolved around disappointment over the outcome of the complaint. Over a third of the victims felt that the police did not do enough to investigate the offence, or were dissatisfied because the offender had not been caught or because their property had not been recovered.

However, a significant minority also cited reasons which focused on the presentational style of the police. In these

cases, it was not so much what the police did in response to the complaint which mattered, but the way in which they presented and communicated what they were doing. Only a few complained that the police were impolite, handled the investigation badly or failed to refer them to other agencies for help, but many more were dissatisfied because the police did not pay sufficient attention to them. Thus, for example, 32 per cent of those who were dissatisfied complained that the police seemed uninterested, and 17 per cent complained that they were not kept informed of progress. Even when victims' complaints focused upon investigative inadequacies, failure to keep them informed may also have been a contributing factor in their concerns. Absence of feedback, for example, may make victims feel that officers are doing little to advance their case or may fail to dispel unrealistic expectations about what the police can achieve.

All of this suggests that paying attention to what victims say, being seen to take them seriously, providing more feedback on what is being done or, if nothing much can be done, explaining why, would go some way towards improving victims' perceptions of police performance. Indeed, explanations as to why offenders are unlikely to be caught or why property is unlikely to be recovered might also go a long way towards offsetting victims' dissatisfaction with the perceived "failure" of the police in this area.

### Characteristics of those dissatisfied

As well as being linked with the actions and perceived attitudes of officers dealing with the reported offence, victims' satisfaction was also related to their social background. Maori and Pacific Island victims were markedly less satisfied and more dissatisfied with the response of the police than other ethnic groups. For example, only just over half (52 per cent) of Maori victims were satisfied compared with almost two thirds (63 per cent) of New Zealand European/European victims; on the other hand, more than a quarter (26 per cent) of Maori victims were dissatisfied compared with less than a fifth (17 per cent) of New Zealand European/European victims. Pacific Island victims were even less likely to be satisfied with the police. Only 26 per cent expressed themselves as either satisfied or very satisfied, with 29 per cent being either dissatisfied or very dissatisfied.

Younger victims were also less satisfied and more dissatisfied than older victims. For example, less than a half (49 per cent) of 15-24 year old victims were satisfied compared with more than three fifths of 25-39 year old victims (62 per cent) and 40-59 year old victims (61 per cent); on the other hand, a quarter of 15-24 year old victims were dissatisfied compared with less than a fifth of 25-39 year old victims (15 per cent) and a fifth of 40-59 year old victims. And victims who were students, involved in home duties and beneficiaries were also more dissatisfied. Indeed, a quarter of the victims who fell into this category said they were very dissatisfied with the police response.

It is unclear how these findings should be interpreted. Dissatisfaction among particular groups may, for example, be the result of pre-existing attitudes and expectations that such groups have of the police. On the other hand, it may be the product of police reactions to such groups when they report offences. Whatever the reason, it is noteworthy that the National Survey also found that young people and Maori and Pacific Island groups tended to be most at risk of victimisation and were most worried about it. It is a cause for concern that they are also the groups who are most dissatisfied with the police response when they report it.

## MEETING THE NEEDS OF VICTIMS

Part of the New Zealand Crime Prevention Strategy is to "address the concerns of victims and potential victims". This includes policies to aid victims' recovery from the effects of offending. The National Survey asked all respondents in the survey a range of questions about their awareness of victim support services. It then asked victims about their contact with support agencies after the offence, and the extent to which their needs were met by them.

### Knowledge of victim support services

When all respondents were asked about their knowledge of victim support services, almost two-fifths (39 per cent) mentioned no services at all, and almost a third (29 per cent) mentioned only one. A third of the sample was aware of Victim Support, and it was the most frequently identified provider of help for victims. Rape Crisis, Citizens Advice Bureaus and Women's Refuge Centres were the next most frequently mentioned organisations. There were clear differences between socio-demographic groups in knowledge about the availability of services for victims:

- those of lower socio-economic status were significantly less likely to be aware of services for victims than those of higher socio-economic status;
- men were significantly less likely than women to be aware of services for victims: almost half (49 per cent) of the men mentioned none, compared with less than a third of the women (31 per cent);
- both Pacific Island and Maori respondents were significantly less likely than New Zealand European/European respondents to be aware of services for victims: well over half (59 per cent) of Pacific Island respondents and more than two fifths (43 per cent) of Maori respondents mentioned none, compared with just over a third of the European respondents (35 per cent); and
- older respondents were significantly less likely than younger respondents to be aware of services for victims: for example, more than half of those aged 60 and over (55 per cent) mentioned none compared with less than two fifths (39 per cent) of 15-24 year olds.

### Level of assistance to victims

Where victims do report offences to the police, it is now recognised to be "good practice" that they should be provided with information about other agencies which may be able to help them deal with the aftermath of the offence. And sometimes, as with Victim Support, their name may be provided to that agency for further follow-up. In this sample, however, at least in relation to those offences where the information was available, only 12 per cent of those who had informed the police about the offence recalled being subsequently contacted by any organisation. The majority were contacted by Victim Support, and about half of these were the victims of burglary.

Victims were also asked whether or not they themselves had approached some organisation for help or advice, whether or not they had reported the offence to the police. Only seven per cent of victims had. A wide range of different organisations were contacted – for example, Victim Support, supervisors, employers, lawyers, teachers, Citizens Advice Bureaus, social workers, MPs and the media, but the proportion of victims contacting any one agency was very low.

A greater proportion of victims of violent offences than either victims of household offences or victims of individual property offences contacted organisations for help or advice.

### Need for targeting

The fact that so few victims were contacted by or contacted victim support services does not necessarily mean that victims are not receiving the assistance which they require. A large number of offences are fairly minor, causing no significant or lasting physical or psychological injury, and resulting in little or no financial loss. In these cases, most victims cope with the effects of the offence perfectly well without any outside intervention. Moreover, even when victims do require outside assistance, they often receive this from neighbours, friends or relatives; in the National Survey just under one-quarter (23 per cent) had received help of this sort. A critical question, therefore, is whether those who actually need assistance are getting it.

This is a complex question and not one that is easy to answer. Overseas researchers certainly urge caution over relying simply on victims' assessment of their needs (see, for example, Shapland, J et al (1985) *Victims in the Criminal Justice System*). Moreover, those very much affected by their experience of victimisation do not necessarily have correspondingly high levels of need for support or help from official or external agencies; and some victims who objectively have not experienced serious offences may be much affected by them and need help and support.

It has to be remembered too that less than half (41 per cent) of the offences disclosed in this survey had been reported to the police. Moreover, the main reason for not reporting offences, even offences such as robbery and assault which are generally assumed to be "serious", was that they were viewed by the victim as "too trivial". This might indicate that victims who did not report their offence to the police did not have unmet needs. However, even when an offence was reported, it cannot be assumed from this that it indicated a need for assistance, except in the broadest of senses, since reporting is often linked instead to a sense of obligation or to the need to report to enable insurance claims to be made.

Notwithstanding these difficulties of interpretation, it seems clear from the findings of the National Survey that better targeting of victim support services is required. There are three reasons for this. First, although those affected by the crime "very much" or "quite a lot" were slightly more likely to be contacted by a victim support organisation than those affected "just a little", almost a third of those affected "very much" or "quite a lot" were not contacted, while one-half of those affected "just a little" were. To the extent that the effects of the offence are related to the degree of need, this suggests relatively poor targeting. Secondly, victims were specifically asked whether or not there was any assistance or advice that they would have liked to get after the incident but which they did not receive. Just under one in ten (9 per cent) wanted additional assistance or advice following the incident. Finally, in contrast, of those who were contacted by Victim Support (the organisation most commonly offering assistance), more than a third (38 per cent) did not accept or want help, a finding which applied across all offence categories.

Taken together, these findings suggest that some victims who do not wish help or who are little affected by the crime are being offered assistance; other victims who do want help or are affected by the crime are not being offered it.

Of course, the cost of offering services to all victims would be both high and unnecessary. The resources of victim support agencies are necessarily scarce, and the challenge is to target those resources to the areas of most need. This requires close cooperation between the police and victim support services, combined with clear protocols for the identification of those most in need. This is no easy task: any system will inevitably be imperfect, resulting in at least some victims in need falling through the cracks in the support system. However, the National Survey suggests that we should be much more effective in this area than we currently are. The recent establishment of agreed protocols between the police and the national organisation of Victim Support may go some way towards achieving this.

Currently most victim support services in New Zealand (with the exception of Rape Crisis) aim to deal with the immediate effects of crime. Overseas research, however, indicates that for some victims at least the effects of crime are long-lasting (see Newburn, T (1993) *The Long Term Needs of Victims: A Review of the Literature*). The National Survey was not designed to examine this, but service provision should perhaps not only be better targeted but should also be more responsive to these longer term needs. ❑

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*continued from p 381*

Replacement bodies are proposed. In the brave new world a New Zealand Law Council and related or satellite organisations such as the Law Foundation and the Law Commission will take up their role. The staff on local Law Societies who have built up considerable experience and expertise in areas of public benefit in innumerable ways must either change employer or job specification. What a waste!

Even more remarkable is the removal of the setting and policing of professional standards from the Law Societies. Their members are supposed to know, live, breath and radiate those standards. No doubt some other regulatory quango will make out for itself a case for efficiency without even a fleeting thought of the benefits of the seamless integration of a regulatory and disciplinary function within an organisation that is itself advancing professional standards and dealing with the real-life problems of the everyday practitioner.

Finally, what is the likely development of this new self-centred organisation of lawyers? If membership is voluntary, practitioners whose standards fall below the norm – however that is defined – will simply not join. Its influence will be crippled. What about its leadership of the profession? It would be surprising indeed if the new look Law Society attracts to its governing body and presidency the calibre of past incumbents. Many of those have been motivated to put time into Law Society affairs precisely for the public benefit issue which has gone.

Let us have change by all means. However, hopefully our profession has the wisdom to realise that a professional body whose sole objective is to promote its members' interests will be quickly treated as nothing more nor less than a lobby group. That is not what one would call progress. ❑

CRIMINAL PRACTICE

edited by
Catherine Cull

# CASE MANAGEMENT

Has the pursuit of efficiency in criminal justice compromised fundamental principles of the adversarial system?

With this question in mind, the writer reviewed a variety of material to try to ascertain whether the rights of the Crown and the accused had been whittled away by the quest for speedy trials. Every trial jurisdiction operates a different administration system however it would appear that the overall aim is to facilitate case management – to ensure that all evidential arguments are dealt with pre-trial; to ensure no adjournments; to ensure only the merit-worthy cases go to trial. All these aims are admirable, but is it the task of a Judge to enforce such a system, is it appropriate for a Judge to enter into the administration arena and take over a managerial role rather than a purely judicial role?

The dilemma is encapsulated by Hardie Boys J in *Martin v Tauranga District Court* [1995] 2 NZLR 419 at p 430 where he states –

> As with other rights relevant to the investigative and trial processes of the criminal law, there is tension between the individual right and the interest of the community in the detection and conviction of offenders. An overenthusiastic assertion of the former to the detriment of the latter can only lead to a destructive diminution of community respect for the law, its institutions, and the administration of justice. The staying or withdrawal of over 47,000 charges in Ontario alone as a result of the decision of the Supreme Court of Canada is *R v Askov* (1990) 59 CCC (3d) 449 may be thought a cautionary tale.

Section 25 New Zealand Bill of Rights Act 1990 sets out the minimum standards of criminal procedure. In particular, s 25(1) and (b) state –

> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:
>
> (a) The right to a fair and public hearing by an independent and impartial Court.
>
> (b) The right to be tried without undue delay ... .

The section was considered in *Martin* at 420, where the President of the Court of Appeal stated –

> Paragraph (a), so far as it relates to the fairness of the hearing, is primarily concerned with the manner in which the hearing is conducted. Paragraph (b) is primarily concerned with the lapse of time between the charge (which in the context of a Bill of Rights will generally refer to the first official accusation) and the trial (which no doubt extends to appeal processes, although that question does not arise in this case).

In *Martin*, the Court of Appeal particularly looked at the issue of systemic delay and s 25(b). The Court approved the judgment of Sopinka J in *Morin* (1992) 71 CCC (3d) which states –

> The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in *[R v] Smith* [1989] 52 CCC (3d) 97], "(i)t is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" (p 105). While the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analysing how long is too long may be listed as follows:
>
> 1. the length of the delay;
> 2. waiver of time periods;
> 3. the reasons for the delay, including –
>    (a) inherent time requirements of the case;
>    (b) actions of the accused;
>    (c) actions of the Crown;
>    (d) limits on institutional resources; and
>    (e) other reasons for delay; and
> 4. prejudice to the accused.

The Court held that the 17 month delay from charge to trial date resulting from the unjustified action of the prosecutor amounted to "undue delay" under s 25(b). The Court also noted that it would need further data before attempting to set guidelines on what time periods amounted to "undue delay". Both Richardson and Hardie Boys JJ outlined areas to be investigated.

Richardson J at 426 states –

> it is important to note what, if any, performance goals have been set, the experience in meeting the goals and the extent to which they have been met. Any resource constraints and other impediments and, in the absence of performance targets, any identifiable community expectations and how long cases actually take to come to trial.

Hardie Boys J at 430 reminds us –

> The Bill of Rights Act was not enacted in a vacuum, but in the social and economic climate of 1990. Section 25(b) was not designed to secure any mass jail delivery, but rather to insist that all those respon-

sible for the administration of criminal justice should thenceforth ensure that unreasonable (an apt synonym for "undue") delay does not occur. Delay can be caused by many factors, alone or in combination: inadequate Court facilities, understaffing or inefficiency of Court administration, insufficiency of Judges, deficiencies in the prosecution process. Observance of the s 25(b) right is the obligation of those responsible for each of these areas. The reasonableness of their actions is not however to be judged solely by reference to the resources they have at their disposal. It is the obligation of the state to provide the resources that are needed. The fact that delay is systemic does not justify it.

> I do not think this Court is yet in a position to give guidelines as to when delay may become undue or even as to when inquiry may be warranted and explanation called for. As a starting point one would need to know the situation nationwide in 1990 when the Bill of Rights was enacted. One would need to know also, and again on a nationwide basis, what trends there have been, what steps have been taken and with what results it would be wrong for the Court to approach the matter theoretically and, in the face of genuine and reasonable effort to bring about improvement, to lay down standards or even guidelines that are incapable of being met. Until the information is available to enable the Court to adopt a general across the board approach, I consider that each case must be dealt with on its own merits.

The matter of procedural delays in criminal trials was again discussed in *R v B; R v Parkes* (1995) 13 CRNZ 377. The Court of Appeal held that the Court should not attempt to lay down a framework of time guidelines for the hearing of criminal cases. Henry J noted at 380 –

> The acceptance by the Solicitor-General that the aim should be to dispose of trials within 12 months of arrest is commendable. The practice note issued by the Chief Justice and the Chief District Court Judge and presently being implemented on a trial basis under which certain time frames are stipulated for the disposal of criminal trials is also a desirable step to ensure there is due expedition. But in our view it would be wrong to elevate either of those matters to the status of establishing the foundation for an argument that a failure to meet the particular aim is indicative of a breach of s 25(b). Whether or not a breach has occurred must always remain an open question to be determined by the circumstances of the case.

The schemes implemented by the varying Court administrations have involved the introduction of pre-trial callovers; the insistence of pre-trial applications being made and heard before trial (despite ss 344A and 347 Crimes Act which enable such applications to be made at any time); standby or provisional trials; the clamp-down on adjournment applications; Judges at callovers being more pro-active and often descending into the merits of the case and case scheduling; Practice Notes relating to sexual abuse trials and their scheduling.

The legislature has also introduced ss 345A, B, C, D and 346 Crimes Act 1961, which set out new time limits for the filing of indictments by the Crown.

From the writer's perusal of the reasoning behind such changes it would seem that the New Zealand rationale follows Britain's. Leng, in *"Losing Sight of the Defendant. The Government's Proposals on Pretrial Disclosure"* [1995] Crim LR 704, 706, discusses the British Government's proposals for defence disclosure:

> The Government bases its case for change on a powerful characterisation of the factors frustrating the proper operation of the criminal process. ... experienced criminals tailoring last-minute ambush defences to the prosecution case; unscrupulous lawyers (ab)using every possible procedural device to gain unmerited acquittals; and Court created procedures which involve massive wastage of time and resources for the police but which serve no useful purpose of justice. Whether the Government's case for change can be accepted must depend to a large extent upon whether this vivid picture accurately depicts or merely caricatures the problems currently facing the criminal justice system.

Combining this approach together with that of the Court of Appeal in *Martin* and *R v B; R v Parkes* it is suggested that it is imperative that information be obtained immediately about the following matters before the role of the Judiciary becomes even more involved in the management of criminal trials. In the interests of all parties in the criminal process it is necessary to be clear of the aim of such new procedures and whether in fact such procedures can achieve those aims.

The areas to be analysed are –

- The number of trials delayed by adjournments either by the Crown or defence and the reasons given for those applications.
- The costs incurred for a Court to hear a pre-trial application before trial as compared to hearing the matter during the trial and keeping the jury panel waiting.
- The average number of pre-trial conferences each trial matter has and the cost of these to the country.
- The number of provisional/standby trials which actually get reached in a trial week, compared to the additional time delay caused by the trial being provisional and then being further adjourned to another date.
- What is the justice system trying to achieve with such procedures, what mischief is trying to be met?

It is not clear what these statistics would show but I suggest that to date the changes are no less expensive or no more efficient than the system used before. The expansion of the Judge's role to include administration has and will lead to more work down the track in appeal Courts.

My reasoning has been shown to be correct in cases relating to trial adjournment applications.

In *R v West* [1960] NZLR 555 the Court of Appeal considered an appeal against a refusal to grant an adjournment before the implementation of case flow management procedures and s 25. The headnote reads –

> It is not encumbent on the Court to grant an adjournment in every case where a criminal trial comes on earlier than has been anticipated and senior counsel, or any counsel who has been briefed, is not present or available and a junior or someone on his behalf seeks such an adjournment with an intimation that, if it is refused, there will be a withdrawal by counsel leaving the accused altogether unrepresented. Every case must depend on its own facts, and the responsibility of counsel to be present when his case is reached is a grave one.
>
> Where, however, the wholly unavoidable absence of counsel might leave the accused person without

representation in any real sense of the word it would be proper to grant an adjournment.

In that case the trial Judge had clearly emphasised the matter of convenience to the jury whereas the Court of Appeal confirmed that the important matter in a criminal trial is not the convenience of the jury or counsel or anybody else but justice to the accused.

In *Superliquorman Hotels (Napier) Ltd v Napier City Council* [1984] 1 NZLR 58 the Court of Appeal again considered an appeal against the refusal of an adjournment application. the President at p 61 states –

> Whether or not a Judge has wrongly exercised his discretion to refuse an adjournment is always something to be considered by reference to the facts of the actual case itself: see for example *R v West* [1960] NZLR 555. But in the case under appeal there was no particular need for the prosecutions to have been pushed forward; on the face of it the medical certificate provided an understandable reason for the absence of this witness who after all was not himself a party to the proceedings; and it seems unlikely that any inconvenience let alone prejudice would have been occasioned the informant by granting the adjournment. Nor is there a stated difficulty about arranging for an adjourned hearing at some reasonably close period ahead. Certainly those involved in litigation before the busy District Courts will not be allowed to interrupt the even flow of work for casual or inconsequential reasons to suit themselves, but that kind of consideration must always be balanced against the elementary principle that a person charged with an offence is to be given every fair opportunity of presenting his case. After all that is the basic purpose of s 354 of the Crimes Act 1961 which provides that "every person accused of any crime may make his full defence thereto by himself or by counsel". And if any New Zealand authority were required to support that concept it is to be found at p 562 of the *West* case.

In *R v Kay* (1992) 9 CRNZ 464 the High Court considered an adjournment application due to a bereavement in the family of counsel for the accused.

Thomas J at p 466 states –

> there are two reasons why I do not consider that the considerations relevant to her position can prevail in this case. The first is that the primary objective of ensuring that an accused has a fair trial must predominate. This does not mean that an accused can "call the tune" as it were. If he or she, or their counsel or solicitor, are responsible for the claimed prejudice to the accused, the accused can properly be called upon to proceed. But if the prejudice is real, and has arisen notwithstanding the reasonable efforts of the accused and his or her counsel and solicitor to avoid that prejudice and comply with the procedure laid down for the disposition of criminal cases, an adjournment may be properly contemplated. Indeed, depending on the circumstances, it may be essential to grant the adjournment if the accused is to obtain the fair hearing to which he or she is entitled in law.

He goes on further to say at p 469 –

> The importance of accepting and proceeding with a trial on the basis of the rulings and decisions made by the Judge in charge of the criminal list is patent. The smooth and effective operation of the criminal Courts is dependent on the callover system and the ability of the Judge in charge of the list to make definitive rulings which will be binding at the ensuing trial. This is to everyone's advantage; the accused, their counsel, and the Courts.
>
> In the special circumstances of this case, however, the desirability of upholding the integrity of the established system and procedure must give way to the requirements of justice.

From these cases it would appear that additional Court time, lawyer time and Judge time has been required because the original Courts have tried to enforce "case flow" and have been overturned. In criminal trials particularly it is necessary for both sides to be able to present its full case – fast-tracking matters for convenience of the Court does not necessarily meet that aim.

The other area of concern is the pro-active stance taken by Judges both at pre-trial callovers and at trial. No one can argue that there needs to be a "firm hand" kept on counsel to ensure the effective flow of cases but it is suggested that it may not be in the interests of justice in jury trials for intimations to be made from the Bench or in Chambers by presiding Judges as to interpretations of evidence, credibility of witnesses and appropriateness of charges. This was shown in *R v Stewart* (1991) 7 CRNZ 489 where the Court considered an appeal where, owing to the pressure of time on the Court brought about by an under-estimation by counsel of the time the trial was to take, the trial Judge had refused to allow defence counsel to call evidence at the last minute from a child psychiatrist.

Casey J at 491 states –

> However, any failure by counsel to act with the consideration due to the Court cannot deprive his client of a remedy if there may have been a miscarriage of justice as a result of the Judge's consequent refusal to hear the witness.

Bias and pre-determination of a matter have long been appeal points, particularly as they relate to judicial intervention at the trial. Given s 25 and the development of the role of the Judge as administrator before trial it seems that there will be more opportunities for appeals on these grounds; accordingly no gains will be achieved and Court time will still not be efficiently utilised.

An example can be seen in *R v Butcher* (CA 59/97, 30 July 1997), in which the appellant appealed her conviction successfully. Her sentence had included an order for costs of $3,000. Blanchard J states at 8:

> during the trial His Honour had indicated his intention of imposing costs if Miss Butcher's defence were to be unsuccessful. He was evidently of the opinion that she was wasting the community's resources by defending the charges before a jury. Obviously that now proves not to have been so. But, even if it were, the Judge was quite wrong in principle in seeking in this way to penalise a defendant for exercising her basic right to trial by jury. This was not a situation in which an accused's antics had unnecessarily prolonged a trial; and even in such a case a Judge must make every effort to avoid the appearance of bringing inappropriate pressure to bear upon an accused during the trial. The costs order is set aside.

Although this area of law is relatively new some assistance can be gained from the following cases and further developed in the future –

*E H Cochrane Ltd v MOT* (1987) 3 CRNZ 38 (CA). The President of the Court states at 41 –

> It is recognised, too, that even under the adversary system the Judge is entitled, provided that he avoids descending into the arena, to engage in what was called by Jeffries J in *McClean v Ministry of Transport* Auckland M722/83, 16 September 1983, "a lively and active participation in the trial process". Of course, the more lively his activity, the more wary the Judge has to be of the pitfall. We would put it that he should avoid any appearance of taking on an adversary role himself or of espousing a cause, but that he can rightly be constructive, particularly in clarifying issues or eliminating irrelevancies.
>
> A further point that is reasonably clear is that, as to the appearance of bias, it may be important to draw a distinction between a purely judicial officer and an officer or body having an administrative or policy role as well. This point is particularly brought out in the judgments of Woolf J in the *Amber Valley* and *Frankland* cases.

In *R v Loumoli* (1995) 13 CRNZ 7 the Court of Appeal had to determine whether the questioning of the trial Judge demonstrated that the questions either tended to enhance the Crown case or undermine the defence. At p 25, the Chief Justice states –

> a critical aspect is the quality of the interventions as they relate first to the attitude of the Judge as it might be observed by the jury, and secondly the effect the Judge's interruptions had on the orderly and lucid development of the case for the defence.

Later in *R v Fotu* (1995) 13 CRNZ 177 the question of excessive judicial intervention was again looked at. The Court held that the trial Judge "may have been playing a managerial role in the trial", a role which went beyond what was normally appropriate (p 183). At p 191 a strong directive was given –

> If the approach to the conduct of a trial followed by the trial Judge in these cases is intended to suggest that there should be some shift away from the NZ tradition of a fair trial, in the direction of more active semi-prosecutorial participation by the Judge, it is a suggestion that this Court is unable to find acceptable.

In conclusion is it necessary for those involved in the criminal trial to ascertain from all sides what is trying to be achieved and is it to be done by Judges? Should Judges remain out of the administrative role and leave managing cases and so on to others – thus protecting them from appeals and reviews?

# "COMPLAINANT DELAY" AGAIN

## "COMPLAINANT DELAY"

Following publication in the NZLJ August issue of the article "Sexual Abuse Prosecutions – Complainant Delay", the Court of Appeal delivered a ruling which discussed in depth the issues raised in that article. In *T v Attorney-General* (CA 175/97, 27 August 97) Richardson P, Henry and Elias JJ, considered an appeal from a judgment of Panckhurst J which quashed orders made in the District Court which stayed charges against the appellant. The charges faced were based on allegations of sexual abuse which occurred 18-20 years ago. The complainant was required to give evidence on a voir dire at a pre-trial application detailing her reasons for her delay in complaining to the police. Nothing by way of evidence was advanced by the accused as illustrative of specific prejudice, eg evidence lost, witnesses unavailable. The District Court Judge stayed the charges noting –

(i) the only defence available to the accused due to the delay was a general denial;

(ii) the vagueness of the dates of the alleged offences and the discrepancies in the dates between the evidence of the complainant and her mother;

(iii) the complainant had had a number of opportunities to disclose the offending;

(iv) intervening changes in the law.

Panckhurst J "recognised that the granting of a stay is a grave step which should only be taken 'where prejudice is made out or the period of the delay is so long and has not reasonably been justified as to the conclusion that it would be unfair to require the accused to stand his trial'. ... the question to be asked was whether the delay rendered the trial unfair." (at 5.)

The decision of the District Court was overturned by Panckhurst J because "the Judge had failed to address the right question which was whether, despite the delay, the accused could in the particular circumstances still receive a fair trial". Panckhurst J held that the District Court Judge had not focused "upon whether a fair trial was possible, but rather upon the veracity of the allegations" (8).

The judgment of Elias J upholds that of Panckhurst J. The passage of particular interest is at 9 –

> While absence of excuse for delay and the strength of the Crown case may in some circumstances be relevant to an assessment of whether the accused has been prejudiced by delay, such cases are likely to be rare. The sufficiency of reasons for a delay in complaint are not to be elevated too highly. Unless relevant to prejudice suffered by the accused as a result of the delay, deficiency in excuse will not amount to abuse of process in itself although it may in some cases be critical to the jury's assessment of a complainant's credibility. That is not a proper matter for the Judge, except in truly exceptional circumstances in exercise of the s 347 jurisdiction. In most cases the course here adopted of conducting voir dire on the reasons for delay will not be appropriate. Indeed, the dangers of such an approach are illustrated by the findings made by the District Court Judge which go to the merits of the complaint, rather than the question of delay.

It is therefore essential for the accused to tender evidence to identify specific prejudice to a fair trial if there is an application for a stay of proceedings. If this is not done or is successfully undermined it seems unnecessary to have the complainant "justify" her delay and certainly the complainant should not have to have her veracity judged by a Judge, pre-trial. The onus is on the accused to show prejudice, not for the complainant to justify delay. ❑

TRANSACTIONS

# RECENT CASES

*edited by*
*Brian Keene*

## FAMILY PROTECTION ACT AND WILL-MAKING CONTRACTS

In *MacLennan v Chisholm* HC Wellington, AP 110/96, Gendall J considered how the Family Protection Act 1955 applies to a Will intended to satisfy an inter vivos contractual obligation of the deceased when the Will does not correspond with the contract? What are the competing rights of adult, self-sufficient children?

The testator, Gubbins, retained the appellant as his housekeeper for a period of seven and a half years prior to his death. She was paid $375 per week before tax with both parties recognising that she should be paid further for weekend work. The evidence accepted on appeal was that the deceased agreed to pay the appellant in his Will at the rate of $5,000 per year for each completed year of service.

The deceased, in what was the first of a series of Wills, generously left the appellant $10,000 for each complete year, thus exceeding his promise to her. Over time the Wills were revised. In the version current on his death the testator left the appellant $150,000 plus free use of his home for three months after his death.

The executrix was the deceased's only child. She was 62, had two adult children, and was financially self-sufficient. She applied under the FPA for a better provision for herself from the estate pleading lapse of "moral duty" by the testator. Instead of the $150,000, the Family Court at first instance reduced the appellant's entitlement to $40,000 so that the daughter received the balance of the residual estate. At issue on the appeal were the competing principles of sanctity of contract, the upholding of a deceased's Will and the circumstances in which an adult self-sufficient child can support a claim under the FPA.

### Sanctity of contract

At first instance the case was decided simply upon testamentary and FPA issues. Gendall J, however, referred to authorities including *Breuer v Wright* [1982] 2 NZLR 77, and *Schaefer v Schuhmann* [1972] AC 572 (PC). If there was a contract then that was an obligation of the deceased to be settled prior to the distribution of the balance of the estate:

> the rights of the claimant do not arise under the Will but they arise contractually and exist independent of the Will. (p 7)

The corollary of this is that the contract must be proven and performed in its terms. Here the Will provided a bounty to the appellant in excess of her contract, which could not be recovered under contract law.

### Giving effect to the will

Once the contractual obligation was discharged by the payment of $5,000 for each year or part thereof, how was the Court to approach the Will? The appellant argued that the Will should not be set aside and pleaded a testamentary promise in terms of the Law Reform (Testamentary Promises) Act 1949. Gendall J did not exclude the possibility that there could be a testamentary promise arising from circumstances which may already be in part covered by the inter vivos contract. He did this together with weighing up the moral duty provisions of the Family Protection Act.

### Family Protection Act

Citing *Re Leonard* [1985] 2 NZLR 88, Gendall J held it was proper to make an award for an only daughter even although she was in a financially sound position. He pointed out the difficulty that appellate Courts have in interfering with a discretion exercised by the lower Court. He, however, indicated no different view on the merits and agreed that, notwithstanding the Will, it was appropriate to award the daughter the whole of the residue of the estate once the contractual claim had been met.

The Family Court's decision had given the appellant $40,000 based upon the provisions of the Will and the inter-related effects of the Family Protection Act and the Law Reform (Testamentary Promises) Act. Gendall J achieved exactly the same result by accepting the contractual claim at $40,000 and then disposing of the residue entirely in favour of the daughter. No change in financial result occurred even though the principle upholding the award on appeal was effectively that the $40,000 should be treated as a creditor of the estate rather than a part of the estate proper.

But the first instance judgment resolved that the distributable estate should be distributed approximately 40/60 between the appellant and the daughter. Now the distributable estate (excluding the creditor claim) fell 100 per cent to the daughter. Although justified as a reluctance to interfere with a discretion, the appellate Court in fact substantially changed the exercise of its discretion affecting the distributable estate.

Of course the law in this area is under review. The Law Commission in its *Report No 39* proposes that adult self-supporting children should no longer have any statutory claims (except in the very rare cases of a support or maintenance claim). Under that regime the testator's Will in this case would have been upheld and the testator's wishes honoured.

There would also be an interesting question of whether the relationship between the testator and his housekeeper would have fallen within the proposed new legislative definition of a "partnership" being a relationship "in the nature of marriage". The width

and vagueness of that term will become a challenge – and also, regrettably, an opportunity – for the Courts.

If you look after someone seven days a week, live in the house and rely upon their Will making beneficence to make up the difference, is that a relationship "in the nature of a marriage"? Lack of cohabitation may be a factor, but only that. If there is a relationship of some sharing and mutual inter-dependence which exists over a reasonable duration, Courts may well be disposed to hold it to be in the nature of marriage. If the relationship passes the test, then one-half of the assets are deemed to belong to the partner. This illustration serves merely to show that the present law, plagued with wide judicial discretions, may not become any easier or more transparently fair when replaced by legislation with definitions so wide that they themselves become foundations for new discretions arising out of case-by-case "interpretations".

## INDEFEASIBILITY OF TITLE

A full Court of the Court of Appeal considered in *CN & NA Davies Ltd v Laughton* (CA 264/96, 21 July 1997) whether the respondent mortgagees could set up an in personam claim against the appellant, the registered proprietor of a mortgage, on the grounds that the mortgage security was, in truth, a security for a guarantee the terms of which the principal debtor had altered without the guarantor's knowledge or authority.

Thomas J delivered the judgment of the Court on issue which he described, perhaps optimistically, as "simple enough". The Laughtons signed a form of mortgage over their house property to assist their son to acquire a business. The mortgage showed a principal sum of $75,000 when executed by the Laughtons. Following execution there were further discussions direct between the lender and the son. There was a change in the wording of the mortgage written up by the son's solicitors, but never confirmed by the Laughtons, who remained unaware of it. Shortly thereafter the transaction failed and the lender sought to realise the security from the Laughtons. In the context of injunction proceedings the test was whether there was a "serious issue to be tried". The Court had to decide whether the appellants' title as mortgagee was indefeasible with the result that the Laughtons could not pursue their in personam claim.

At first instance Blanchard J was confronted with the argument that the effect of the registration of the mortgage was to confer an indefeasible title on Davies as mortgagee by virtue of ss 41, 62 and 63 Property Law Act. It was not contended that the fraud exception in s 63 had any application. Blanchard J resisted this argument by pointing out that, were the Laughton's case upheld by the evidence, the obligation to pay a sum under the mortgage was in the nature of a collateral obligation of guarantee. If, he reasoned, under the law of guarantees that obligation no longer existed, nothing remained to be indefeasibly secured by the mortgage. In that event the security created by the mortgage may be extant and, if so, it is indefeasible but, if there is no underlying obligation, then the security cannot operate. On this basis he argued that there remained a serious question to be tried and upheld the continuation of the injunction.

The Court of Appeal agreed, emphasising the important qualification that in personam claims relate to the contractual matters between the parties found in law or in equity.

> The indefeasibility provisions of the statute are designed to protect a transferee from defects in the title of the transferor, not to free him or her from an interest with which they have burdened their title. (at 8)

The Court held:

> the concept of indefeasibility does not interfere with "the ability of the Court, exercising its jurisdiction in personam to insist upon proper conduct in accordance with the conscience which all men obey ...". Rights in personam may be enforced against the registered proprietor notwithstanding the doctrine of indefeasibility of title.

Based upon this reasoning the Court of Appeal upheld Blanchard J's decision that there was a serious issue to be tried and dismissed the appeal.

Although the issues were said to be "simple enough" they are, in reality, far from being so. The distinction between the Court inquiring whether there is any underlying legally binding obligation due under a mortgage and a similar inquiry relating to the acquisition of good title under a void proclamation (see *Boyd v Mayor of Wellington* [1924] NZLR 1174) is not easy to grasp. In both cases the underlying "personal" contractual obligation seems to go to the whole root of title of the registered proprietor. Yet in one case (void proclamation) indefeasibility is a shield against a claim and in the other, it is not. The test is probably more safely put on the basis of the concurrence of the registered proprietor with no third party interest affected. The facts in each case need to be carefully reviewed against the legislation. However, "simple" it is not.

## RECEIVERSHIPS: INDUSTRIAL DISMISSALS

In *Weddell NZ Ltd (In Rec and Liq) v The Meat Workers' Union* CA 6/97, 10 September 1997, Henry J, on behalf of the full Court, reviewed the application of the Receiverships Act 1993 to collective employment agreements. The issue is new and arises out of a provision of the Act as yet unconsidered by the Courts.

Section 32(1)(b) makes a receiver personally liable for the payment of wages and salaries under a contract of employment during a receivership: "if notice of the termination of the contract is not lawfully given within fourteen days after the date of the appointment".

Three days after the appointment, the receivers sent letters to all relevant employees terminating their contract of employment, either immediately or within a few days. However, cl 36 of the collective employment contract provided that, in the case of redundancy, one month's notice of termination or payment in lieu was required.

Counsel for the union argued that, as the notice was in breach of the employment contract conditions, it was not one "lawfully given" under s 32(1)(b). In consequence the receivers became personally liable for any wages due to the appellants. This issue has potential application in all receiverships and, therefore, the construction of the word "lawfully" is of considerable public importance.

The Court noted that, prior to the coming into force of the Receiverships Act, a receiver became liable only if he adopted the contract of a worker employed prior to his appointment. Unfair consequences may arise when the worker believed that such "adoption" had taken place but the receiver's commitment or actions were insufficient to constitute "adoption" at law. Section 32(1)(b) was enacted to alleviate that hardship and give increased protection to employees.

At first instance Fisher J held that "lawfully" did not require the notice of termination be in accordance with the terms and conditions of the pre-receivership contract. This judgment was upheld by the Court of Appeal. To hold otherwise would be to profoundly change the current law adversely to secured creditors and open up worker and individual bargaining specifically designed to gain a preference over those creditors. For example, a managing director may provide in his employment contract that no cancellation is possible except on, say, twelve month's notice. Under the interpretation contended for by the Unions, no notice inconsistent with that contract could be given by the receivers, who would then be personally liable for the managing director's remuneration over the period.

The Court of Appeal held that "lawfully" means that the termination had to be given in accordance with the provisions of the Receiverships Act – but not the contract. Thus it must be given in proper form, properly transmitted and pursuant to appropriate powers vested in the receiver under the debenture document. Once those "formalities" had been attended to, then cancellation was effective at law.

The decision is in accordance with past practice and the general views of the commercial community concerning priorities arising in receivership situations. To construe the word "lawfully" as being not contrary to any contract would result in a significant economic shift in favour of employees, which is unlikely to have been the intention of the legislation.

In passing the Court of Appeal referred to a series of decisions in the Labour Court which raised the possibility that a receiver who terminates a contract of employment other than in accordance with its terms may attract the penalty provisions of s 52(2) of the Employment Contracts Act 1991 for aiding and abetting a breach of an employment contract. However, this line of decisions was not argued and, if accepted – and the differences between the Court of Appeal and the Employment Court are now legendary – limiting the word "lawfully" to breach of the Receiverships Act (and not any other enactment) would still achieve the same outcome.

This is an area when there are known principles in practice which have grown up over many years. Any change in the law should be clear and unequivocal and the Court of Appeal's decision should be welcomed as reaffirming that past certainty.

## ROMALPA CLAUSES:

In *Lab-Plas (NZ) Ltd (In Rec and Liq) v ICI NZ Ltd*, Salmon J, HC Auckland, M 1467/96 16 July 1997, the High Court has revisited the fraught area of reservation of title clauses and the consequence of product covered by them being incorporated into new product with separate identity.

ICI supplied Lab-Plas with translucent polyester terephthalate granules. Lab-Plas processed these granules into transparent plastic products (mostly bottles) by technologically controlled chemical reactions. ICI was unpaid as to some $400,000 worth of product processed into bottles at the date of liquidation of Lab-Plas.

ICI's first claim was for a declaration that it had valid title in those quantities of raw materials supplied to Lab-Plas which that company had manufactured into finished goods and were being held in stock. ICI argued on the authority of the leading case of *Pongakawa Saw Mill Ltd v NZ Forest Products Ltd* [1992] 3 NZLR 304, that further the manufacturing processes can add value to them without them being inconsistent with the seller's continued ownership of the product. In the *Pongakawa* case, logs were changed to sawn timber and yet the reservation of title clause continued to apply. On the present facts, what were formerly granules became plastic bottles.

Salmon J questioned whether applying the proper broad principles of the construction of the contract it could be said that these bottles were "the goods" as referred to in the conditions of sale. He decided on a proper interpretation they were not. He was reinforced in that view by the technical evidence concerning the nature of the processes and the extent of change between the granules and the clear plastic bottle material. In the result the reservation of title did not apply to the "plastic" in its new form and the receiver/liquidator was entitled to dispose of the finished product without recognising ICI's claim.

ICI's second claim was based upon cl 10.2 of its supply contract which provided:

> If any of the goods are incorporated in or used as material for other products so as to lose their separate identify, then ownership of that proportion of the new products equal in value to the total sum owing to ICI shall on manufacture immediately vest in ICI absolutely and not by way of charge until ICI receives payment in full.

ICI argued that it was entitled to receive from the proceeds of the sale of goods manufactured from its granules in priority to other debts in the receivership the amount it was owed. The receivers and liquidators on the other hand argued that in substance this clause created a charge over the new product which, because it had not been registered, was void against the liquidator and any creditor of Lab-Plas.

Salmon J acknowledged the obiter statements of Oliver and Goff LJJ in *Clough Mill Ltd v Martin* [1984] 3 All ER 982 at 993 and 989:

> I am not sure that I see any reason in principle why the legal title in a newly manufactured article composed of materials belonging to A and B should not lie where A and B agree it should lie.

Salmon J expressed himself as sympathetic in principle with this view but found himself concerned at the result in practice. He held that cl 10.2 seeks to achieve the transfer of a certain proportion of new product from Lab-Plas to ICI based upon the value of the total sum owing to it. At any point the proportion of product will fluctuate dependent upon the amount outstanding. There is neither an actual nor a commercially practical way of appropriating product against the contract. Without that appropriation an acquisition of an undivided interest in the larger stock will not pass property in individual items (see *In Re London Wine Company (Shippers) Ltd* [1986] PCC 121). This view of the law is consistent with ss 19 and 21 of the Sale of Goods Act 1908 which requires appropriation to a contract before property passes in unascertained goods. The result was a finding that all ICI may have acquired was an interest by way of security for the amount owing to it which, not having been registered as required by s 103 of the Companies Act 1955 is void against the liquidator.

The judgment illustrates that the ingenuity of lawyers in drafting Romalpa clauses will be rewarded to the extent that the substance of the transactions are reflected in the wording of the clause. When the contractual provisions are out of keeping with the reality of the parties' contract then they will not be held to be effective. Applying the approach in this case it seems difficult to imagine how a form of

clause could be better drafted to protect the supplier's legal position.

The Court's attitude to these Romalpa clauses has consistently varied somewhere between conservative and negative. There are no doubt strong economic arguments that the secured creditor's position must be protected. However if supplying creditors become practically unable to secure protection under their contracts then their availability as a source of credit trading for commercial enterprises may wither. This contest between secured lenders and suppliers seeking greater legal protection has now been fought in the Courts for some 20 years. The final shot has most certainly not been fired by suppliers who with the help of sound commercial drafting have already made significant inroads into secured creditors' comfort zones.

## ARBITRATION IS FOREVER

*Armstrong Rigging Co Ltd v Parapine Timber NZ Ltd* CA 296/96, 21 August 1997. The last few decades have shown the Courts' growing support of the finality of the arbitrators' awards. The Court of Appeal has delivered firm reaffirmation of those principles.

There was a dispute between the parties on a logging contract which was referred to sole arbitration under the provisions of the 1908 Act. The arbitrator held Armstrong to be in breach and delivered his award accordingly.

Armstrong attacked the award for error of law on its face and procedural unfairness. It succeeded in having Ellis J at first instance review the merits of the appellant's claims before the arbitrator – a step which the Court of Appeal said was perhaps not appropriate. In the end the High Court upheld the award and the appellant appealed.

Ominously for the appellant the judgment opens by quoting the observations of Lord Mustill *Pupuke Service Station Ltd v Caltex Oil NZ Ltd* (16 November 1995, PC 19/1) at p 1. After referring to the decision of the parties to go to arbitration he observes:

> In prospect this method often seems attractive. In retrospect, this is not always so. Having agreed at the outset to take his disputes away from the Court the losing party may afterwards be tempted to think the better of it, and ask the Court to interfere ... . All developed systems of arbitration law have in principle set their face against accommodating such a change of mind. The parties have made a choice, and must abide by it.

The Court of Appeal readily dismissed the "errors of law" argument by indicating that the interpretation of the contract rendered by the arbitrator was available to him and therefore was a question within jurisdiction. It is only if the decision is in some more fundamental way illegal or misconceived that the Courts will intervene.

A more careful examination was given to the procedural unfairness plea. It is always available as a basis for overturning awards. However, on a review of the facts, the grounds argued were not made out.

This decision is based upon the Arbitration Act 1908. Appeal rights on errors within the arbitration award are now more confined under the 1996 Act. The procedural unfairness ground still exists, although with a wider and more precising defined statutory basis. In many respects the reasoning of this case reflects new arbitration attitudes enshrined in the new Act.

## ASSIGNMENTS AND NOTICE

In *Mountain Road v Michael Edgely Corporation Pty Ltd* (CA 51/97, 8 September 1997) the New Zealand Court of Appeal considered when an assignment became effective as against a third party to transfer rights. Edgely sued Mountain Road for damages arising out of an alleged faulty manufacturing process. Mountain Road's original contract was with a company Venue Enterprises Ltd, from whom Edgely took an assignment. Edgely sued prior to any notice of that assignment being given to Mountain Road. By the time the notice was given the cause of action was statute barred. The Court of Appeal was asked to rule when the assignment between Venue and Edgely was effective against the third party, Mountain Road.

At first instance Tomkins J held that Edgely had the right to sue and the proceedings were not premature. Tipping J delivered the sole judgment on appeal and held that, both at law and in equity, notice of an assignment must be given before the assignment becomes effectively a third party. At equity the assignment is effective as between assignor and assignee when the contract is complete. However, there was no decided authority on the decision between the assignee and the third party. The Court held:

> The trend of authorities supports the view that notice in the case of an equitable assignment is necessary to perfect the title of the assignee .... The present is a case in which equity should follow the law. From the point of view of the third party, it matters little whether the assignment, as between assignor and assignee is legal or equitable. What is material to the third party is that there has been an assignment of whichever kind and that there is now a new creditor or plaintiff. We can think of no convincing reason why the requirements for notice to third parties should differ depending on whether the assignment is legal or equitable.

The effect of the decision was to hold that, as notice of the assignment was not given until the limitation period had expired, the proceedings were not effectively brought and should be struck out. The principle of the decision is, however, wide ranging. Its implications are:

- as between assignor and assignee, on the date of perfection of the contract the debts are assigned in equity; any breach between assignor and assignee inter partes can be sued upon at that time;
- as between the assignee and the third party whose obligations the assignor has assigned, the third party is liable to the assignee only after notice of the assignment has been given.

The logical corollary of these two propositions is that, until notice has been given to the third party, the assignee may continue to enforce its right against the third party and, if it makes a recovery, then the correctness or adequacy of its dealings is to be measured in terms of its contractual relationship with the assignee. It also logically follows that the rights taken over by the assignee against the third party are those which existed as at the date of the notice, not as at the date of the assignment. The assignee cannot inherit greater rights than its assignor. The third party can only be obliged to change its course of dealings affecting the obligation when notice of the assignment is in its hands.

This area of legal and equitable assignment has long been one of difficulty. The Court of Appeal's judgment is an entirely reasonable and rational approach to the commercial realities arising on assignment. It is a lucid and valuable contribution to the law in this area. ❑

# MEDICAL MANSLAUGHTER

*Kevin Dawkins, The University of Otago*

*attacks the proposed raising of the threshold of liability*

The Crimes Amendment Bill (No 5) 1996 proposes an important change to the Crimes Act 1961. Its main purpose is to increase the degree of negligence required for manslaughter arising from breach of the duties imposed by ss 155 and 156. These provisions require persons doing dangerous acts to use "reasonable knowledge, skill and care" (s 155) and those in charge of dangerous things to take "reasonable precautions and care" (s 156). It is well established that the standard of culpability required to sustain a charge of manslaughter under these provisions is negligence in the ordinary civil sense of failure to take reasonable care in all the circumstances of the case (*Yogasakaran* [1990] 1 NZLR 399, (1989) 5 CRNZ 69 (CA); *Myatt* [1991] 1 NZLR 674, (1990) 7 CRNZ 304 (CA)). In recent years this standard has been applied in manslaughter prosecutions of motor vehicle drivers, aircraft pilots, firearms users, a power boat operator, an owner of an unfenced swimming pool, a bungy jump operator, workmen using a blow torch, a car mechanic, a manufacturer of contaminated food, and several medical practitioners and other health professionals. The duty in s 156 has also been the basis of several prosecutions for criminal nuisance under s 145: *Mwai* [1995] 3 NZLR 149; (1995) 13 CRNZ 273 (CA) (infecting with HIV); *Turner* (1995) 13 CRNZ 142 (CA) (selling contaminated mussels); and *Tranz Rail Ltd* HC, Wellington, 15 February 1996, Doogue J, T1/96 (failing to provide secure handrail on train). So both ss 155 and 156 are important provisions of general application.

However, if the proposed amendment is enacted, criminal responsibility for negligent manslaughter in such cases will depend on a proof of "major departure" from the standard of care expected of a reasonable person. This test is intended to raise the threshold of liability from ordinary negligence to some undefined standard akin to gross negligence. And although this new test would be of general application, it is designed to accommodate one special group – medical practitioners.

## THE PROBLEM

According to the explanatory note to the 1996 Bill, the current state of the law regarding criminal responsibility for breach of legal duties is of "particular concern" to the medical profession. The source of this concern lies in the two different standards of negligence which apply to the various duties "tending to the preservation of life" in Part VIII of the Crimes Act. Failure to perform or observe any of these duties may result in liability for manslaughter under s 160(2)(b) where death results, for injuring under s 190 in circumstances where it would have been manslaughter had death been caused, or for criminal nuisance under s 145 whether or not any harm is caused.

Although similar consequences may follow from a breach of these duties, the threshold of liability for failure to observe the duties in ss 151, 152, 153 and 157 is a high degree of negligence variously described as "gross", "criminal" or "culpable". These are the duties imposed on parents and others to provide the necessaries of life and the general duty to avoid omissions dangerous to life. By contrast, as already mentioned, criminal responsibility for breach of the duties in ss 155 and 156 requires proof of no more than ordinary negligence. Since s 155 specifically refers to persons who undertake to administer "surgical or medical treatment", the "problem" – so the explanatory note to the Bill maintains – is that doctors are especially "vulnerable" to criminal prosecution under ss 160, 190 or 145 for ordinary rather than gross negligence. This is said to be inappropriate, unjust, counterproductive to the practice of good medicine, and needlessly out of step with other jurisdictions where a uniform standard of gross negligence applies. What is needed, apparently, is an amendment that will allay doctors' concerns even if it means undermining the accountability of all others affected by ss 155 and 156.

## THE POLITICS

The proposed amendment largely implements the recommendations made by Sir Duncan McMullin in his report to the Minister of Justice on ss 155 and 156 Crimes Act (*McMullin Report*, September 1995). In effect, that report was commissioned by the New Zealand Medical Law Reform Group (NZMLRG), a powerful coalition formed with the support of the New Zealand Medical Association, the Medical Council of New Zealand, and several specialist colleges and societies. In March 1995 the NZMLRG presented extensive submissions on the Medical Practitioners Bill to the Social Services Select Committee (*Submissions*). By sleight of process, in the course of those submissions it also managed to introduce a specific proposal to amend s 155 of the Crimes Act by adopting the "major departure" test as the standard of criminal responsibility.

The NZMLRG's campaign was provided with a *cause célèbre* in June 1995 with the discharge of a Hamilton anaesthetist who had been charged with the manslaughter of an elderly patient: *Long* [1995] 2 NZLR 691; (1995) 13 CRNZ 124; see Corkhill and Merry (1995) 438 *LawTalk* 9; Merry, Corkhill and Blair (1995) 108 *NZMJ* 348. Without any doubt, the *Long* saga and pressure from the NZMLRG led to the Minister's decision to appoint Sir Duncan McMullin to review ss 155 and 156. In his report released in September 1995 Sir Duncan recommended that the "major departure" test should apply to all the duties in Part VIII of the Crimes Act. The amendment proposing the "major departure" test was introduced, without debate, in July 1996

and was given a pro forma second reading the following month. It is now before the Justice and Law Reform Committee which has recently heard submissions from apologists for the NZMLRG.

To put both the proposed amendment and the McMullin Report into recent perspective, we need to go back to the Crimes Bill 1989. It contained a general definition of negligence which would have required a "very serious deviation from the standard of care expected of a reasonable person" (cl 24). When the Casey Committee reviewed the Bill it recommended that the expression "very serious deviation" be replaced by "major departure" – the test favoured in the McMullin Report and now incorporated in the proposed amendment (*Report of the Crimes Consultative Committee*, 1991, 15). But much more to the present point, the Casey Committee redrafted the general definition of negligence so that it would *not* apply to the duty provisions corresponding to ss 155 and 156. It did so for the specific reason that these provisions concern "inherently dangerous activities" which warrant "strict adherence to a standard of reasonable care" (*id*). Thus the Casey Committee considered that standard of ordinary negligence should continue to apply to ss 155 and 156, as the Court of Appeal had reaffirmed just two years earlier in *Yogasakaran*.

Between 1993 and 1995 the Department of Justice also submitted several reports on medical manslaughter to the Minister. The first of these reports reinforced the view of the Casey Committee that the standard of ordinary negligence should remain applicable to the inherently dangerous activities covered by ss 155 and 156 (*Medical Manslaughter*, Report to the Minister of Justice, 6-5-93, 2-3). A further report in 1994 reached the following conclusions: (1) the case for amending ss 155 and 156 was not convincing; (2) any piecemeal reform would have significant implications for the law of manslaughter generally and would result in anomalies; and (3) the best way to proceed would be by comprehensive revision of the Crimes Act within the framework proposed by the Casey Committee (*Medical Manslaughter*, Report to the Minister of Justice, 15-2-94, 15-16).

It is also clear from those reports as well as the McMullin Report that the Police, the Crown Law Office and the New Zealand Law Society did not then see any special or general need to amend ss 155 and 156. But all seem to have since changed their tune after "discussions" with Sir Duncan. The Police are now said to be "quite relaxed" about the proposed changes to ss 155 and 156; the Crown Law Office finds the "major departure" test "acceptable"; the New Zealand Law Society is believed to "support" an amendment; and the Department of Justice "would be content" with Sir Duncan's recommendations (*McMullin Report*, 43-45).

So, in a country where the progress of serious criminal law reform is inchmeal, the NZMLRG has all but secured a tailored amendment to the Crimes Act – by means of political patronage, with the help of a report commissioned for the purpose, and without legislative scrutiny. This is nothing short of law reform to order.

## THE NZMLRG CAMPAIGN

### Risk of prosecution

Throughout its campaign the NZMLRG has protested that doctors are constantly at risk of criminal prosecution and conviction for "mere inadvertence", "simple error" or the "slightest deviation from perfect practice" (*Submissions*, 17, 20). Apart from misrepresenting the law by suggesting that any omission may result in criminal liability (see *Yogasakaran*, above), this claim grossly exaggerates the risk of criminal prosecution. Before 1982 there were no known prosecutions of doctors or other health professionals for negligence resulting in the deaths of patients. Since then there have been eight prosecutions with another currently proceeding (a Tauranga anaesthetist charged with the manslaughter of a 13-year-old boy during a routine knee operation). Five cases have resulted in manslaughter convictions: *McDonald* HC, Christchurch, 24-10-82, Roper J, T24/82 (an anaesthetist); *Yogasakaran* (another anaesthetist); *Morrison* HC, Dunedin, 23-4-91, Fraser J, S 7/91 (a radiologist); *Brown* HC, Wellington, 1993, S 27/94 (a nurse); and *Ramstead* CA, 12-5-97, CA 428/96 (a cardiothoracic surgeon). Criminal charges have also been brought against health professionals in three other cases involving the deaths of patients: *Long*, above, where the anaesthetist was discharged; a manslaughter prosecution in 1991 of an oral surgeon who was also discharged; and a 1993 prosecution, later withdrawn, of a cardiac surgeon for offences against ss 145 and 190 Crimes Act.

But what concerns the medical campaigners as much as the number of prosecutions is the "trend": none before 1982, nine since then, and eight since 1989. Yet the NZMLRG has been rather less ready to acknowledge the fact that since 1988 there has been a statutory obligation to report every death under anaesthesia or as a result of a medical, surgical or dental procedure to the Police who effectively act as agents of coroners (Coroners Act 1988, ss 4(1)(c), 5(2)). The Police now investigate such cases as a matter of course. Increased public awareness of medical accountability and patients' rights in recent years also helps to explain why the Police have investigated other cases not subject to the reporting obligation under the Coroners Act. In this New Zealand is not alone. Although the standard of negligent manslaughter in Britain is gross negligence, the recent increase in the number of prosecutions of doctors has also unsettled the medical community eg *Sargent* (1990) 336 *Lancet* 430; *Prentice and Sullman* [1994] QB 302; *Saha and Salim* (1994) 15 Cr App R (S) 342, (1992) 340 *Lancet* 1462; *Adomako* [1995] 1 AC 171.

Even where there is evidence of medical negligence, other factors reduce the risk of prosecution. In particular, reported Police policy is to prosecute only in the worst cases (*McMullin Report*, 44). The 1994 Department of Justice report also cites cases from Police files where inquiries have foundered because of difficulties in proving causation and the refusal of hospital staff and experts to cooperate: case of *Dillon*, undated, Wakari Hospital, Dunedin (combined errors resulting in death by radiation overdose); case of *Tuipuloto*, 11-6-93, Palmerston North (death by administration of cleaning fluid instead of diazole during renal dialysis) (*Medical Manslaughter*, 15-2-94, above, 8-10). *Long* and the unsuccessful prosecution in 1993 further illustrate the difficulties of establishing causation.

A significant number of cases of prima facie or indeed gross negligence have also been dealt with by disciplinary proceedings rather than criminal prosecutions. To borrow the NZMLRG's own figures, between 1990 and 1994 28 cases involving deaths of patients were heard by the Medical Practitioners Disciplinary Committee: five resulted in findings of professional misconduct and 11 in findings of conduct unbecoming a medical practitioner (*Submissions*, Appendix B, 9).

The conclusion to be drawn is that far from evidencing a profession under siege, the prosecution figures since 1982

may not accurately reflect the true extent of culpable medical negligence resulting in death.

### Alarming assumptions

An alarming assumption apparent in recent statements by prime movers in the NZMLRG's campaign is that the mistakes in *McDonald* (failing to check theatre equipment) and *Yogasakaran* and *Morrison* (failing to check drugs) were just "simple" or "common" errors involving "comparatively minor breach[es] of professional standards": Merry and Wilson (1995) 43 *Newsletter, NZ Society of Anaesthetists* 13, 14; Mason and McCall Smith, *Law and Medical Ethics*, 1994, 216; Blair (1994) 107 *NZMJ* 511.

Although these assumptions are entirely wrong, they indicate that in some medical quarters the expectation is that even such serious failures to take elementary precautions would not meet the proposed "major departure" test. One might then ask what kinds of egregious incompetence would do so. Could it be that what the NZMLRG really wants is effective immunity from criminal scrutiny?

### Hippocratic or hypocritical?

The professed aim of the NZMLRG is "a proper balance between the criminal code and other means of accountability". It accepts that there is a need for members of the medical profession to be "explicitly and transparently accountable for their activities" (*Submissions*, 1, 3). Those pronouncements are difficult to reconcile with the following:

- In its submissions on the Medical Practitioners Bill to the Social Services Select Committee in 1995 the NZMLRG set its face against mandatory disclosure of information, obtained as a result of quality assurance activities, to coroners, the Police or any other authority.
- In 1979 the Hospitals Act was amended to include a requirement that medical practitioners and dentists report every death related to anaesthesia to the Anaesthetic Mortality Assessment Committee. Although that Committee had considered about 600 cases by 1984, virtually no reports have been made since 1992. The Committee is now effectively defunct. The NZMLRG has convinced the Minister that the Committee should be replaced by a non-statutory body to be created under the auspices of the Australian and New Zealand College of Anaesthetists. The existing mandatory reporting provision will be repealed (*McMullin Report*, 34-35).
- Although the NZMLRG piously attributes the recent increase in manslaughter prosecutions against doctors to "an undesirable reaction to ACC reforms" (*Submissions*, 16), the New Zealand Medical Association has vigorously resisted the introduction of the medical misadventure levy specifically required by s 123 Accident and Rehabilitation Compensation Insurance Act 1992 (see Paterson (1995) 439 *LawTalk* 8, 9).

## THE McMULLIN REPORT

The explanatory note to the proposed amendment refers to four reasons identified in the McMullin Report as "compelling" justifications for changing ss 155 and 156.

### Manslaughter inappropriate

The McMullin Report declares that "manslaughter is an inappropriate crime for acts of mere carelessness as distinct from gross negligence or recklessness" (45). To support that claim it relies on the English Law Commission's view that a charge of manslaughter should be brought only as a last resort after other sanctions, such as civil negligence actions and disciplinary proceedings, appear inappropriate (*Criminal Law: Involuntary Manslaughter*, Law Com CP No 135, 1994, p 119, para 5.44).

Of course the English Law Commission presupposes something not available in New Zealand as an alternative sanction – civil action for compensatory damages for personal injury. Furthermore, punitive damages are not recoverable by the estate of a victim of medical negligence (Law Reform Act 1936, s 3(2)(a); *Chase* [1989] 1 NZLR 325 (CA)); and even under the latest judicial development, an award of exemplary damages for avowedly punitive purposes as a result of negligence causing personal injury is apparently to be confined to cases where there is an "outrageous and flagrant disregard" of another's safety: *McLaren Transport Ltd v Somerville* [1996] 3 NZLR 424, 434. Similarly, punitive damages for personal injury under s 57(1)(d) Health and Disability Commissioner Act 1994 are available only where there is a breach "in flagrant disregard" of a patient's rights under the 1996 Code of Health and Disability Services Consumers' Rights. Thus, if the "major departure" test is adopted the only avenues of redress for ordinary medical negligence causing injury or death will be under the complaint and disciplinary procedures of the Health and Disability Commissioner Act and the Medical Practitioners Act 1995.

### Other jurisdictions

The McMullin Report is transfixed by the notion that New Zealand is out of step with comparable jurisdictions where a higher standard of negligence applies eg gross negligence in Britain and Australia and a "marked departure" in Canada. The riposte to this must be that the appropriate standards of criminal responsibility in our society are to be determined in light of the conditions that apply here rather than elsewhere. Historically, in jurisdictions like Britain, Australia and Canada, the justification for requiring a higher degree of culpability in criminal law arose from the coexistence of civil and criminal responsibility for negligence. To maintain a distinction between compensation and punishment, the criminal sanction was reserved for conduct manifesting a high degree of culpability. However, even though the adoption of the ordinary negligence standard for ss 155 and 156 pre-dated the abolition of the civil action for personal injury in New Zealand (*Dawe* (1911) 30 NZLR 673 (CA); *Storey* [1931] NZLR 417 (CA)), the extinction of the civil remedy distinguishes the circumstances in this country from those elsewhere. With the removal of the deterrent of civil action, now more than ever there is every reason to maintain ss 155 and 156 in their present form by insisting on strict adherence to the standard of reasonable care when *anybody* engages in inherently dangerous activities. Outsiders seem to have no difficulty in understanding the interrelationship of criminal and civil liability in this area: see Deutsch (1990) 20 VUWLR 287, 291.

### Undesirable consequences

Another tendentious argument advanced by the NZMLRG and accepted by the McMullin Report is that in their present form ss 155 and 156 are causing all kinds of undesirable consequences that are counterproductive to the maintenance of good health and sound professional standards. Doctors are resorting to defensive medicine; some may not continue

to practise in New Zealand; overseas doctors may be discouraged from coming here; and there is a reluctance to report information that would help improve medical procedures (*McMullin Report*, 31-36, 41-42, 47-48).

All these things are attributed to the pervasive fear of prosecution, though the supporting evidence is almost entirely based on anecdotal reports from medical professionals and groups. As for the practice of defensive medicine, two brief points can be made. First, if a doctor professing to exercise reasonable care and judgment would not undertake an unnecessary procedure, then any doctor who makes an error in defensively resorting to such a procedure would presumably have no answer to a criminal charge. Such practices may very well increase rather than reduce the risk of liability. Secondly, in the absence of a "lawful excuse", a doctor who practises defensive medicine by withholding an essential service from a patient risks criminal liability under s 151, change or no change to the existing law (*Auckland Area Health Board* [1993] 1 NZLR 235). As for the alleged difficulties in retaining local doctors, there is no evidence of any exodus from New Zealand. So far as recruiting from abroad is concerned, the facts speak for themselves – in 1994 65 per cent of newly registered medical practitioners in New Zealand came from overseas (Paterson (1996) 4 *Health Care Analysis* 59). Lastly, the unhappy history of the Anaesthetic Mortality Assessment Committee and the reporting scheme under the Hospitals Act suggests that many in the medical community will be satisfied with nothing less than total confidentiality of audit and reporting procedures and complete protection from external inquisition.

### Anomalous results

The final reason given by the McMullin Report is that anomalous results may follow from the two different standards of negligence required by the various duties in Part VIII of the Crimes Act (the case cited to support the proposition is *Crump* noted in [1970] *NZ Recent Law* 191). It is claimed that this could occur where the same facts may be covered by more than one duty provision, each requiring a different standard of negligence eg a doctor who failed to give proper medical treatment to a patient could "in some circumstances" be charged under s 151 (requiring gross negligence) or s 155 (requiring ordinary negligence) (*McMullin Report*, 18). The short answer is that such circumstances have never arisen in the recorded history of the criminal law of this country. Furthermore, there is no evidence that the present law has produced inappropriate or unjust results (*Medical Manslaughter*, 15-2-94, above, 12). As the Court of Appeal pointed out in *Yogasakaran*, in practice the standard of ordinary negligence is mitigated by (1) the necessity of proving causative negligence beyond reasonable doubt; (2) the fact that a doctor would not ordinarily be negligent if he or she had acted in accordance with a professionally accepted standard or, where there may be a difference in standards, with a responsible body of medical opinion; and (3) an exceptionally wide judicial discretion as to penalty. Of the five convictions for manslaughter, three resulted in convictions and discharges (*Yogasakaran*, *Morrison* and *Brown*), one in a fine of $2500 (*McDonald*) and the other in a suspended sentence of six months' imprisonment (*Ramstead*).

## A FALSE PREMISE

Under the proposed amendment a new s 150A would be inserted into the Crimes Act. The effect of this provision would be to codify the "major departure" test for the purposes of Part VIII of the Act which includes ss 155, 156 and the other duty provisions, as well as the provisions on culpable homicide (s 160) and injuring by negligent omission (s 190). Although the McMullin Report recommended that this higher threshold should also apply to the criminal nuisance provision of s 145 in Part VII, the note to the Bill explains why the government was not persuaded that changing s 145 was necessary or appropriate. First, s 145 is an important general provision on endangerment that supplements many other particular provisions penalising "ordinary" negligence resulting in death or injury. And secondly, the offence under s 145 carries a maximum penalty of one year's imprisonment and is much less serious than manslaughter. Consequently, the arguments for adopting the "major departure" test for manslaughter – that a "minor" degree of negligence may result in a criminal conviction for a major crime – do not apply to s 145.

The distinct implication is that s 145 will remain available as a residual sanction for ordinary negligence that endangers life, safety or health. But that is quite wrong. To establish liability under s 145 it must be proved not only that a person was negligent in failing to discharge a legal duty – say under s 155 – but also that he or she *knew* that the omission would endanger life, safety or health. In other words, s 145 requires proof of an element of conscious advertence to the risk of danger in addition to the requirement of ordinary negligence needed to prove a breach of ss 155 or 156 (see *Mwai, Turner, Tranz Rail Ltd*, above). To match the assumption that s 145 punishes ordinary negligence, the provision would have to be amended by deleting the present requirement of knowledge.

## WHAT NEXT?

The concluding part of the McMullin Report gives added cause for concern about the future criminal accountability of medical practitioners. It endorses Hammond J's suggestion in *Long*, that there is justification for treating medical manslaughter cases in a special way by requiring that prosecutions be initiated only by consent of the Solicitor-General. What is more, the Report seems to approve Hammond J's further fancy that a medical advisory panel could assist the Solicitor-General in making the decision whether to prosecute, and that the Solicitor-General could even receive reports from the doctor involved. This is unacceptable. In combination with the proposed "major departure" test, such a development would make negligent medical practitioners practically immune from criminal prosecution.

## PHYSICIAN HEAL THYSELF

At least some members of the medical community are honest enough to acknowledge that the real "problem" lies in the profession and not the law: Chamley, "The Furore over Medical Manslaughter: A Mistaken Diagnosis" (1994) 42 *Newsletter, NZ Society of Anaesthetists* 11. It is to be found in the medical profession's assumption of immunity from accountability, its reluctance to accept responsibility for the negligent conduct of some of its members, and its self-serving claim that raising the threshold of criminal liability will somehow improve medical standards.

As for the law, instead of piecemeal change any future reform should proceed by way of careful, informed and comprehensive revision of the law of homicide and the current scheme of non-fatal offences against the person. In the meantime ss 155 and 156 should be left alone. ❑

# RCD AND THE RULE OF LAW

*Yvonne van Roy, Victoria University of Wellington*

*finds cause for concern in the handling of the RCD crisis*

> It is excellent to have a giant's strength, but tyrannous to use it like a giant. (*Measure for Measure:* William Shakespeare)

Since Parliament is inevitably ruled by the majority votes of the governing party or coalition, that giant's strength is largely kept in balance through adherence by Government to legal procedures and conventions. This is demanded by the Rule of Law, a constitutional concept described by Joseph (*Constitutional and Administrative Law in New Zealand*, p 167) as "the sentinel of constitutional government". Much has been written about the Rule of Law since Dicey's discussion of the doctrine in 1885. Concepts such as Government according to law, equality before the law and the absence of arbitrary power have been redefined in line with the changes in society, but remain fundamental.

However, of what value is this "sentinel of constitutional government" if a Government makes a Regulation knowing that it is almost certainly procedurally ultra vires and probably also substantively ultra vires? Is it proper for Government to then use its power in Parliament to pass a Bill which purports retrospectively to validate that Regulation; to make a Regulation which not only has the effect of nullifying a validly-made decision of a Government official (of which the Government has no power of review); to reward those who have openly defied that decision: and, in anticipation of a law change, to decline to prosecute or prevent continued defiance of the law?

These issues have all arisen from the Government's response to the illegal importation and release of rabbit calicivirus disease (RCD). An application to import and use RCD for biological control was declined by the Deputy Director-General of MAF after an extensive inquiry under s 21 Animals Act 1967. Several disappointed farmers took the law into their own hands and spread virus which had been illegally imported (mostly on baits as a biocide, as the virus did not spread readily by infection). MAF made an initial attempt to confine the spread of the disease, but soon gave up and left the farmers to use the virus how and where they wanted. Some farmers mixed up infected rabbit livers in their kitchen blenders, kept the resulting cocktail in the domestic refrigerator, and proceeded to spray this mixture onto baits which were then air-dropped around areas in the South Island. While this was going on a MAF Officer and the Minister of Biosecurity announced that, whilst the importation of RCD was illegal, the possession and release of it was not. This prompted some farmers to make boastful confessions on TV and made it very difficult for MAF to take prosecutory action until the legal position was clarified. This clarification was then promptly given by the Crown Law Office, who explained that the possession and release of RCD was indeed illegal.

However, no further action was taken to prosecute or prevent the use of RCD. Cabinet then decided to legalise the use of the RCD inoculum currently in New Zealand and announced that it would make a Regulation to bring this about. The Regulation was made under the Biosecurity Act 1993, as all but five sections of the Animals Act had been repealed by s 167(1) and the Third Schedule of the Biosecurity Act. As the relevant empowering section in that Act required consultation with interested groups and persons before the Regulation could be made, submissions were requested and 84 received from individuals or organisations. Notwithstanding this, the Regulation was made in the third working day after submissions closed. However, through poor drafting this Regulation does not appear to achieve what it set out to do (ie remove RCD from s 21 Animals Act). At or about the same time, a Bill was placed before Parliament revoking the Regulation but also purporting to validate it retrospectively. In place of the Regulation, it proposes (more effectively this time) to amend the relevant provisions of the Biosecurity Act and to remove RCD from s 21 Animals Act. In the meantime, instead of taking action to prevent the spreading of home brew mixtures, MAF is reported as expecting its main role to be giving advice to farmers on how to mix this brew and use it more effectively. Recipes for this home brew (dubbed "Kitchen whizz smoothies") are openly published – along with cautions for the farmers to wear masks because of the risk of contamination from other micro-organisms such as salmonella. For example, the recipe published in *The New Zealand Farmer* (2-10) states:

> The mixture is as simple as mixing rabbit livers, hearts and lungs with water. Saline solution (9 gms of common salt to each litre of water) is an optional medium. Officials say the ratio of water to rabbit is almost academic

Four major concerns arise from the above facts (the biological, medical, ethical and other concerns are best examined in other forums):

- MAF's decision not to enforce the law against all those using the virus;
- the making of a Regulation which nullifies the validly-made decision of the Deputy Director-General and rewarding those who acted in defiance of that decision;
- hastily making the Regulation without the required consultation, and in the knowledge that its validity was being questioned;
- the introduction of a Bill which purports retrospectively to validate that Regulation (and which will also retrospectively remove RCD from s 21 Animals Act).

Cumulatively this amounts to a determined wielding of power by Government in response to political pressures, but with scant regard for the Rule of Law. This has not been

without consequences, as it has sent disturbing messages both within New Zealand and to our overseas trading partners.

## NON-ENFORCEMENT

MAF has consistently said that it would prosecute the person or persons who imported the RCD virus illegally, but has declined to take any action to prosecute those who possess or use the virus. It would have been inappropriate to prosecute farmers who had confessed to use of the virus after the Ministry incorrectly announced that this was not illegal, and before this announcement was publicly corrected after advice from the Crown Law Office. However, this should not have prevented the Ministry from taking action to prevent continued release, and to take full prosecutory action once the law had been clarified.

It is difficult to understand how MAF could ever have believed that possession or release of RCD was legal. A quick perusal of statutes with which MAF should have been familiar would have revealed the fallacy of that contention. To begin with, knowingly possessing RCD was illegal under s 21(4) Animals Act (which is retained by s 169 and the Third Schedule of the Biosecurity Act in relation to organisms not established in New Zealand). This section would certainly have applied to those who were releasing the virus in an attempt to spread it throughout New Zealand, as it could not be argued that RCD was established in New Zealand at that time.

Actions were possible, and may still be possible, under s 154(f) and (g) Biosecurity Act, which create offences for possession and disposal (by sale or otherwise) of "unauthorised goods". This included RCD because it was an imported good for which no biosecurity clearance had been given.

As RCD is able to be defined as a "pesticide", the Pesticides Act 1979 also applies. "Pesticide" is defined in s 2 as:

> any substance or mixture of substances represented by the proprietor as suitable for the eradication or control of any pest, whether by way of modification of behaviour or development or otherwise ... .

"Proprietor" means the manufacturer or importer of the pesticide, and "manufacturer" means an owner who packs the pesticide for sale in or by means of a container. This should cover all those who mix up "home brews" of RCD virus mixture for "sale" – which includes disposal by way of gift, loan or otherwise (s 4). Whether it would also cover those who make up the same or similar mixture for their own use is uncertain. Pesticides must not be imported, sold or supplied for reward unless registered (s 21); for example, the RCD Regional Councils plan to use would be covered by the Act. It does not seem possible for "home brews" to obtain registration under the Act, as each brew is different and will contain an unknown amount of other ingredients (including other diseases).

Just as one would expect that dealing in RCD should be regulated in the same way as dealing in 1080 poison (the substitute product), one would also expect there to be some controls over what can and cannot be spread about the countryside or dropped from the air. Section 15 Resource Management Act 1991 makes it a contravention of that Act to discharge any contaminant (which would include RCD) into the air, land or water, or onto the land, in a manner that contravenes a rule in a regional plan. Permits to make discharges are granted only after notified public hearings.

If these sections had not given MAF enough actions to choose from, others such as s 17(3) RMA and ss 145 and 66 Crimes Act 1961 are worth considering. Does failure to understand their own legislation, or to get sound legal advice when common sense would indicate that action should be possible, constitute negligence on behalf of MAF?

The Ministry is reported (*Dominion* 23-9) as stating that although those who spread the virus before the Regulation changes would technically have broken the law, the Ministry considered it impractical to prosecute most of the people involved. It is astounding that the Ministry considered contraventions of all the aforementioned Acts to be only "technical". Also, how would it have been "impractical" to enforce the law when the location and times of some aerial drops have been openly publicised, and when planes and airstrips are licensed?

The real reason for MAF's failure to enforce the law has been provided by the Director-General of Agriculture himself:

> In view of Government's decision to amend the Animals Act and, as a consequence, the Biosecurity Act, to make the possession of RCD legal, MAF elected not to pursue prosecution of the many persons who possessed RCD material. There was a clear Government policy determination to exploit the existence of RCD, a decision which recognised the impossibility of containment and eradication of RCD. (Information obtained under the Official Information Act.)

Two issues arise from this statement. Firstly, even when the possession of RCD is legal, the requirements of Acts such as the Pesticides Act and the RMA continue to apply. Such Acts are designed to prevent what is now occurring – the uncontrolled spreading of substances which contain not only unknown concentrations of deadly haemorraghic disease, but very probably also contain a number of other contaminants and diseases. Little recognition appears to have been given to cross-species exposures, aerosol generation, inoculum effect, secondary contamination and residual contamination. Although MAF has reported (*NZ Herald* 24 Oct) that interim results from tests of some homebrew mix did not show any *new* viruses or bacteria, this does not mean that such brews, (each of which is different), do not contain *other* viruses or bacteria.

Secondly, such a blanket refusal to enforce any of the laws applicable to those who use or deal with RCD cannot be equated with the use of discretion on whether or not to prosecute a particular individual. It could well be seen as suspension of the law, reminiscent of the facts in *Fitzgerald v Muldoon* [1976] 2 NZLR 615. In that case also the Minister announced by press release that, since the law was to be changed, actions required under the then current legislation would cease forthwith. Wild CJ found that the Minister was purporting to suspend the law without the consent of Parliament in contravention of s 1 Bill of Rights 1688. He quoted Dicey (*Law of the Constitution*, 10th Edn, p 39):

> The principle of parliamentary sovereignty means neither more nor less than this, namely that Parliament ... has ... the right to make or unmake any law whatever; and ... no person or body is recognised ... as having a right to override or set aside the legislation of Parliament.

This issue has special significance now that MMP makes the outcome in Parliament less certain – what if Parliament declined to change the law or to validate the Regulation? Even if MAF's actions cannot be concluded to be a breach of the law as in *Fitzgerald v Muldoon*, its actions in condon-

ing widespread disregard for the law on the basis of "Government policy" must surely be a breach of the Rule of Law, the consequences of which are discussed at the end of this article.

In practical terms, however, MAF's failure to act has far more serious consequences than the Minister's actions in *Fitzgerald v Muldoon*. Although farmers have been spreading RCD around the South Island for some time, the disease has only recently begun to spread by infection. It was not inevitable that RCD would spread by infection throughout New Zealand, and an attempt could have been made to prevent this by stopping the use of RCD as a biocide. If MAF had taken action to prevent the spreading of home brews – as good biosecurity management should have mandated – then it is unlikely that there would be any real argument for the Regulation or the Amendment to the Biosecurity Act. The Government would also have been forced to concur with the use of the proper legal procedure, a revisiting of the decision under s 21 of the Animals Act (or the Hazardous Substances and New Organisms Act which should come into force next year and replace that section). That would require inquiry into safety and efficacy, and much public debate – and the risk of yet another "no" decision. Does this explain the almost incomprehensible obtuseness of MAF in the matter of enforcement?

***It is difficult to understand how MAF could ever have believed that possession or release of RCD was legal. To begin with, knowingly possessing RCD was illegal under s 21(4) Animals Act***

## NULLIFYING A VALID DECISION

The decision to decline the application to import and release RCD in New Zealand was made after a long process of peer review and public consultation, involving around 800 submissions from farming groups, conservation groups, animal protection groups, scientists (including overseas experts) and others. The three principal reasons given related to uncertainties about the epidemiology and the effectiveness of the virus and the inadequacy of the proposed management programme. Risks relating to infection of humans and other species, virus mutation and prey-switching, would have been tolerated if the Deputy Director-General had been satisfied that the benefits argued by the applicant would actually have occurred (*The Press* 3-7).

The decision provoked incautious outbursts from some Members of Parliament. For example, the Minister of Agriculture was reported as saying that it was the wrong decision, and that he was "extremely disappointed" with it. He also said that "he would do everything in his power to get this rabbit-killing calicivirus disease approved", and that he backed calls for a judicial review (*Dominion* 3-7, 4-7 and 12-7).

After a meeting with the Minister of Agriculture, the applicant appealed to the Director-General of MAF to review the decision of the Deputy Director-General. The Director-General took legal advice from the Solicitor-General and was reported to have said (*Evening Post* 20-8):

> In my view the process was lengthy, even-handed and transparent, and I am satisfied that this enabled the outcome of a credible decision. I can find no evidence to suggest to me that [the Deputy Director-General's] decision was reached as the result of a wrongful analysis or interpretation of the scientific information. His conclusions are consistent with those of the expert reviewers.

It is important to note that decisions made by the Deputy Director-General or the Director-General under s 21(1) of the Animals Act are unable to be reviewed by either Minister. Even if they had that power, they would have been confined to the decision-making criteria set out in the procedure followed by the Deputy Director-General. They could not have used the reasons put forward by the Minister of Biosecurity to justify the Regulation or the Amendment Bill.

These reasons were: (1) RCD is now widely distributed in New Zealand; (2) it would be desirable to promote responsible, safe and effective use of the virus; and (3) there needs to be a good flow of information and people will not be forthcoming with information if they feel under legal threat. This sort of reasoning – that if people will do it anyway, legalise it so that it can be managed properly, simply does not address the reasons for the illegality. Also, RCD is not widespread in New Zealand because as yet it has not been reported in the North Island. Even if it had been widespread in New Zealand, that is no reason for legalising its use when a decision had already been made to decline it. Hopefully the Minister would not have wished to legalise the use of the virus if it had been proved that its host-range was wider than rabbits. The real reason would appear to be that the Minister has disagreed with the risk analysis inherent in the decision of the Deputy Director-General. If he had agreed with that analysis, attempts would have been made to prevent the use of the virus as a biocide.

In addition, it is difficult to see that there can ever be "safe and effective" use of RCD while so little is known about the virus, and so long as MAF continues to allow the use of home brews. Information from those who are using the virus can never be regarded as "reliable", whether the use is legal or not, as there are too many reasons for such persons to keep any adverse findings to themselves.

The real point at issue here is the Government's use of its regulation-making power and, ultimately, its legislation-making power to do what the normal procedures in the Act did not enable it to do. That is, to nullify a decision made validly under the Animals Act for reasons quite different from the criteria relevant to that decision, and to provide farmers with the result which they were unable to achieve through the process set out in the Act. Anarchy has proved to be more profitable than adherence to the law.

Although perfectly legal, legislation which reverses a judicial or quasi-judicial decision is a breach of the Rule of Law if it reverses the outcome of the case in question, and not merely the application of that law to future cases (see Brookfield, "High Courts, High Dam, High Policy" [1983] Recent Law 62). It is regarded as especially serious when the decision being reversed had been adverse to the wishes of the Government, for it indicates that Government is willing to use its strength in Parliament to overturn the law when a legal decision goes against it.

## REGULATION MAKING PROCESS

The relevant empowering section for making the Regulation under question, s 165 Biosecurity Act, requires that the Minister consult with "such persons as the Minister has reason to believe are representatives of interests affected by

the regulations", before making a recommendation to the Governor General. The Minister invited 160 individuals and groups to respond, and others were also able to make responses if they wished. A maximum of seven days (five working days) was available for persons to make replies. In the end MAF received 84 responses which covered a wide range of legal and technical issues. Although no independent scientists were asked for a response, several felt strongly enough to make one. The closing date was Wednesday 17th Sept. In the next two working days MAF speed readers must have got into action, and scientific and legal opinion obtained with the adroitness of Superman – for while the news media were still reporting (23-9) that the Regulations were not expected to be formalised till the Minister returned on the Thursday or Friday, the Regulations had already been passed on Monday 22nd (and gazetted on the 24th).

That the responses from those consulted had not been fully digested is evidenced by the fact that some of them had drawn the Minister's attention to the requirements for "consultation" set out by the Court of Appeal in *Wellington International Airport Ltd v Air New Zealand* [1993] 1 NZLR 671, pp 674-675:

> Those consulted must be given a reasonable opportunity to state their views. They must be allowed sufficient time, and genuine effort must be made. It is to be a reality, not a charade.
>
> To consult is not merely to tell or present. Nor, at the other extreme, is it to agree.
>
> Implicit in the concept is a requirement that the party consulted will be (or will be made) adequately informed so as to be able to make intelligent and useful responses.
>
> It is also implicit that the party obliged to consult, while quite entitled to have a working plan already in mind, must keep its mind open and be ready to change and even start afresh.
>
> Consulting involves the statement of a proposal not yet finally decided upon, listening to what others have to say, considering their responses and then deciding what will be done.
>
> Even though the nature and object of consultation must be related to the circumstances which call for it, it would be extremely difficult for the Minister to argue that he had complied with the above requirements for consultation. There are several ways in which "consultation" failed including:

Five working days was insufficient time in which to make responses, given the nature of the issues and the fact that organisations were being asked for their views. Two working days is not sufficient for 84 such responses even to be read, much less fully digested, individual persons or groups consulted further, differences of views sorted out, etc. The actual wording of the Regulation was not given, even when this was specifically requested.

This suggests that a Court would probably find that the Minister had already decided what was to be done, and that the consultation was a mere "charade". The Regulation is therefore almost certainly procedurally ultra vires. To attempt to "cure" this by retrospectively validating it through an Act of Parliament is reprehensible.

The promise of retrospective validation effectively prevents all but the most determined (and wealthy) litigants from challenging the Regulation in Court. This is of real concern, not only because of procedural ultra vires, but also because there are very good arguments for finding that the Regulation is substantively ultra vires also. These arguments were put to the Minister by some of those consulted.

## SUBSTANTIVE ULTRA-VIRES

The Biosecurity (Rabbit Calicivirus) Regulations 1997 have been made under s 165 (w) and (x) of the Biosecurity Act. Clause 2 of the Regulation reads:

> 2. Section 21 of the Animals Act 1967 not to apply to rabbit calicivirus – For the purposes of the savings provision relating to s 21 of the Animals Act 1967 that is set out in the Third Schedule of the Biosecurity Act 1993, the organism known as viral haemorrhagic disease of rabbits, or rabbit calicivirus, is to be treated as an organism established in New Zealand.

The empowering clause in s 165 (w) Biosecurity Act reads:

> Prescribing transitional and savings provisions relating to the coming into force of this Act, which may be additional to or in place of any of the provisions of Part X of this Act, ...

First, can removal of a specific disease from s 21 Animals Act relate to the coming into force of the Biosecurity Act, especially when that disease had already been the subject of an inquiry under the Animals Act four years after the coming into force of the Biosecurity Act? Also, can a provision which removes something from the Animals Act (and does not replace it with a provision in the Biosecurity Act) be a "savings" or "transitional" provision? The proper place to look for an empowering clause for Regulations which contain other than transitional or savings provisions was in the Animals Act (s 107), but this clause has been repealed. Also, as the Third Schedule is enacted under Part IX and is not therefore "any of the provisions of Part X" of the Act, can s 165 (w) be used to alter it?

To complicate things further, the Regulation simply fails to do what it is intended to do, ie remove RCD from s 21 Animals Act. The Regulation deals only with the savings provision relating to s 21 of the Animals Act that is set out in the Third Schedule of the Biosecurity Act. However, the savings provision in the Biosecurity Act is s 169 and not the Third Schedule (the Third Schedule is a repealing provision not a savings provision). Section 169 reads:

> 169. Savings of Animals Act 1967 for limited Administrative Purposes – Notwithstanding s 167(1) of this Act [that enacts the Third Schedule] the Animals Act 1967 shall continue to full effect to the extent necessary for the proper administration of sections 13, 14, 15, 16 and 21 of that Act in relation to organisms not established in New Zealand.

As s 169 applies notwithstanding the contents of the Third Schedule, it would appear that RCD remains within s 21 and that importation and possession remain illegal. (The proposed Amendment to the Biosecurity Act recognises that both the Third Schedule and s 169 must be addressed, for it purports to retrospectively provide for the removal of RCD from both provisions.)

Even if the Regulation were worded in a way which properly expressed its purpose, additional arguments of substantive ultra vires could still be made, ie repugnancy, pursuit of improper purpose, and that the Minister was influenced by irrelevant considerations or failure to consider relevant considerations.

The second empowering provision used was s 165(x):

Providing for such matters as may be contemplated by or necessary for giving full effect to this Act and for its administration.

Although this is a widely drawn provision, it appears to be limited to matters relating to the Biosecurity Act and not to the Animals Act. Even if it were not so limited, it is difficult to see how removing a particular disease from s 21 Animals Act, after a determination has been made under that section not to approve the use of the disease, is a matter which is contemplated by or necessary for giving full effect to the Biosecurity Act and its administration.

## RETROSPECTIVE VALIDATION

Although Parliament is legally able to pass retrospective legislation, in principle such legislation may well be repugnant to the Rule of Law (Wade and Bradley, *Constitutional and Administrative Law*, 11th Edn, 1993, p 267). Before Parliament wields its giant's power it should consider very carefully if such legislation is really necessary. The Biosecurity (Rabbit Calicivirus) Amendment Bill has only four sections, but these contain three retrospective provisions. These are set out in cls 2 and 3 as follows:

2. Section 21 of Animals Act 1967 not to apply to rabbit calicivirus – (1) The organism known as viral haemorrhagic disease of rabbits, or rabbit calicivirus, is deemed on and after 24 September 1997 to have been established in New Zealand for the purposes of s 21 of the Animals Act 1967 (as continued in force by the Third Schedule of the principal Act).
   (2) The organism known as viral haemorrhagic disease of rabbits, or rabbit calicivirus, is deemed on or after 24 September 1997, to have been an organism established in New Zealand for the purposes of s 169 of the principal Act.
3. Validation and revocation of Biosecurity (Rabbit Calicivirus) Regulations 1997 – (1) The Biosecurity (Rabbit Calicivirus) Regulations 1997 are deemed, on and after 24 September 1997, to have been valid.
   (2) The Biosecurity (Rabbit Calicivirus) Regulations 1997 (S.R 1997/203) are revoked.

The intention appears to be for the provisions in cl 2 to replace the Regulations (which are to be revoked by cl 3(2)). However, as the Regulations were never effective with respect to the savings provision in s 169 of the Biosecurity Act, cl 2(2) must be seen as retrospectively legalising actions which have remained illegal under s 21(4) Animals Act right up to the date the Bill is passed. Clause 2 will effectively "cure" the shortcomings of the Regulation, but only by legalising retrospectively.

Of even more concern is cl 3 which purports to validate retrospectively Regulations which are almost certainly ultra vires, but which are also inadequately formed to effect the intended law change. Clause 3 is simply a nonsense and should be removed. However, the fact that the Government should wish to include it is an issue of great concern. Its intention appears to be to "cure" the failure to consult adequately, and to deter challenges to the validity of the Regulation because of this – indicating that Government does not consider it necessary to comply with the legal requirement to consult. It also appears to "cure" the fact that it does not fit within the scope of the empowering clause – indicating that Government does not consider it necessary to comply with the legal constraints of an empowering clause. All can be "cured" by Government's ability to control Parliament and to legislate retrospectively. This is the most serious challenge to the Rule of Law.

## CONSEQUENCES OF BREACHES OF THE RULE OF LAW

The Rule of Law is reliant on the ability of Government to understand that there are limits beyond which it is sensible not to wield its power, even when it is "legal" to do so. When the Government gets this wrong there are always consequences.

Probably the most readily foreseeable consequence is that farmers who wish to introduce a different means of biological control at some future time may not consider it necessary to follow the legal procedures in the relevant legislation. They may well believe that MAF has neither the means nor the will to stop them, that the Government will come to their aid in spite of the law, and that their rights are more important than the rights of others. It is dangerous to give any group in society the message that, should they wish to disobey the law, no one is able to stop them.

Other interest groups who have not been successful in pursuing their causes by legal means might also try to take the law into their own hands. After all, their belief in the "rightness" of their cause may equal that of the errant farmers. If their actions are met by the force of the law, then genuine rifts in society occur. Some people are seen to be more equal than others before the law. A pertinent comment in that regard was made by Penny Pepperell in *The Capital Letter* (1997) (20 TCL 35):

> The irony of one act of vandalism (of the America's Cup) attracting a 34 month prison sentence while another unlawful act (introducing the rabbit calicivirus) has been rewarded with Cabinet endorsement, provides a good illustration of the importance of applying the rule of law on an impartial rather than a popularity poll basis. It is also a reminder of why Judges' perceptions of the role of the Courts in our constitutional framework is of some importance.

Those whose legal rights have been rendered nugatory by MAF's refusal to enforce the law will feel powerless and cheated. Yet society expects their response to be within the law. The obvious irony is that New Zealanders are expected to comply with biosecurity laws which were enacted primarily for the protection of farmers. If farmers are going to be given something which has been declined under legislation designed to protect them, is New Zealand really ready for the new Hazardous Substances and New Organisms Act, with its precautionary principle and its emphasis on environmental concerns?

New Zealand's clean green image has taken a battering in recent times, as noted in *The State of New Zealand's Environment* by the Ministry for the Environment. This fiasco will do nothing to assist its recovery. The message being given clearly to the overseas community (including our trading partners) is that New Zealand cannot cope with a biosecurity emergency, and that its Government does not comprehend that there are real biosecurity problems in letting individual farmers mix up and spread about the countryside home brews which include unknown concentrations of deadly virus, as well as unknown amounts of other contaminants (including other diseases). This surely undermines the international credibility of MAF's certification procedures. As one Professor of Zoology noted in his letter to the Minister: "Internationally we will surely be viewed ... as a country that has momentarily taken leave of its senses". ❑

# WOMEN OFFENDERS AND COMPULSION

*Elisabeth McDonald, The Law Commission*

***discusses the treatment of women who fail to protect their children***

In 1993 two cases of child abuse resulting in death were dealt with by the criminal Courts. The deaths of Delcelia Witika and Craig Manukau were the result of physical violence by their stepfather, Eddie Smith, and father, Carl Manukau. In both cases, however, their mothers were also charged with criminal offences – ranging from failing to provide the necessaries of life to murder. The role of each mother in the deaths was arguably different – Tania Witika admitted hitting Delcelia on a number of occasions, Lavinia Manukau did not. In both cases, however, the women were also seriously abused by the men convicted of the murder and manslaughter of their children. They were both battered women who claimed they were too scared of their partners to prevent the abuse of their children, or, at the final hour, to get the medical attention that may have saved their children's lives.

> While the ten-year-old boy was being kicked to death by his father, his mother, Lavinia, went into the kitchen, closed the door, turned up the radio and put her hands over her ears to shut out the noise. (*New Zealand Herald*, Auckland, 22 November 1993, 9.)
>
> On the day the death occurred at about 10 am the appellants took their young son and left Delcelia in the house .... In her evidence Witika admitted she knew the child was going to die, she thought from the burns. They spent the day with friends and returned to find the child dead at about 5.30 pm. (*R v Witika* [1993] 2 NZLR 424, 430.)

The outcomes were significantly different. Tania Witika was found guilty on several counts, including manslaughter, and was sentenced to 16 years' imprisonment, the same penalty received by Eddie Smith. Lavinia Manukau was found not guilty – she was viewed as powerless to save her son.

The cases, particularly the difference in outcome, highlight important issues for the advocacy of battered women who commit, or are party to, violent crimes – including acts or omissions leading to the death of their children.

There is no doubt that the case of Delcelia Witika was one "of wicked child abuse". (*Witika* at 427.) The fact that the abuse went on for so long and that at no time did Tania seek medical help was clearly significant at trial, and on appeal. Tania was held responsible for some of the physical abuse, which she admitted. Neither she nor Smith admitted any of the serious injuries, including the sexual abuse of Delcelia (441) with which no one was charged. It was accepted, however, that Tania herself was beaten and raped by Eddie Smith, a doctor stating that the severity of her beatings was "close to 10" on a scale of 0-10. (428) But to what extent was Tania's abuse taken into account? It appears not at all – "the claim to have been under domination is negated by the verdicts". (441) It may be that the jury simply did not accept the argument that Tania herself had no control over the events because of her own abuse. Like Kevin Dawkins, many have viewed the case as not being about battered woman's syndrome at all, but about "fatally battered child syndrome" ("Criminal Law and Procedure" [1994] NZ Recent Law Review 48, 63) and certainly the facts make it a difficult case. Overseas jurisprudence has established, however, that "bad" clients are usually unable to rely on a defence based on their own abuse.

> The more a woman may have displayed anger or aggressive tendencies, have experienced problems with alcohol or drug abuse, have been involved in criminal activities, or have demonstrated autonomous behaviour in other spheres of her life, the more risky a defence based on battered woman syndrome may become. (Martha Schaffer "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R v Lavallee* (1997) 47 University of Toronto LR 1, 25.)

Tania Witika may well have been penalised because she deviated "from the ideal of the 'deserving' victim/battered woman who has 'faultlessly' and passively endured vicious abuse". (Schaffer at 25.) In the words of Dawkins again: "By contrast, the appeal in *Gordan* ... drew sympathetic attention to the plight of victims of domestic abuse ..." (63, emphasis added). This statement can be compared to the words of the Court of Appeal: "The position of battered women indeed calls for sympathy but there can be no justification for broadening the grounds on which the law should provide excuses for child abuse." (436) Witika it seems was not a battered woman who deserved sympathy. Lappin "Disciplinary Technologies for Enticing Sexed Order: A Case Study" (1997) 8 Aust Fem LJ 125, 128 also comments on the need for women defendants to meet the standard of an "ideal" woman in order to be acquitted.

What is also apparent from this case, however, is that the current law simply cannot accommodate the situation of a battered woman who is powerless over a long period of time – that is, the Courts (and juries) simply do not believe it is possible. Because the case was not treated, or accepted, as being about a battered woman, it may be that the trial Judge and the Court of Appeal simply did not understand the dynamics of an abusive relationship. Further, the extent to which an abused woman has to lie or pretend about her life

may not have been argued. There are at least two illustrations of this failure to understand from the case.

First, as reported by Dawkins: "[T]he credibility of any defence based on compulsion ... was significantly reduced by ... compelling videotape evidence of her demeanour on the day before the child's death." (64) The videotape of her at a friend's house was introduced in part to show that she was not battered enough to be subject to Smith's will all the time. This again raises the issue of particularising the "syndrome" to such an extent that individual women may not be viewed as abused at all. As mentioned above, women who are forced to behave a certain way at home are also invariably forced to behave a certain way in public. (See Nan Seuffert "Lawyering and Domestic Violence" (1994) 10 (2) *Women's Studies Journal* 63 (and Seuffert's LLM thesis, held at Victoria University of Wellington). According to Tania, Eddie Smith would not let her stay at home that day and had held a knife to her throat and threatened her. It is unclear to what extent this kind of dynamic was explored at trial.

The second example is from the judgment of the Court of Appeal: (at 436, emphasis added.)

> [I]t is quite clear that there were substantial periods during which Smith was not present and Witika had opportunities to seek assistance and secure medical care for her child and otherwise bring an end to her ill-treatment. While those periods continued she failed in her duty. *Her situation was no different from that of a person who has an opportunity to escape* and avoid committing acts under threat of death or serious injury.

Subsequently, which, through the use of the analogy in italics indicates a real lack of understanding of the options available to battered women, Thomas J has delivered a judgment describing more accurately their situation:

> [T]he battered woman relationship is characterised by the batterer exerting excessive control over the woman. The abuser generally exerts not only physical control but financial and social control as well. Women in these relationships are frequently kept without money, are not allowed friends, and are forbidden to move outside the house without the knowledge of the dominant party ... .The phenomenon has also been labelled "traumatic bonding". Women have little control over their lives, *are unable to predict the outcome of their choices, and cannot identify or take advantage of opportunities to escape the relationship*. (*Ruka* [1997] 1 NZLR 154, 171 and 172, emphasis added.)

It is of considerable concern that the context in which the argument about the relevance of battered woman syndrome is presented, (including the facts of the case, the "worthiness" of the women and the make up of the Court of Appeal) has such a significant bearing on the outcome of any particular case. In my view, the relevance of Tania's abuse was never adequately considered and her case demonstrates the importance of using the context of women's offending in an appropriate way, including the use of expert evidence. "Absent expert testimony, the jury would have difficulty understanding ... why she sat passively waiting for events to unfold." Monique Gousie "From Self-Defence to Coercion: *McMaugh v State* Use of Battered Woman's Syndrome to Defend Wife's Involvement in Third-Party Murder" (1993) 28 *New England LR* 453, 474.

Her abuse was also not given appropriate weight in the sentencing process, even though it was acknowledged (in a way that minimalised the extent of the abuse) that "Smith, *who demonstrated from time to time his physical superiority* over his partner, was in a stronger position to bring an end to the abuse and to ensure appropriate medical treatment". (441, emphasis added.) The (in)ability of battered woman to take action in the absence of their abuser also has significant implications for the availability of the defence of compulsion, which was unavailable to Tania Witika. The elements of this defence will now be discussed in more detail.

## WOMEN AS PARTIES TO MALE OFFENDING

> Ninety per cent of the women in here are here because of men. Usually women are only involved [in offending] because of their connection with a man. (Comment from woman inmate, 1996, to Law Commission's *Women's Access to Justice Project*.)
>
> [85 per cent of them] would not have gone to prison in the first place if it were not for their involvement with abusive male partners. (Karl Rasmussen, Executive Director of the Women's Prison Association in New York, cited in Elizabeth Schneider "Resistance to Equality" (1996) 57 Uni of Pitt LR 477, fn 51.)

Although the above quotations confirm the power imbalance of relationships between men and women, to the extent that women may be pressured by their partners into offending, this dynamic is rarely apparent in the defence or sentencing of female offenders. In particular, the defence of duress or compulsion is radically under-utilised by women, in part because the coercion they are subject to does not easily fit within the defence as defined by law.

> Evidence of BWS is relevant to the woman's duress claim because it links the on-going violence she experiences with the specific crime she has committed ... .The battered woman does what she can to keep her batterer happy in order to avoid to avoid becoming the target of his violence. Every action a battered woman takes is thus coerced. Courts need to recognise that when any woman does even the simple, everyday things she does to placate her batterer, she does them under duress. Crimes that she may commit are simply an extension of the same duress that leads her to cook his favourite meal or keep the children quiet. They are yet another effort to placate her batterer. She, too, is a victim of a crime, frequently more heinous than the one she has committed. Although technically she made a choice to commit a crime, the odds were so heavily against her as to make that choice almost farcical. (Susan Appel "Beyond Self-defence: The Use of Battered Woman Syndrome in Duress Defences" [1994] Uni of Illinois LR 955, 977-8.)

As this quotation suggests, the coercion experienced by battered women is part of their experience *as* battered women. Dr Lenore Walker even defines a battered woman in: *The Battered Woman* (1979) as:

> [O]ne who is repeatedly subjected to any forceful physical or psychological behaviour by a man *in order to coerce her to do something he wants her to do* without any concern for her rights.

Battered women would seem to be, therefore, the group most able to rely on the defence of compulsion, as provided by s 24 of the Crimes Act 1961. The defence, however, contains elements that, as with self-defence and provocation, cannot easily be satisfied by women who are abused.

Although all the elements of the defence have not been tested in relation to the situation of battered women (for

example, in *Witika* the "presence" requirement was not satisfied (436) and in *Ruka* the Court of Appeal had no jurisdiction to hear argument on the point (170)), there are several issues that may arise.

First, there must be a threat of immediate death or grievous bodily harm. Although the Court of Appeal has accepted that an implied threat might satisfy the section (see *Raroa* [1987] 2 NZLR 486, 492-3), the defendant must reasonably believe there was a threat. The abuser, however, may not make an express threat and the implied threat a battered woman perceives may not be apparent to any other person, therefore will not found a legally reasonable belief. Battered women, however, will usually develop "hypervigilance" as a symptom of the cycles of violence and learned helplessness. To a battered woman, otherwise insignificant behaviours such as an eye twitch, a particular tone of voice, or a certain movement are all things that may signal an impending attack.

> Women are hypervigilant to cues of impending danger and accurately perceive the seriousness of the situation before another person who had not been repeatedly abused might recognise the danger. (Walker "Battered Women Syndrome and Self Defence" (1992) 6 Notre Dame J of Law Ethics and Pub Pol 321, 328.)

Dr Walker compares battered woman to an animal who has been in a bush fire and then jumps when a match is lit. Both the animal's and the battered woman's reactions are instinctual. Battered women may therefore exhibit hypervigilant behaviour in response to threats made by people other than her batterer. Battered women may perceive behaviour by any men as threatening, while a non-battered woman would not. This heightened perception of threats by battered women means that it essential to explain how the threat is real to them. If the defence is based on the belief of the defendant, then a battered woman's belief should be recognised and understood, rather than classified as "unreasonable".

The next requirement of the defence of compulsion is that the threats need to be made by a person who is present at the time the offence is committed. This factor may also be difficult for battered women to satisfy, as was demonstrated in *Witika*.

> Assuming, very much in favour of Witika, that her failure to get medical help was capable of being excused under s 24 while Smith was present, she lost that ground of exemption from liability when he was no longer present and she had the opportunity to get help. (435-6)

Although this may have been an appropriate finding in the context of the case, that is, the Court rejected the argument that Witika was "prevented from [providing medical care] by Smith by whom she was dominated physically, mentally and sexually over the last month of Delcelia's life" (433), it should not become a strictly interpreted factor in every case. As I have argued elsewhere, battered women may always feel controlled, whether or not their batterer is close to them. "Is Tania Witika Guilty? An Exploration of Battered Women's Syndrome and the Criminal Law" in McDonald (ed) *1993 New Zealand Suffrage Centennial Women's Law Conference Papers* (Women's Legal Group, Wellington, 1993) 215, 231. See also Pualani Enos "Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children" (1996) 19 Harv Women's LJ 229.

The Court of Appeal also compared Tania's situation to "that of a person who has the opportunity to escape and avoid committing acts under threat of death or serious injury". (436) Apart from introducing a requirement to escape, which is not found in the section, this comparison again ignores the reality of battered women who, in the words of Thomas J, "cannot identify or take advantage of the opportunities to escape". (*Ruka* at 172) How can a battered woman take an opportunity she can not see, even though it might be apparent to a hero or even a reasonable person? Again, as with the implied duty of battered women to first go to the police (*Wang* [1989] 2 NZLR 529, 534), to hold a battered woman to the standard of an ordinary person is to deny her reality and her experience.

The final requirement of importance is that the defendant must believe that the threats will be carried out. For battered women, this requirement, importing as it does a reasonable standard, has similar implications. It may be that only the battered woman knows about the likelihood of serious bodily harm at that particular time. Her belief may be based on knowledge of many previous cycles of violence and contrition, but to anyone else the likelihood of harm may not be readily apparent.

Although the defence of duress has been made available to battered women in other jurisdictions, including Australia (see Easteal, Hughes and Easter "Battered Woman and Duress" (1993) 18 Alt LJ 139), and Canada, (*R v Lalonde* (1995) 37 CR (4th) 97) the strictness of interpretation of the section by the Court of Appeal in *Witika* is probably denying women use of the defence. It is hoped that the issue will be raised with the Court of Appeal or the legislature in the near future. In the words of one North American commentator:

> [D]espite the similarities between the defences of duress and self-defence, battered woman coerced into crime have long been ignored in [the] movement toward recognition and law reform. (Blake "Coerced into Crime: The Application of Battered Woman Syndrome to the Defence of Duress" (1994) 9 Wisc W LJ 67, 93.)

At the very least, the context of coercion in many women's lives should be made an issue at sentencing, as provided in the United States.

> There appears to be ample room in the guidelines for Judges to use departure to account for the most obvious forms of coercion and abuse. ... [P]olicy statement 5K2.12 provides that "serious coercion, blackmail or duress, under circumstance not amounting to a complete defence" is a basis for downward departure. Courts have employed this section to justify downward departures for battered female offenders. (Nagel and Johnson "The Role of Gender in a Structured Sentencing System: Equal Treatment, Policy Choices, and the Sentencing of Female Offenders Under the United States Sentencing Guidelines" (1994) 85 JCL & Crim 181, 209.)

For example, in *United States v Johnson* 956 F 2d 894 (9th Cir 1992), the Court vacated the sentences of several female participants in a drug trafficking conspiracy headed by a violent, male drug lord. The Court in *Johnson* was also sensitive to the gendered nature of duress, noting that "gender is also a factor to be considered" as one of the defendant's personal characteristics in determining whether the fear is well grounded, and whether there is a reasonable opportunity to escape.

This approach was not taken in the case of Tania Witika. The outcome of her trial, appeal and sentencing, indicates that appropriate recognition of the context of her offending, and therefore her culpability, has not occurred. ❑

# "LET JUSTICE FLOW LIKE A RIVER"

*Judge F W M McElrea*

***gave the sermon at the annual church service of the Auckland District Law Society. The address contrasts a Christian view of law with a secular view rather than with other religious views. The readings on the occasion were Psalms 85: 4-13 and 1 Peter 3: 8-16***

Speaking as I am to a group of Christian lawyers – practitioners, academics, Judges and others – the question I want to ask is this: If we really take our Christianity seriously, what is it that should differentiate us from other lawyers? What difference should the fact that we are Christians make to the practice of our profession?

Over the holidays I read Alex Frame's award-winning biography of Sir John Salmond, *Salmond: Southern Jurist*. It raised again for me the age-old question about the relationship between law and justice. Is the true model of law (as the Austinian school contended last century) simply the command of a sovereign power backed by sanction, with no necessary moral content? Is law the measure of justice? Alex Frame shows how this "positivist" view, which does not require any "grand plan" (divine or otherwise), fitted in with Darwin's newly stated theory of the evolution of life by a process of survival of the fittest. Legal and scientific theory alike supported the Victorian emphasis on the freedom of the individual to flourish according to its strengths. Although we tend to think of the Victorians as strongly religious, they continued the process already begun in "the Age of Reason" of confining the domain of religion and making possible a secular view of the world, one which is very much in the ascendancy today. Salmond, who bridged two centuries, did not expound any religious view of law but did allow for an ethical component.

Can we take a positivist approach and say that the law is designed for a secular world, so we should apply secular values in our working life and keep our Christian values for our personal and social life? This "solution" has the appeal of consistency with the separation of Church and State, and with the principle that our laws are designed for those of any faith, or none. It is also an "easy" solution in the sense that it helps Christians to avoid crises of conscience in their working life or confrontations with the established order. (I am not saying that those who adopt this separatist view – "Don't mix law and religion" – do so because they prefer an easy life. Some will see it as a matter of firm and clear principle.)

Closely aligned with this approach is the widely held notion that justice involves the even and fair application to all citizens of rules promulgated through constitutional means. That is a respectable proposition for the secular world, and no doubt true so far as it goes. FE Dowrick's *Justice according to the English Common Lawyers* (Butterworths, London, 1961) largely describes such a "process" view of justice. But is procedural justice enough for a Christian? I suggest not.

The twin Hebrew words *tsedeq* and *tsedaqah* sometimes translated as "justice" are more often translated as "righteousness" (Richardson A (ed) *A Theological Word Book of the Bible* SCM, London, 1957, p 203). In the Old Testament they mean ethical uprightness but also benevolence to the helpless, salvation for the oppressed. (ibid.) As one Jewish commentary on the scriptures explains:

> To understand the idea of justice in Israel we must bear in mind the biblical teaching that man is created in the image of God; that in every human being there is a divine spark; and that each human life is sacred, and of infinite worth. In consequence, a human being cannot be treated as a chattel, or a thing, but must be treated as a *personality*; and, as a personality, every human being is the possessor of the right to life, honour and the fruits of his labour.
>
> (*Pentateuch and Haftorahs* (2nd ed) ed Dr J H Hertz, Soncino Press, 1975, p 821 – by courtesy of Judge David Robinson)

In fact, if we look at the biblical idea of justice we find that a separation of process from content is not possible. Certainly the duty of even-handed justice to all is laid down. King Jehoshaphat of Judah instructed his Judges:

> Be careful in pronouncing judgment; you are not acting on human authority, but on the authority of the Lord, and he is with you when you pass sentence. Fear the Lord and act carefully, because the Lord our God does not tolerate fraud or partiality or the taking of bribes.
>
> (*2 Chronicles 19: 6-7*; all biblical quotations use the Good News Bible translation unless otherwise stated)

Moses had similar advice for his people: see Deuteronomy 16: 18-19. The judicial oath taken in New Zealand echoes this principle of doing right by all people, "without fear or favour, affection or ill will".

But an equally strong biblical strain is the concept of justice as a divine and ultimately irresistible force. The Jewish commentary already mentioned notes at p 820 that Isaiah uses only one Hebrew word to designate both "justice" and "victory" – ie the triumph of right in the world. Significant too is the way the prophet Amos speaks of justice:

> Spare me the sound of your songs;
> I shall not listen to the strumming of your lutes.

*Instead let justice flow on like a river*
*and righteousness like a never-failing torrent.*

(*Amos, 5: 21-24*; transl Revised English Bible)

The same insistence on action appears in the New Testament:

> Not everyone who calls me "Lord, Lord" will enter the kingdom of heaven, but only those who do what my Father in heaven wants them to do. (*Mat. 7: 21*)

What God unmistakably requires of us is that we act as His agents in this world to help bring in His kingdom. Instead of just talking and singing about His kingdom we are to *act*. And how? By letting "justice flow on like a river". Another translation says "let justice roll down like waters" (New Revised Standard Version). The simile conveys the image of justice as something we should thirst for – a life-giving force, originating from the creator, that feeds the land and its people. Above all else that, I believe, is what we need to understand and live out.

Next to be noted is the strong biblical connection between justice and peace. In our Old Testament reading for today the psalmist exclaims:

> Mercy and faithfulness have met;
> justice and peace have embraced ...
> Justice shall march before him
> and peace shall follow his steps.
>
> (*Psalm 85: 10 and 13*; translation from Peter Coughlan et al, *A Christian's Prayer Book*, Geoffrey Chapman, London, 1974)

Likewise Isaiah tells us

> The work of justice is peace;
> and the effect thereof quietness and confidence forever.
>
> (*Isaiah 32: 17*, as translated in the Jewish commentary referred to above. See also *Psalm 72*)

The Mennonite writer Howard Zehr, in his seminal work on restorative justice *Changing Lenses*, emphasises the connection between justice and *shalom*, usually translated as "peace" but basically referring to a state of "all rightness" in various dimensions – physical well-being, a right relationship with others, and personal honesty or moral integrity (p 131 of *Changing Lenses* (1990) Herald Press, Scottdale, Pa USA). This enables Zehr to develop a biblically based view of criminal justice as peace making.

While the Greek philosophers had explained justice in terms of a harmonious arrangement of society, the Hebrew concept goes much further than this dimension of peace – it makes justice akin to holiness. The Jewish commentary already cited notes at p 821:

> The oppressor, the man who tramples on others, ... is throughout Scripture held forth as *the* enemy of God and man.

And as my own vicar the Revd Brian Jenkins has put it –

> Holiness is loving and serving and obeying God, and that is intimately and absolutely connected to loving and serving others with God's love
>
> (Sermon for the Anglican parish of St George, Epsom, 18 February 1996)

Justice and mercy are also closely linked in biblical sources. As we have already heard in the Old Testament reading

> Mercy and faithfulness have met;
> justice and peace have embraced.
>
> (*Psalm 85: 10*)

The prophet Micah asks the well-known question which links these two driving forces together:

> And what does the Lord require of you?
> To act justly and to love mercy
> and to walk humbly with your God.
>
> (*Micah 6: 6-8*, transl New International Version)

Of course with Christ's coming God has provided us with a model of how we should live.

> A new commandment I give to you,
> that you love one another as I have loved you.
>
> (the translation used in the Anglican New Zealand Prayer Book p 406)

From Christ's example we know that our God is "personal, faithful, and concerned about the underdog and about the human condition generally": Howard Zehr (above) at p 135. Note that it is not just that we should love our neighbour as ourselves, which is to be found in the Old Testament, but that we should love others *as Christ loved* his disciples. St Paul's great eulogy to Christian love in 1 Corinthians 13 can be our guide.

This involves a change of heart. As the Revd Brian Jenkins has said:

> The key to the reversal of a people who by almost every standard of measurement are going downhill, is *not* in law and order. Do not expect whoever governs this country to be able to reverse the crime rate, the violence, the dishonesty, the immorality, or any of those sorts of things. In order to change society, people must change – in their hearts. That's the principle of the kingdom of God.
>
> (Sermon for the Anglican parish of St George, Epsom, 7 November 1993)

And so we see that for Jews and Christians alike, justice is part of the very nature of God. It is therefore not something we can decline to be interested in, or that allows us to say "Yes it's important but we will leave it to the Courts or the Ministry of Justice or to legislators to pursue as they see fit". And of course Judges (and litigation lawyers) are indirectly involved in law making. It would be hard to improve on Salmond's expression of this reality in 1900:

> We must admit openly that precedents make law as well as declare it ... we must recognise a distinct law-creating power vested in them and openly and lawfully exercised. ... Creative precedents are the outcome of the intentional exercise by the Courts of their privilege of developing the law at the same time that they administer it.
>
> (J W Salmond, "The Theory of Judicial Precedents", (1900) 16 LQR 378, cited by Alex Frame *Salmond: Southern Jurist* p 59)

Justice being of the very nature of God, we as Christians must work for its advancement in this life, here in New Zealand. As lawyers of one sort or another there are several things we can do. Can I make five brief suggestions:

1. Obviously, in our own lives we must apply those standards of honesty and integrity of which the scriptures speak, and which the profession is entitled to expect of all its members. This is usually fairly obvious, but at times may require some difficult personal decisions.
2. Christian lawyers must be prepared to uphold ethical standards in business, and to lose the client if their advice is unacceptable. They cannot see themselves merely as

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# MEDIATION AND PUBLIC LAW

*Phillip D Green, Barrister, Wellington*

***discusses the contribution of mediation to public law in a paper given at the AIC 1997 Administrative Law Conference***

At its simplest level, mediation is about giving disputants problem solving techniques, helping the disputants understand their problem and then guiding and encouraging them towards a win/win solution. It is a constructive approach. As everyone knows, it is in stark contrast to litigation which creates the win/lose result.

The nature of conflict and its different forms is recognised at least implicitly in our different streams of law. Criminal law, commercial law and public law are shorthand descriptions for types of law dealing with different interests and relationships. Contrary to popular belief mediation, at least in my view, is not the panacea for all dispute resolution running across these streams of law. Writers and analysts of ADR often use refined distinctions to explain what will or will not become a dispute susceptible to mediation. Not all disputes are amenable to the mediation model.

A starting point is that of John Burton in his book *Conflict Resolution and Prevention*. (1990 MacMillan) He creates a distinction between what he calls "disputes" which can be mediated and "conflict" which by his definition cannot be mediated. To understand his distinction, I need to explain that "conflict" under his definition concerns "deep rooted human needs".

"Disputes" are about negotiable matters susceptible of compromise.

Abraham H Mazlow explores the "needs", "values" and "interests" divisions which sit behind conflict. (*The Farther Reaches of Human Nature* Penguin 1976)

Burton develops this. Just as these fundamental distinctions apply to individuals – they also can be said to apply to the state.

Public law is about the relationship of the individual to the state.

The hallmark of any relationship is the blend of agreement and disagreement, the latter of which can ripen into dispute. So why should it matter whether an issue is "needs", "values" or "interests" based in the context of disagreement and dispute?

By now you may be asking "What relationship does this analysis have to public law?"

In response I argue that analysis of these headings in the context of dispute resolution determines the realism or otherwise of advocating a place for mediation in public law.

Burton defines "needs" as reflecting universal motivations. (p 2)

Mazlow says needs embrace not only the biological needs of food and shelter, but also "growth and development".

Conflict studies demonstrate that "needs" will be pursued by all means available. A failure to have them met can generate conflict of almost limitless proportions.

"Values", Burton says, are "those ideas, habits, customs and beliefs that are characteristic of particular social communities. They are linguistic, religious, class, ethnic or other features that lead to separate cultures and identify groups." (at 36)

Where discrimination takes place (and in all its guises) defence of the values becomes the response for the protection of personal security and identity.

Burton makes the point that it is the pursuit of individual needs that is the reason for the formation of identity groups through which the individual operates in the pursuit of a wider ego, security and identity.

It is values which have divided Ireland and have the Croats and Serbs warring while in this country values have driven to promotion of *taha Maori* and the surge towards securing Maori identity.

Finally, I must refer to "interests". This refers to the "occupational, social, political and economic aspirations of the individual, and of identity groups of individuals within a social system".

Typically, they are competitive and have a high win/lose component. They are transitory and alter with circumstances – often relating to material goods or "role occupancy". "Interests" influence policies and tactics in the pursuit of needs and values.

"Interests" are a negotiable item – individual interests can be traded.

The Fisher/Ury (*Getting to YES* 1987, Arrow) model of interest-based negotiation, although using the word "interest" in a somewhat different way, demonstrates the point. If "interests" of the Burton variety can be identified between disputants then the Fisher/Ury model can be applied to it to achieve a mediated solution.

But, needs and values are off-limits for trading. One cannot mediate survival nor compromise on identity.

Public law is often concerned with needs and values. For example, it sets the limits for our welfare safety net and does so by policies, Acts and Regulations.

Recipients receive the crumbs from the policy table and have no bargaining power to change the crumbs into a cake. The state does what it chooses to do according to its broad economic vision influenced by pressure groups at all ends of the spectrum.

But as between the individual and the state, there is nothing to negotiate – and so, nothing to mediate.

To illustrate the point consider the Immigration Act 1987 and the Appeal provisions enacted in 1991. The latter provisions set up the Residents Appeal Authority and the Removal Review Authority. Previously the Minister held discretion to determine the issues now under the jurisdiction of these Authorities. The Act provides that immigration rules will be set down through immigration policy. The policy gets its *vires* from the legislation.

It can be changed by the Minister. So the policy is not contained in statutory regulations and the Minister relying on Government policy spells out the management of immigration.

It will be seen at once that the state has no ordinary relationship with a prospective immigrant. The state sets the rules. The policy is imposed and it would seem according to some of the political winds may even be "identity" – that is "values" driven. Again, a curtain is pulled across the prospect of mediation.

Does this mean that mediation can never have a role in public law dispute?

The answer must be "no" again having regard to the analysis set out above. In some instances, matters of public law are yet "interest" based as between the parties.

A most striking example of this may be found in Treaty negotiation. Here the Treaty partnership has pushed the players into meeting across the table.

The conflict for resolution is "interest" based and concerns resort to a fiscally driven solution usually being a mix of land and money. Plainly, there is a role for mediation. And if an appropriate procedure is adopted I am sure it would work. So far, I am bound to observe that the Crown has been reluctant to adopt the recognised mediation models and this, in turn, has impacted on the success of the hybrid forms of mediation I have seen used.

Contrary to popular belief, not every dispute is susceptible to a mediated settlement.

Any mediated settlement requires at least one of the parties to move from the position adopted at the point of stand-off. That movement can take place by a change of position or a change of thinking about that position or the position held by the other party.

The relationship between the state and individuals within it is a relationship circumscribed by imposition through statute, regulation, policy and rules.

For mediation to work, there has to be an undertaking by the parties at least to consider moving the position and, of course, having the ability to actually make the change required if agreed upon.

The people present at the mediation must have the direct power to settle the dispute.

In the realm of public law, immediate difficulties are identified. Where decision makers are working under the constraints of statute or regulation there is no power to alter the position. By and large and with a few exceptions where policy is determined at ministerial level, unless the process involves the Minister the same obstacle arises.

Parliament expresses the will of the Crown. Generally, it is not in the business of mediating its position. It is an imposer of the rules that govern society and will not change them to meet individual needs. ❑

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there to do their client's will – "a cog in the wheels of commerce", as one lawyer put it. Advice should be given with intellectual honesty, and not tailored to what the client wants to hear.

3. We all come across situations of blatant injustice or oppression where opportunities exist for *pro bono publico* legal work. This is not limited to Court work. Commercial, conveyancing or mediation skills may be needed but beyond reach. Neighbourhood Law Offices and Citizen's Advice Bureaus are two places amongst others in need of such help.
4. Because we have the privilege of knowing how the legal system works, we should be on the lookout for those areas in which it produces injustice, and work to change them. Lawyers (including academics) are uniquely placed to engage in law reform because law is their profession. They know the processes of law making and should have the intellectual skills to analyse injustice and argue for its defeat. The Law Society's various committees are one avenue for such work. The Legal Research Foundation is another. (In that context I have argued for the introduction of restorative justice processes in criminal law – see eg "Accountability in the Community: Taking Responsibility for Offending" in *Re-Thinking Criminal Justice* Vol I, LRF (1995) p 61; and also in schools – see "School Discipline and Restorative Justice", in *School Discipline and Students' Rights*, LRF (1996) p 87.)
5. As educated and articulate members of the community, Christian lawyers should be looking at the values of the world around them, and where they are anti-Christ, where they promote oppression, poverty or injustice, be prepared to speak out against them, to take a stand for God's values. The rapid growth in the dehumanising and impoverishing business of gambling is one target largely untouched so far.

In all of this, without any blowing of trumpets and without seeking to proselytise, we must make it clear whose values they are that we seek to promote, and in whose name we use our talents.

> Do not be afraid of anyone, and do not worry. But have reverence for Christ in your hearts, and honour him as Lord. Be ready at all times to answer anyone who asks you to explain the hope you have in you, but do it with gentleness and respect.
>
> (*1 Peter 3: 14-16*)

Let us now say together the following prayer of the people (from the Anglican New Zealand Prayer Book p 464):

> God of peace,
> let us your people know
> that at the heart of turbulence
> there is an inner calm
> that comes from faith in you.
> Keep us from being content with things as they are,
> that from this central peace there may come a creative compassion,
> a thirst for justice,
> and a willingness to give of ourselves
> in the spirit of Christ. AMEN ❑