

THE FIRM - II

Time has permitted further comment on *Thirty Pieces of Silver*. Most such comment has been directed at the specific allegations. Most commentators seem to conclude that the evidence produced does not support the charges levelled. It has also been pointed out that the discovery decisions on which Dr Molloy places such emphasis, were made by independent counsel, including a QC.

This leaves the more general comments about the nature of Russell McVeagh and indeed of the modern legal profession generally. Some of the attack on Russell McVeagh can only be described as misleading in the extreme. An example of a statement that a lawyer will regard as a statement of the obvious, but which the general reader might think was evidence of serious shortcomings occurs on p 377. There Dr Molloy notes that although Paul Carran ceased to be a member of Russell McVeagh during the bloodstock proceedings, he continued to be represented by the same solicitors and counsel who represented the firm as a whole. "The firm did not seek to detach itself from him, but stood with him."

But this follows from the nature of joint and several responsibility. The partners sued are the partners at the time that the cause of action arose and they cannot avoid liability by pointing to one of their number. Their interests in that particular proceeding are therefore identical and they are properly represented by the same counsel.

The philosophy which presumably informs the book as a whole is unfolded in the final chapter. The cynic might see this chapter as yet another lecture from someone earning a multiple of average earnings to the effect that there are better things to worry about than earning money. Alternatively, it might be seen as a plea for a return to a lost golden age of professional responsibility to which lip service is still paid by the profession.

The root question Dr Molloy pursues is whether lawyers should devote themselves to the interests of their clients or to some higher ideal of justice. The discussion is accompanied by some more general discussion of current economic and social attitudes and an attack on proposals to deregulate the legal profession.

Posner is quoted as saying that "competition implies the subordination of other interests to those of the consumer". This is why competition is in general to be preferred to lack of competition. The only purpose of producing anything is for it to be consumed, so it follows that the consumers' interests should be determinative, not the producers'.

So is the case of the legal system, and legal services, any different? First, lawyers provide professional services. The very reason that people consult lawyers is that the lawyers know more than the client. This makes it difficult to know

how to assess the worth of one lawyer compared to another. But this is equally true of cars or any other product that people have to buy. Most people are not well informed about cars and rely on the information that the price mechanism provides.

Secondly, professionals have to advise people how to do what they normally decide for themselves, namely balance conflicting interests. In the case of a doctor, the balance will often be between the short and the long-term interests of the patient. In the end the decision is one for the patient, but only the doctor can provide the information.

Lawyers have yet another interest to balance. This is the client's long-term interest, shared with everyone else, in the effective operation of the legal system. But this is a public good. Hence, we have a free-rider problem. If I breach the rules today I can both derive the private benefit that I will get from breaking the rules and get the benefit of the order and security that flows from the rules' existence.

Unfortunately, Dr Molloy fails to gain the insights that economics might provide since he, evidently, believes that economics is about money, rather than about the pursuit of preferences of all sorts. His descriptions of free market attitudes come from such reliable sources as novelists and film characters. His solutions are exhortation and education, rather than appropriate incentive structures.

But the lesson of life is that no amount of exhortation and education can overcome countervailing incentives. So why is it that large law firms have developed remuneration systems which encourage people to work from dawn till after dusk, six or seven days a week? The answer of course is that a partnership in which profits are shared is peculiarly vulnerable to the free rider, to the shirker who does little and then takes a share. Perhaps the result has been an over-correction, but if so the answer lies in examination of those incentive structures rather than in grandiose statements about professional responsibility.

The problem we are grappling with is therefore the classic problem of the under-provision of a public good and its subordination to the pursuit of private goods. Why this problem seems to have got worse in the professions in recent years is uncertain, but a generation of high inflation and high taxation which has destroyed the generally comfortable life that such people used to enjoy must take some of the blame.

The last doctor who got out of bed to make house calls and then never sent bills to poor patients died some time ago. In a system dominated by government money and a professional cartel, such doctors will never reappear. Perhaps in a deregulated environment they might. □

LETTERS

WOMEN'S SAFETY SURVEY

This paper "continues the discussion of the National Survey of Crime Victims by looking specifically at female victims".

The sample – Starting with the 5000 randomly selected New Zealanders in the National Survey of Crime Victims, women from this group who were currently living with a male partner or who had been living with a male partner within the last two years were invited to become part of a pool from which 500 women were randomly selected. In other words, they were randomly selected from a self-selected group.

Of the women 351 were non-Maori, 149 were Maori. NZ Maori made up 9.7 per cent of the population in the 1991 Census according to the 1996 *Yearbook*. Census 1996 spreadsheets indicate that the percentages were 14.9 in 1991 and 15.7 in 1996. In any event, the figure is well below the 30 per cent in this sample.

The paper speculates on factors resulting in the sample over- or understating the incidence of violence, suggesting the former due to victims being more likely to respond, and the latter due to victims being harder to trace.

Victimisation – the women were asked if they had experienced any of 22 items of physical or sexual abuse including, "using a weapon against you", "choked or tried to choke you", "threatened to slap you", and "threatened to push or grab you in a way that could hurt you". The most common behaviour reported was, "pushed or grabbed in a way that hurt". Around a quarter of the 438 women with current partners had experienced at least one of the 22 acts by their partner. One in seven women (ie about 70) had experienced at least one act from their current partner in the last twelve months. The figure for Maori was one in four (ie about 37), so the figure for non-Maori is less than one in ten.

Multiple acts – two per cent (ie nine) of the women with current partners had experienced ten or more acts (time period not specified). In the conclusion it states that one in one hundred women (ie four or five) reported that they had been victimised by their current partners very or quite often in the last 12 months. The figure for Maori was one in 50 (ie three, which leaves one or two non-Maori).

International comparisons – three per cent of Canadian women had experienced violence by a spouse or ex-spouse within the last 12 months, and also three per cent in an Australian study, compared to 15 per cent for this survey (not counting ex-spouses). Fifteen per cent of Canadian women and eight per cent of Australian women experienced at least one incident during their relationship, compared to 24 per cent in this study (44 per cent for Maori, and hence about 15 per cent for non-Maori).

Terminology – the paper refers to threatening as being violent.

Conclusion – "Whatever the accuracy of the estimates of violence revealed in this survey, the data are certainly indicative of high levels of violence experienced by New Zealand, especially Maori, women at the hands of their current partners." She does not consider that the New Zealand study might overestimate violence in New Zealand, rather suggesting that overseas studies might give underestimates.

She treats the overall results as representative of the situation in New Zealand, although Maori are significantly over-represented and they have a much higher incidence of reported violence, thus markedly inflating the figures.

Equivalent New Zealand studies have not been done to measure women's violence against their male partners, except for the Dunedin longitudinal study.

Violence perpetration rates for the 21-year-olds in that study were:

	Male %	Female %
Verbal aggression	85.8	94.6
Minor physical violence	21.8	35.8
Severe physical violence	5.7	18.6
Any physical violence	21.8	37.2

Violence victimisation rates for the 21-year-olds in that study were:

	Male %	Female %
Verbal aggression	89.7	83.8
Minor physical violence	31.8	26.1
Severe physical violence	21.2	12.7
Any physical violence	34.1	27.1

(From: Magdol L, et al, "Gender Differences in Partner Violence in a Birth Cohort of 21-Year-Olds: Bridging the Gap Between Clinical and Epidemiological Approaches", (1997) 65 *J of Consulting and Clinical Psychology* 68.

This would suggest that if, as Morris claims, New Zealand women are experiencing high rates of violence from their partners, then the experience of New Zealand men is even worse.

Stuart Birks
Massey University

MAORI LAND COURT CONSULTATIVE COMMITTEE

Prior to my appointment as the NZ Law Society representative on this Committee, I did not know of its existence – despite over 30 years' practice in the Maori Land Court. I now find it a useful forum for raising concerns and I invite practitioners with problems or concerns to let me know so that I can raise them and hopefully encourage appropriate action. The Committee is chaired by the Deputy Chief Judge. Its members include the Maori Land Court Chief Registrar, representatives of the Registrar-General of Lands, Te Puni Kokiri, and FOMA. Concerns relating to the Maori Land Court judiciary, Maori Land Court administration and Rules, the interrelation of the records system between the Court and the Land Registries, and Maori land legislation, are considered. Obtaining support to appropriate change is no guarantee that change will occur, but members of that Committee are influential in the right quarters. So please let me know of any matters that concern you at:

PO Box 5003, Wellington
fax: 04 473-3696 or
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Russell Feist
Tripe Matthews & Feist

W(H)ITHER ANZAC DAY?

Abraham van Melle, Victoria University of Wellington

discusses the legal protection for "Anzac" and Anzac Day's future

Few words in our national lexicon are as evocative as "Anzac" – encapsulating as it does many of the images, characteristics, and values that we believe identify us as New Zealanders or as Australians. It is precisely this feature, and the growing interest in Anzac Day amongst younger (high-consuming) New Zealanders, that make the word an attractive target for marketers. It is therefore timely to consider whether the Anzac legend and our national remembrance day should be surrendered to commercial interests.

SUPER LEAGUE'S "ANZAC TEST"

Last year's Anzac Day saw the emergence of several commercial ventures seeking to capitalise on the Anzac legend, the most notable being the inauguration of the Super League's annual "Anzac Test" between Australia and New Zealand – the trophy for which includes a representation of an Australian slouch hat and New Zealand lemon squeezer hat. The Anzac Test was controversial not only for its use of the word "Anzac" but also for the manner in which the advertisements cast the participating athletes in the gladiatorial mould currently in vogue for the promotion of professional sports, suggesting in some way that they were modern "Anzacs". The National Deputy President of the Australian Returned Services League proclaimed in the advertisements:

Mark my words, Australia is still in grave danger from one of our so-called neighbours. The Kiwis were once our allies and now they're on the other side – at least for 80 minutes.

The advertisement concluded with the words "lest we forget". Mr Ruxton was estimated to have been paid up to A\$5,000 for his part in the commercials (*Sydney Morning Herald*, 22 April 1997) and in an attempt to quell the furor the Super League announced it would donate \$20,000 to the RSL and provide free entry for returned servicemen. Super League's explanation was that it was "trying to create a young audience" and that it could "contribute through our young audience so that young people should realise the great history and traditions of some of our servicemen [who] have gone away and given their life for their country" (Editorial, *Sydney Morning Herald*, 19 April 1997).

LEGAL PROTECTION OF "ANZAC"

The commercial exploitation of Anzac is not a new issue. Within months of the landing at Gallipoli in April 1915 the Anzac legend was already taking shape and a substantial Anzac merchandising "business" burgeoned. The application of Aspey, White & Co in June 1916 to register "Anzac" as a trade mark in respect of dried fruit (*Patents Journal*, 8th June) and other similar activities precipitated moves by

New Zealand's war-time Government to protect the Anzac name from commercial denigration. (NZPD, Vol 177, July-August 1916, 29.) Clause 33 of the ensuing War Legislation Amendment Act 1916 required little explanation when Sir Francis Bell introduced it to the Legislative Council as "a very important provision":

The necessity for it arises principally with regard to the use of the word "Anzac". We have been asked to prevent the misuse of that word in its application to trade-marks and so forth, and this enables such a trade-mark to be cancelled [by the Registrar of Patents, Designs, and Trade Marks]. It also gives a general power to protect the use of any such title which may in its application be offensive to public sentiment, and the Governor is to be the Judge of what is offensive. I am glad to say such a provision is already in place in other parts of the Empire (ibid, 774-775.)

This general power was immediately exercised by the Governor, the Earl of Liverpool, in Regulations promulgated in August 1916 (*Gazette*, 1916, at p 2893) which forbade "the use of the word 'Anzac' in connection with any trade or business". A specific exemption from this prohibition was made in December 1916 in a Regulation to permit

the manufacture or sale, with the approval of the Attorney-General, of jewellery, ornaments, badges, or other articles having the word "Anzac" thereon, provided that such word is not used as or for the purposes of a registerable design, or a trade mark, trade name, or description of such articles. (*Gazette*, 1916 at p 3765.)

These Regulations are still in force pursuant to the Flags, Emblems, and Names Protection Act 1981, one of our more obscure laws relating to intellectual property. In respect of "Anzac" s 17(1) provides that the Governor-General may by Order in Council

prohibit, regulate, or control the use in connection with any business, trade, or occupation of the word "Anzac" or of any other word that so closely resembles the word "Anzac" as to be likely to deceive or mislead any person.

Section 17(c) deems the 1916 Regulations to be orders made under subs (1) of that section. Section 17(2) provides that every person commits an offence

who uses the word "Anzac" or any other word that so closely resembles the word "Anzac" as to be likely to deceive or mislead any person in contravention of any provision of an order made under subs (1) of this section.

The 1916 Regulations do not appear to have been revoked or impliedly repealed. Thus the contravention of these regulations is a criminal offence under s 17(2), the penalties for which are prescribed in s 24. Unlike s 33(5) War Legislation

Amendment Act, the permission of the Attorney-General is not required to bring a prosecution under s 17 Flags, Emblems, and Names Protection Act.

ELEMENTS OF THE OFFENCE

Likelihood of deception need not be proved where the word "Anzac" itself is used as the deception element in the section applies only to any other words which may be "deceptively similar" to "Anzac". (See s 20(1) as amended in 1992, paras (a) and (b) of which have commensurate objects but use clearer punctuation than s 17(2), and also s 33(2) War Legislation Amendment Act.)

How far does the prohibition on using the word "in connection" with a business or trade extend? Many uses of "Anzac" might appear to satisfy this definition but not be the sort of offensive use that is within the Act's intended scope. Advertisements containing the words "open from 2:00-5:00 pm on Anzac Day", "official contractor for the Anzac Frigate project", or even "located on the corner of Anzac Avenue and" could all fall within a strict reading of the Regulations. A distinction needs to be drawn between the use of the word "Anzac" in a purely factual or descriptive sense, albeit in a commercial context, and uses that seek to appropriate the marketing goodwill of the word itself by identifying a manufacturer or product. Whether it can be read into the seemingly blanket prohibition in the Act is uncertain, but such a distinction would be consistent with the objects of the Regulations which were aimed at restraining merchandising rather than statements of fact, and this sort of reading down would probably also be necessary to avoid absurd consequences.

This distinction could not be extended to permit anything which amounts to a generic product description however (eg "Anzac cookies"), and certainly not to a firm-specific product such as "The Anzac Test". The exemption in respect of badge-type articles includes the proviso that "Anzac" not be used "as or for the purposes of a ... description of such articles". This limitation to the exception would only make sense if use of the word "Anzac" to describe a product type breached the prohibition in the August Regulations in the first place.

There is no doubt that non-factual uses in connection with a business or trade breach the Act. Using the word "Anzac" as part of a company name (as one computer hardware manufacturer in California is currently doing) or indeed using the name "Anzac Test" seem to fall squarely within the ordinary meaning and objects of the prohibition in the Regulations and Act. *Mens rea*, if a requirement of s 17(2), would not of course necessitate proof that the defendant had knowledge of the law itself, but merely that the defendant had knowledge that the word "Anzac" had been used. So in effect anyone who deliberately uses the word "Anzac", or a word deceptively similar to it, in connection with a business or trade commits a criminal offence – with the possible qualification that purely factual statements in which "Anzac" is not associated with a product description would not fall within the prohibition.

STEWARDSHIP OF "ANZAC"

The RSA and RSL themselves have no legal proprietary interest in the word "Anzac" which, if it belongs to anyone, would be the common law property of the Australian and New Zealand Defence Forces – although ownership, as a right to license and control "Anzac", is an immaterial issue

as the Regulations forbid all commercial exploitation. But the RSA and RSL have a strong claim to moral stewardship of the word and policy-makers will look to those organisations for guidance in its appropriate use. The New Zealand RSA was consulted by the RSL in 1997 about the proposed Super League test. The RSA had no objection to the playing of a match during the part of the day not set aside as a public holiday, but like the RSL it did object to the name "Anzac Test": "Anzac Day Test" would be more appropriate as this was an indication of the day on which the test would be played. Apparently by the time the advertisements had been produced the name had reverted to "Anzac Test". This year the test will be played on April 24th, and the RSA and RSL (which have dissociated themselves from the event) have again objected to "Anzac Test" preferring the more appropriate "Anzac Eve Test". This lacks the ring of "Anzac Test" and it remains to be seen whether the National Rugby League (the promoters of this year's test) will respect the wishes of the RSA and RSL. Comments by Gerald Ryan of the NZ Rugby League to the effect that NZRL is not a commercial organisation and is not using the word in a commercial fashion reveal a degree of obstinacy in this respect (*Sunday Star Times*, 8th March 1998). From the discussion above it will be apparent that even "Anzac Day Test" is likely to breach the Act, notwithstanding the RSA's preference for this form of name.

The issue of protecting "Anzac" is a delicate one for it concerns those who can no longer speak for themselves. Any relaxing of the absolute prohibition in the Regulations would inevitably involve value judgments which many people may not feel entitled to make. For this reason there is some attraction in ensuring that the Regulations are properly enforced. No doubt many people do not object to the concept of an Anzac test per se: After all a fair portion of the Gallipoli Expeditionary Force's spare time while training in Egypt was taken up by rugby (although presumably union and not league). But the Regulations make no allowance for subjective opinions as to tastefulness or propriety. The principle of the rule of law requires that the law be applied equally to all in accordance with the criteria contained within those laws. If the law is not enforced against everyone who breaches Act then, in fairness, it cannot be enforced against anyone. If the Anzac Test and other such promotions are allowed to proceed in their current form, absent a specific amendments to the Regulations permitting those activities, then the spectre of pulling up to the drive-through for a \$5 Anzac Feast ("a dinkum meal for diggers") looms, or perhaps even worse. One thing is certain however and that is that the soldiers who served in the Gallipoli campaign were protective of the name they had earned as "Anzacs". C Pugsley in "Gallipoli: The New Zealand Story" (1984, p 25) quotes a poem from a contemporary magazine which expresses the sentiment well:

... These are the Anzacs; the others may claim
Their zeal and their spirit, but never their name.

Responsibility for protecting the word and enforcing the law rests with the Government, and perhaps a policy statement is overdue from the Minister of Internal Affairs to deter future misuse of "Anzac". The best interim course is for the prohibition on commercial exploitation to be enforced, but if the public sentiment is that the Regulations are out of date, and Anzac Day's status as a solemn remembrance day should be reviewed, then the Regulations should be revoked or amended in the proper manner. □

TAX TREATMENT OF YEAR 2000 EXPENDITURE

Andrew Maples, The University of Canterbury

asks whether there is a bug in the system

No part of our law of taxation presents such almost insoluble conundrums as the decision whether a receipt or outgoing is capital or income for tax purposes." – Lord Upjohn, *Regent Oil Co Ltd v Strick* [1966] AC 295, 343.

The tax treatment of Year 2000 expenditure is yet another example of this conundrum.

The Inland Revenue Department (IRD) has issued for public comment a draft public ruling entitled "Year 2000 Expenditure – Income Tax Deductibility" (the "Ruling"). This article summarises the IRD's conclusions and compares the conclusion of the draft Ruling with the IRD's 1995 policy statement on the tax treatment of another "one-off" event – the reregistration of companies. It is suggested that there is inconsistency in the application of tax principles between the two. Finally, brief comment is made on the current state of play in the United Kingdom and Australia.

THE RULING

As the title to the Ruling suggests, it applies to:

the incurring of expenditure by a taxpayer to diagnose, correct, and/or test computer software affected by the "Year 2000 problem", when the software is used by the taxpayer in deriving gross income or in carrying on a business for the purpose of deriving gross income.

The Ruling summarises the Year 2000 problem as:

the inability of certain computer software to correctly perform its functions in respect of dates after 31 December 1999, due to problems with recognising the last two digits of such years.

As is standard practice, the draft Ruling is accompanied by a commentary. The commentary is well researched, discussing inter alia, case law on the capital/revenue distinction and international accounting pronouncements on the treatment of Year 2000 expenditure.

The Ruling's conclusion will surprise many. Expenditure incurred on diagnosing, correcting, and/or testing software which is affected by the Year 2000 problem is not deductible on the basis that it is capital in nature. Accordingly it must be capitalised and depreciated. This finding is contrary to the majority of the international accounting sources reviewed in the Ruling which would treat the expenditure as an income expense "seemingly based on the absence of an asset as a result of the expenditure".

The four primary reasons for the Commissioner's view as summarised in the commentary to the Ruling are:

- the "need or occasion" which has led to the expenditure is "of an unusual and unique nature";
- the expenditure is made once and for all and will give rise to an enduring benefit by prolonging the existence of the system beyond 31 December 1999;
- the expenditure is made to "bolster" the taxpayer's business structure; and
- the cases analysed on repairs and maintenance indicate that the expenditure is capital in nature.

Due to the widespread use of computer software, the aggregate costs to the business community of simply testing their systems for Year 2000 compliance will be considerable. The Ruling is therefore of major significance to many taxpayers.

If the Ruling in its final form, remains largely unchanged, taxpayers who decide to adopt an alternative stance to that in the Ruling should do so with care for two reasons. The first is that it will be issued as a binding ruling, as distinct from a non-binding ruling or policy statement. Secondly, taxpayers could be subject to penalties under the new penalties regime for lack of reasonable care or adopting an unacceptable interpretation if they do not have strong grounds for adopting a different treatment to that outlined in the Ruling. Taxpayers can be assured that the IRD will target for review, as part of their taxpayer audit program, all software expenditure in the ensuing years.

COMPARISON - COMPANIES ACT REREGISTRATION

As a result of the enactment of the Companies Reregistration Act 1993, all companies were required to re-register prior to 1 July 1997. Companies that did not re-register within the permitted time were automatically re-registered. For many companies, automatic reregistration was not an option. As a result these companies incurred both legal costs and Companies Office charges in the reregistration process.

The IRD issued a two page policy statement on the deductibility of the reregistration fee and associated legal costs in *Tax Information Bulletin* (TIB), Vol 6, no 10, March 1995. As with Year 2000 expenditure, the costs were prima facie deductible as a business cost. The policy statement reviewed whether a deduction was prohibited as capital expenditure. The conclusion was that these costs were revenue and deductible, a finding which taxpayers, including the writer, agree with.

If, however, the costs of reregistration are evaluated against the four reasons for the IRD's view on Year 2000 expenditure above, arguably reregistration costs on this basis would be non-deductible.

(i) Need or occasion for the expenditure

The reason for the incurrance of reregistration costs is the introduction of the new companies legislation and potential risks, such as the loss of pre-emptive rights provisions to a corporate taxpayer's structure and business of not re-registering. The need for expenditure on the Year 2000 problem is the arrival of the year 2000 and the potential risks to taxpayers' computer systems as a result.

Both items of expenditure are, in the words of the Ruling, "of an unusual and unique nature". Both are the result of one-off external factors that will not recur. Accordingly to be consistent on this approach reregistration costs under this heading would be capital.

(ii) Enduring benefit

The Ruling states this factor is probably the strongest one in support of the finding that Year 2000 expenditure is on capital account. The Ruling comments that the costs to diagnose and correct any software problem will be incurred once (even though this may be over a period of time and involve a number of payments). In addition, the benefit provided from the expenditure will "tend to be an enduring benefit" enabling computer systems to continue to operate effectively into the new millennium.

Reregistration costs are also a once and for all payment. A constitution is normally prepared only once. It is filed only once with the Registrar of Companies. In addition, reregistration enables a company to adopt a constitution which is more flexible than the Companies Act 1955. Constitutions can now permit such actions as the repurchase by the company of its shares. Reregistration payments are arguably, therefore, a once and for all business cost which produces enduring benefits to the companies concerned.

(iii) The payments bolster the business structure of the taxpayer

The Year 2000 expenditure is designed, according to the Ruling commentary:

to enhance the business structure of the business in question, rather than being part of the process by which income is earned.

Reregistration of a company clearly affects the structure of the company, going to the very core and existence of the company itself – the constitution. The constitution does not form part of the day to day process by which income is earned, but rather it provides the legal framework and structure underpinning the company's operations. Reregistration allows the company in its constitution to adopt procedures and measures to enhance its framework and structure. Share repurchase is an obvious example. The expenditure on reregistration, therefore, has arguably enhanced the structure of companies and would be capital.

(iv) Case law on repairs and maintenance

The key factors from the cases, in the IRD's view, that indicate the Year 2000 expenditure is capital are:

- it increases the computer program's working life;
- it has the effect of removing an inherent limitation from the program; and
- it improves the program rather than restoring something lost or damaged.

For most companies it would be stretching the point to argue that reregistration increases the working life of a company. In respect of the second point it can be argued that re-regis-

tering a company can remove the inherent limitations present in its Articles of Association imposed by the Companies Act 1955. As far as the third factor is concerned, reregistration does improve the company structure. It does not restore to it anything it previously had. The second and third factors therefore would again indicate reregistration costs be treated as capital.

Conclusion

If the four reasons which are the basis for the IRD's finding concerning Year 2000 expenditure are applied to reregistration costs, these costs would also be non-deductible.

The IRD's conclusion on reregistration costs

The IRD's policy statement in fact concludes that reregistration fees and associated legal costs are not on capital account for the following two reasons:

- There is no new asset created as a result of these payments; "the companies are merely altering the rules by which they are governed".
- "From a practical and business point of view some companies are re-registering to obtain the transactional advantages that the new Act allows."

It is submitted that if these reasons are applied to Year 2000 expenditure, it should also be deductible. It is submitted that no new asset is brought into existence by making computer software Year 2000 compliant. The functions performed by the software remain unchanged. Taxpayers are merely altering their software to ensure it will continue to perform those same functions into the new millennium. This is not creating a new asset but merely maintaining the existing system. This is no different from companies re-registering to ensure continued, efficient and smooth operation.

For companies re-registering, there were "transactional advantages". There are no such advantages of companies making their system Year 2000 compliant thus strengthening the argument in favour of the expenditure being an allowable deduction. All that the expenditure achieves is to ensure the computer system will perform its functions on 1 January 2000 as it had the day before; ie maintain the status quo.

If the reasons in the IRD policy statement for holding reregistration costs are deductible are applied to Year 2000 expenditure, arguably this expenditure is also deductible.

THE UK AND AUSTRALIA

It was anticipated that an announcement would be made concerning concessions for companies combating the Year 2000 problem in the recent 1998 United Kingdom Budget. However no announcement was made.

In Australia, the Australian Tax Office (ATO) is currently developing a discussion paper on this issue. It is proposed that a public ruling will be issued before 30 June 1998. Submissions on the IRD's draft ruling close 30 April 1998. It is hoped that the IRD will not finalise its ruling until it has at least considered the ATO's position.

CONCLUSION

The IRD draft Ruling presents some strong arguments for capitalising this expenditure. This article illustrates, however, some potential internal inconsistency on the part of the IRD in applying tax principles between the draft Ruling and an earlier policy statement. It also shows that there are persuasive arguments based on that IRD policy statement for deducting the Year 2000 expenditure.

Submissions on the draft Ruling close on 30 April. □

LEGISLATING FOR QUASI-CONNUBIALITY

D F Dugdale, Law Commissioner

gives us some purely personal views on the future of family law

Before 1 October 1981, the date of the coming into force of the Family Proceedings Act 1980, the only commonly available ground for divorce without the delay of a three year separation was "that the respondent has since the solemnisation of the marriage been guilty of adultery". (s 21(1)(a) Matrimonial Proceedings Act 1963.) Strangely enough the word "adultery" was never authoritatively defined. Manual gratification (Karminski J ruled in 1954) does not amount to adultery (*Sapsford v Sapsford* [1954] p 394). Other methods of achieving orgasm falling short of carnal union might or might not (see *A v A* [1943] NZLR 45 and the authorities there cited). Whether the ground was adultery or some other ground petitioners were required to recount the intimate circumstances of the breakdown of their marriages not privately, but in a (usually crowded) public courtroom. There would be a press report of the fact of the divorce which if they were lucky would be confined to a statement of the names of the parties and the grounds of divorce but before the coming into force of the Divorce and Matrimonial Causes Amendment Act 1958 which contained a provision (s 4) limiting the content of press reports there was always the risk of a more lurid account in a weekly tabloid.

Then there were the rules based on a view of women's role and status that while fascinating to the anthropologist is to the feminist justifiably maddening. They were rules scarcely less brutal than the wife-sales of an earlier period of English history where a sort of folk divorce was solemnised by a wife being led to market haltered as if she were a prize cow and knocked down either to a pre-arranged buyer or as a result of competitive bidding.

There was, for example, until it was abolished by the Domestic Actions Act 1975, the tort of harbouring, which made liable to a husband in damages anyone who provided his wife with the sort of hospitality that women's refuges do today. The tort was based on the reasoning that if deprived of shelter a wife would be forced to return to the matrimonial home. We can perhaps agree with Devlin J's dry observation that "This is no longer an accepted method of effecting matrimonial reconciliation" (*Winchester v Fleming* [1958] 1 QB 259, 265). There was the husband's right descended from the common law action of criminal conversation (abolished in New Zealand in 1867) to recover from a co-respondent damages for adultery. The Matrimonial Proceedings Act 1963 on some sort of sauce-for-the-goose basis included the innovation of a right by a petitioning wife to claim damages from a female co-respondent (s 36). So from 1 January 1965, the date on which that statute came into force, until 3 October 1975, when damages for adultery were

finally done away with altogether by the Domestic Actions Act 1975 the curious state of New Zealand law was that a rule at best an anachronous relic based on the premise that an unfaithful wife was damaged goods had its folly compounded by the extension to wronged wives of rights once the preserve of cuckolded husbands. (To be fair it should be said that the 1956 Royal Commission on Marriage and Divorce (the Morton Commission) recommended a similar law change (Cmd 9678 para 434).)

There was the action for enticement which the Torts and General Law Reform Committee was in 1968 anxious to keep in existence.

We think that there are cases where people would rightly consider it highly unjust if the law did not provide some remedy to a husband or wife whose home was disrupted by another man or woman and we accordingly recommend the retention of the common law action for enticement of a spouse but the abolition of the action for damages for adultery. (*Miscellaneous Actions* p 9.)

The tort of enticement of a spouse having as a consequence been carefully preserved by the Domestic Actions Act 1975 was not abolished until the Family Proceedings Act 1980 (s 190(2)).

The fundamental justification for all these laws was the belief that the preservation of marriages was not just a matter for the parties but was a legitimate object of public policy. It is a belief that still survives. Dissolution of marriage, for example, is still not available even by consent without the prerequisite of a two year separation (s 39 Family Proceedings Act 1980). It is relevant to my thesis to note just how recent in historical terms is this state intervention. It was, for example, only by Lord Hardwicke's Act of 1753 (26 Geo. II c.33) that the formalities of marriage were prescribed by statute. Even that measure was occasioned more by the importance the landed classes attributed to primogeniture than by any concern with the affairs of the polloi.

We can, of course, properly claim of these aspects of recent legal history that we have changed all or nearly all that. Divorces are now called dissolutions and are granted in private (s 159(2) Family Proceedings Act 1980) and without formality (s 10 Family Courts Act 1980) on the single ground of two years' separation. Sexual misconduct has ceased to be of any relevance to the capital financial adjustments between former spouses (s 18(3) Matrimonial Property Act 1976) and is of limited relevance in calculating maintenance entitlement (s 66 Family Proceedings Act). The private detectives have disposed of their flashlight cameras and rubber soled shoes and gone out of business. The word

"adultery" once so common on the lips of lawyers has retreated to the Decalogue.

But the effect of the old law is by no means spent. The memory of how things were makes entirely rational the attitude of all those couples whose contribution to rolling back the state is to say that because the question of with whom they cohabit and for how long is not a matter of legitimate concern to anyone but themselves they prefer not to marry but to live together in a quasi-connubial relationship. It is a stance assisted, no doubt, by the abolition effected by the Status of Children Act 1969 of bastardy as a legal concept, and by the shift in sexual mores connected with the availability of efficient methods of controlling female fertility. It is a shift that makes it no longer possible to employ with a straight face such an expression as "living in sin".

Sexual intercourse began
In nineteen sixty-three
(which was rather late for me) –
Between the end of the *Chatterly*
ban
And the Beatles' first LP

is how the poet Larkin expressed the matter.

In 1991 11 per cent of couples living together were in de facto relationships. In raw numerical terms this was an increase of 40.7 per cent over the number recorded in 1986. The corresponding figures from the 1996 census are 15 per cent and 46 per cent. The law has to be so shaped as to take proper account of this phenomenon.

There are circumstances in which the status of spouse qualifies its holder to advantages. Succession on intestacy or entitlement to whatever benefits accrue to the relict of a person killed by accident or freedom from compulsion to testify against one's spouse in criminal proceedings are examples. Such advantages may derive not only from general rules of law but also from such private arrangements as wills, trusts or contracts (pension plans for example). In relation to qualifying for advantages those who are married de facto (naturally enough but with a degree of wanting to have it both ways) seek to have their position equated to that of those who are married de jure.

There are circumstances in which the status of spouse is a disqualifying factor (in witnessing wills for example) so that it is in the interest of others to widen the definition. The Director-General of Social Welfare for example has a statutory power to confer what the sidenote to the relevant section calls "Conjugal status for benefit purposes" (s 63 Social Security Act 1964).

There can be discerned a tendency in Canadian, Australian and United Kingdom legislation (listed in the Law Commission's discussion paper *Succession Law: Testamentary Claims* (NZLC PP 24, 1996)) to make provision for claims by quasi-connubial partners against their partners or the estates of their partners. There are now in force in New Zealand some seventeen statutes equating marriages and relationships in the nature of marriage (listed in the Law Commission's report *Succession Law: A Succession (Adjustment) Act* (1997 NZLC R39), 17). In that report the Commission has recommended a new statute with the Orwellian title of *The Succession (Adjustment) Act* to replace the Matrimonial Property Act 1963 (still applicable where both

spouses are not still alive), the Family Protection Act 1955 and the Law Reform (Testamentary Promises) Act 1949 in which almost the same rights are afforded where the relationship is quasi-connubial as where the parties are married.

This is all very well, but we should not close our eyes to the problems that lie ahead. First there are those of definition. The Law Commission's draft statute following eleven of the seventeen statutes already referred to defines the cohabitation necessary if the relationship is to qualify as one "in the nature of marriage". I think that the Commission

was right to opt for consistency. The term has already received judicial attention, (the cases are noted in NZLC PP 24, 42) most authoritatively by the Court of Appeal in *Ruka v Department of Social Welfare* ([1997] 1 NZLR 154) (though it seems from the judgments in that case that a relationship may be one in the nature of marriage for the purposes of one statute but not for another, which is disconcerting). But to define the necessary relationship by reference to matrimony leaves a lot of unanswered questions. If one employs the conventional subdivision into animus and factum, just what intention (as to the duration of the relationship for ex-

ample) is required and just what act? Tipping J doing a job that should have been done by the legislature essayed a list of relevant matters in *Thompson v Department of Social Welfare* ([1991] 2 NZLR 369, 373) but this list was treated with some reserve by the Court of Appeal in *Ruka*.

The practical problems do not cease when one has decided what in law is the test of the existence of such a relationship. It needs to be kept in mind that there has not to date been in New Zealand a civil case turning on the definition where any substantial amount has been at stake. This will change if the law confers on unmarried partners entitlements analogous to those conferred by the Matrimonial Property Act 1976 (as the Law Commission has recommended) or on intestacy (as has occurred in for example New South Wales (Wills, Probate and Administration (De Facto Relationships) Amendment Act 1984) An analogue to such a case is perhaps *In re Estate of Erlanger* (1932) 145 misc 1 (NY) discussed in C G Bowman "A Feminist Proposal to Bring Back Common Law Marriage" (1996) 75 Oregon Law Review 709, 716 where the trial concerned with the existence of a common law marriage took three months, 149 witnesses, a 6965 page record and a 500 page judgment. A long trial of the issue of whether there existed between a wealthy intestate (let us say) and his or her live-in lover a relationship in the nature of marriage with the necessary inquiry into some of the matters advanced by Tipping J ("Whether the parties have a sexual relationship"; "Whether the parties give each other emotional support and companionship") or the issue of commitment seen by other Judges as important is likely to be no less intrusive into delicate matters that should be private than the abolished processes of which I have already reminded you. It adds to the problems that the Law Commission's proposals include a de facto equivalent to a marriage of short duration, so that the inquiry may be not only whether the relationship qualifies but also when it began to do so.

There are other problems. Is it excessively Euro-centric to insist that for a relationship to be in the nature of marriage

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Or does it embrace
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it must be monogamous? Or does it embrace a de facto wife in every port or for that matter a harem? Presumably political correctness requires me to ask the same question in relation to the polyandrous equivalent of such situations. It should be said that the Law Commission's proposals bravely cater for these possibilities.

Then there are same-sex relationships. The Domestic Violence Act 1995, s 2 defines "partner" to include as well as spouses or former spouses

Any other person (whether of the same or the opposite gender) with whom the person lives or has lived in a relationship in the nature of marriage (although these persons do not or were not, or are not, or were not able to be, legally married to each other) ...

The Law Commission's draft Succession (Adjustment) Act spells out that

For the purposes of this Act a relationship in the nature of marriage includes a relationship between two persons of the same sex.

But there will be those to whom the very suggestion that a homosexual relationship can be in the nature of marriage will be oxymoronic and indeed grossly offensive.

Can we do better? An examination of the issue in terms of the current prevailing economic dogma would lead to the conclusion that when the market for marriage is plunging (as it is) we should be examining critically the attractiveness of the product, and I will indeed have things to say on this. But I propose to approach the matter a little more circuitously.

What we are doing when we equate a de facto marriage however defined to a marriage de jure is having regard to substance and refusing to treat as definitive of rights a failure to comply with a requirement of form (On this see P S Atiyah's essay "Form and Substance in Contract Law" in *Essays on Contract* (Oxford 1986) 93). Such an approach is entirely consistent with contemporary views of what constitutes enlightenment. Why, it is said, should we let ourselves be blinded by matters of form? It is the substance that counts.

Yet we need to keep in mind just how valuable in achieving efficiency requirements of form can be, and that no system of justice can survive if it wholly ignores the need for appropriate dispatch and the avoidance of undue cost. Consider wills. The formal execution ritual prescribed by the Wills Act 1837 makes it unnecessary in the great majority of cases to look beyond the face of the will to determine whether it is a document that correctly records the intentions of the by now deceased testator or testatrix. Occasionally there will be a slip up in complying with the formalities, and as a result the document alleged to be the last will of the deceased cannot be admitted to probate though deceased's intentions are clear enough. In such cases one would wish for a discretion to overlook the formal non-compliance, and the Law Commission has proposals on that topic also. But can it seriously be doubted that the formal requirements of the 1837 Statute have brought an order to the law of wills in a manner that is beneficial?

It is not difficult to think of other rules that exist not because they represent some sort of perfect justice but because it would be vastly inconvenient if they did not. The rule that absent anything in the nature of fraud non est factum or misrepresentation of its contents one is bound by what a document one has signed may contain even though before signing one may not have bothered to read it is an example (*L'Estrange v F Graucob Ltd* [1934] 2 QB 394).

The overwhelming utility of marriage as a determinant of rights is that the issue of whether parties do or do not have that status is very easily decided. Conversely the great practical disadvantage of making property and other entitlements depend on the existence of a quasi-connubial relationship is the delay and expense involved in determining whether that relationship exists or has existed. It is likely that de facto marriage is unattractive to a growing number of New Zealanders because as a consequence their autonomy (in particular in relation to the duration and concurrence of relationships) is interfered with.

It is surely not beyond the wit of man to devise a scheme which combines the certainty of de facto marriage with the freedom of quasi-connubiality. The way to do this I suggest is to make marriage more like cohabitation rather than vice versa. Consider a law of marriage partnership where the status of partner depended on a system of registration determinable unilaterally by either party. Concurrent partnership would be permitted. Some such system in relation to same-sex relationships exists in Denmark, Sweden and Norway. Along with this would be a rigid exclusion from the benefits of involvement in a quasi-connubial relationship of those who failed to take the trouble to register.

This would not solve all the problems. There will be situations where it is desired to invoke quasi-connubiality as a disqualifying factor and couples have not registered. There will be situations where couples stoop to the folly of intermingling their financial affairs without taking the trouble to register. But by and large the solution I propose is a neat one. It will be for the partners themselves to determine whether they mark their registration with priests, vows, rings, orange-blossom and Mendelsohn or whether they just duck out in the lunch-hour and make their arrangements privately. What is proposed is a wedlock that partners can make as holy as they like, but a wedlock to which the unlocking key is held not by the state but by each party.

It would of course be possible to change the name of the institution from marriage to something like registered cohabitation, but nothing really turns on matters of nomenclature. It must be said that "Come live with me and be my registered co-habitant" does lack a certain magic.

To conclude by recapitulating. The law should not shut its eyes to the high incidence of de facto co-habitation or to the consequent need to determine the extent to which rules relating to those who are married de jure should be applied to those who are married de facto. The question of definition is a problem, not only in identifying the elements of a relationship in the nature of marriage (or whatever other definition may be employed) but also in proving those elements once identified. One solution would be the formalist one of extending the legal benefits flowing from co-habitation only to those prepared to register as co-habitants. More elegant than a dual system of those who are married and those who are unmarried but registered as co-habitants would be to remove the elements of marriage unacceptable to co-habitants (essentially state control over duration and the prohibition of concurrent relationships). This change would enable the existence of a single system. An incidental merit of the proposal is that it would neatly provide for same-sex relationships.

These proposals which are no more than a modest extrapolation of present trends would if adopted make tidy what is now a sadly messy corner of the law. □

SUPER LEAGUE: A COMMENT

Dr Bill Maughan, Bournemouth University, England

short-circuits the argument over sport and competition

Warren Pengilly ("Super League" [1998] NZLJ 32) reviews *News Ltd v Australian Rugby Football League* (1996) ATPR 41-466, (1996) ATPR 42-521 (on appeal), and concludes inter alia that the *Super League* case is not the beginning of a disaster for joint ventures, and that although the market issue is still unresolved, Burchett J (the trial Judge) was almost certainly wrong in defining the relevant market. Pengilly's conclusions may well be right, but market issues will continue to be unresolved, and joint ventures and other forms of coordinated enterprises will continue to be threatened, as long as the legal profession persists in ignoring the body of economic theory on the firm, and the relationship of this theory to competition law. It is the purpose of this article to show how this theory might have been used to illuminate the principles in the *SuperLeague* case.

THE THEORY OF THE FIRM

Any economic discussion of the firm – and I take it that competition law is based on economics (see Maughan "Meat, Competition and Efficiency" (1996) 2 NZBLQ 219) – must begin with R H Coase's article "The Nature of the Firm" (1937) IV *Economica* (NS) 386. This article was written by Coase at the age of 21 and was one of the two papers for which he was awarded a Nobel Prize at the age of 81. The paper was the first to challenge the concept of the firm as some sort of "natural" entity operating in exchange markets. On the contrary said Coase, firms were not "natural" entities. They were not even theoretically consistent with markets, since, within the firm, resource allocation was coordinated by the individual entrepreneur in response to implicit shadow prices, while in the marketplace resource allocation was coordinated by the invisible hand of the market in response to explicit price signals. Firms were therefore analogous to command economies operating within competitive markets, or in the words of D H Robertson firms were "islands of conscious power in the ocean of unconscious cooperation like lumps of butter coagulating in a pail of buttermilk". The interesting question, asked Coase, was why these "islands of conscious power" existed at all when resource allocation through competitive markets was thought to be the key to economic efficiency.

Coase then set down what was to become the modern theory of the firm. He made the assumption that, if two different forms of resource allocation coexisted, the market and the firm, then both forms must have some cost advantage. He then reasoned that firms reduced costs by reducing the number of repeated short term contracts in (resource)

markets, and by facilitating the making of long-term contracts. Markets, on the other hand were the least-cost mechanism for allocating resources where there was no need for long-term contracts or for repeated short term contracts, or where the firm was too costly to use as a resource allocation mechanism. This last occasion would arise when the entrepreneur was allocating so many resources that he/she was beginning to make mistakes or failing to monitor the internal processes of the firm. Effectively, firms were therefore limited in size by the fallibility and control span of the entrepreneur.

It is easy to quibble with Coase over some of the concepts he used. For instance the contrast between a coordinator (the entrepreneur) and a co-ordinating mechanism (the market) is somewhat strained. Nevertheless the substance of his argument is still valid. Transactions within firms are quite different from transactions on the market, and Coase's market, which equates with the spot market in real life and the perfectly competitive market in the economic model, is sometimes a very expensive option for allocating resources.

LATER DEVELOPMENTS

The substance of Coase's article has been much developed since 1937 by writers such as O E Williamson, S Cheung, A A Alchian, D C North, and others, and has found its way into competition law mainly through the American academic literature on vertical and horizontal coordination. Broadly speaking the developed theory now distinguishes between three different methods of exchange.

1. Market Exchange – ie use of a discrete one-off contract in the spot market between willing buyer and willing seller. This is repeated for each and every transaction, and equates with Coase's short term contract and with the idea of allocation of resources in purely competitive markets.
2. Continuous contracting – Such contracts may be between individuals, between individuals and firms, or between firms. They specify the conditions under which repeated or long-term exchanges can take place, and conform to Coase's long-term contracts.
3. Internalisation of the exchange within a firm – ie use of a contract in service or an employment contract, or use of the merging of firms, in order to ensure that the buyer of a service can direct the actions of the seller.

Option two is more cost efficient than the market when the costs of making and enforcing a contract (transaction costs) are lower for a single or a long-term contract than for repeated short term contracts. Option three is more cost efficient than options two or one where mutual contracting

still does not overcome the high transaction costs. Such situations occur when there is a need for very long-term contracting, or where there is a lack of mutual trust in continuous contracting.

Only the first option is consistent with both the economic theory of perfect competition and with competition law, and then only when the exchange takes place in competitive markets. The second and third options are not consistent with perfect competition, although they may be justified in terms of cost effectiveness.

This inherent inconsistency, combined with the potential benefit of the options, leads to difficulties in competition law in relation to the second and third options, since the net public benefit from either of the options will vary with the circumstances. In general, the following rules have developed in competition law. Continuous contracts can exist so long as they do not contain exclusionary provisions: contracts in service, and firms, can exist per se; and large firms can exist if they can prove net public benefit. Net public benefit is usually present where economies of scale lead to very large firms in a single industry (horizontal mergers) or where there are cost savings to be made in integrating the various stages of production from primary producer to final consumer (vertical mergers). However vertical mergers tend to be preferred in most countries to horizontal mergers. These broad rules provide the background to the following theoretical analysis of the *Superleague* case.

RUGBY LEAGUE

The product

Rugby League is an entertainment produced as a result of a joint venture between individuals, clubs, and some controlling authority which is responsible for making the rules. It cannot be produced by an individual, and it cannot be produced without cooperation. In its minimal form the joint venture requires sufficient players for two teams, and a single club which organises the two teams and enforces the rules of the game. In its more extensive form, Rugby League might involve many players and many clubs organised into one or more competitions under one or more controlling authorities, but with one set of rules. The minimal form equates with a single firm producing rugby league: the more extensive form with an industry producing Rugby League.

The consumer markets

The game is enjoyed (consumed) live, and on television, by spectators and live by those who produce the game, the players. For those who watch it, absurd though the economic jargon may appear in the context of real life spectator behaviour, the game is a public good which is non-rival in consumption: all spectators can watch the game simultaneously without depleting the product. Since the lack of depletable which characterises public goods means that the cost of adding an extra consumer is almost zero, there is a ready rationale for consumers to free ride when consuming a public good – a rationale which is often translated into reality by the difficulty of excluding non-paying consumers. Hence public goods are often difficult to finance. In fact, in the absence of voluntary payment, public goods can only be financed by compulsory tax or levy (in which case

the good is then given away “free”), or by a policy of excluding non-paying consumers (turnstiles on grounds and subscription TV), or through a policy of divorcing revenue from the supply of the service (sponsorship, advertising, merchandising etc).

Rugby league as a public good is financed partly by exclusion of non-payers (gate charges, membership fees, exclusive television rights), and partly by divorce of revenue from supply of the game (sponsorship, club activities, merchandising of intellectual property). Since television, one of

the revenue sources, is itself a public good the ultimate source of part of the finance for Rugby League Football comes from the financing of television through taxation, user pays fees (cable television), or advertising.

From the point of view of the players Rugby League, as a consumption good, is a mix of private and public good since they can get both individual or collective pleasure from the game. They may pay for this pleasure directly through club fees, or indirectly through purchase of the club's social services and

merchandise. Alternatively they may have the pleasure provided apparently free (to them) through sponsorship or through their status as actual or potential professional players.

It is important to note however that, in terms of the economics of the game, it is irrelevant whether the players are amateur or professional, or whether the clubs are profit making or non-profit making. The only issue of any importance is that scarce resources (grounds, players' time, etc) are being used, and that these must be paid for somehow. Thus the trial Judge's decision to characterise the game as sporting rather than economic, and hence outside the Australian Trade Practices Act, is in a sense an irrelevancy to the economic argument, even if it were correct in terms of the legal argument, which it was not.

In short the consumer market for Rugby League is principally a market for a public good, which means that the market is complex and linked to ancillary markets such as television, sponsorship, merchandising, and social activities in ways that are difficult to disentangle.

Input markets

In order to produce Rugby League there have to be a number of input markets. The most important of these are the markets for: players' services and other resources which clubs buy, the market in which clubs buy and sell the rights to players (the draft is an inter-club market) and the market in which organisers buy the services of clubs, and clubs sell their services to organisers.

These markets are, with the exception of the market for rights to players, standard input markets in which firms are buying resources in order to produce an intermediate or final product in the value added chain from producer to consumer. Thus, the primary producers of the game (the clubs) are buying the services of players, and combining these with other resources to make teams. The services of these teams are then sold to competition organisers who in turn combine the teams with other inputs in order to produce a final good (the league competition as a spectacle) which is sold directly to spectators or indirectly to them through television.

continued on p 130

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IN THE DISTRICT COURTS

Judge Kerr, Editor of the District Court Reports

SECTION 43 SUMMARY PROCEEDINGS ACT 1957

A decision of the Court of Appeal important to practitioners involved in summary criminal proceedings in the District Court: Neil Jones was charged with extortion under s 238(3)(a) of the Crimes Act 1961. He elected to be tried summarily. After evidence, Judge Walker reserved his decision. In the course of reviewing the evidence, His Honour found that the facts would more properly support a charge of extortion in different form from that alleged in the information. Judge Walker decided that, subject to hearing submissions on the proposed amendment, he would amend the information accordingly.

In the District Court, counsel for Jones submitted that Judge Walker had no power to amend because the hearing was over once the Judge reserved his decision. His Honour rejected that submission and on appeal, Goddard J made a similar finding.

Leave was granted to take the point to the Court of Appeal and in *Jones v Police* (Court of Appeal, CA 332/97, 22 October 1997) was heard by a Court comprising five Judges, judgment being delivered by Tipping J.

In *Ministry of Transport v Nicol* [1980] 1 NZLR 436, 441, the Court of Appeal considered the amendment by a Magistrate of an information at the conclusion of the evidence. It was argued that in terms of s 43, the hearing had ended at the conclusion of the evidence, and there was therefore no power for the Magistrate to make the amendment, because such power was only exercisable "at any time during the hearing".

The Court of Appeal in *Nicol* did not uphold that submission, but did not deal with the situation where after evidence the judicial officer reserved his or her decision. At p 8 Tipping J in *Jones* said –

We are satisfied, both as a matter of construction and as a reflection of the policy of s 43, that the hearing for the purposes of s 43(1) runs beyond the point when the Judge reserves decision and lasts until that decision is given. The Judge's consideration of the matter, which in terms of s 68 follows the submissions and the evidence, is part of the hearing whether the decision is formally reserved or not.

To treat the hearing as continuing until the point of decision does not unnaturally strain the word "hearing". One of its meanings, as noted in the *Shorter Oxford Dictionary* (3rd ed), is "the trial of a cause" and, particularly "a trial before a Judge without a jury". That meaning has been established in the language since Shakespeare's day as encompassing both the hearing and the determination of a case; as in *Measure for Measure* (1603) "I will take my leave, and leave you to the hearing of the cause".

In more recent times *Black's Law Dictionary* (5th ed) (1986) Vol 2 at 1148 confirms that the hearing of a cause

or matter ordinarily includes its determination. The text and the authorities mentioned recognise that for some purposes the concept of the hearing does not necessarily include a determination. That is the position with s 40 but not with s 43. For a recent application of the general meanings see *Wozniak v Wozniak* [1963] 2 p 179 where the expression "at the trial or hearing" was held to include the final determination of the matter.

Accordingly, Judge Walker was entitled to make the amendment which he did.

REPRESENTATION OF A LIMITED COMPANY IN CRIMINAL PROCEEDINGS

In *Police v Warren Fowler Ltd* [1997] DCR 49 Judge G A Rea dealt with the prosecution of a defendant on a charge of using a heavy motor vehicle which exceeded the maximum permitted gross weight. The company was represented by a non-legally qualified agent, and it was necessary for the Judge to determine the appropriateness of that. His Honour decided that because of the inherent power of the District Court to regulate its proceedings, a Judge might permit non-qualified representation of a company, "in the interests of convenience and efficiency, and in emergency situations when counsel was not available or in straightforward matters where the assistance of counsel was not needed".

In the event, a rehearing of the prosecution was directed, and the learned Judge observed that it would be wise for the defendant company to arrange for counsel to represent it at the rehearing because of the issues as to the weighing of the heavy motor vehicle.

OLD PEOPLE'S HOMES REGULATIONS 1987

A licensee under the regulations operated an old people's home at his Hamilton property. His application to renew his licence was refused by the Acting Director-General of Health. Allegations of assault were made by two residents of the home against the licensee. Charges had been laid against the licensee for the assaults. The refusal to renew took place prior to the charges being dealt with.

In *Bell v Director-General of Health* [1997] DCR 145 Judge A J Twaddle decided that the Acting Director-General was not required to await the outcome of the criminal charges before making his decision. His duty was to come to a decision himself after appropriate inquiries. The evidential burden was not the same as in criminal proceedings and the ambit of his inquiry was wider than that in the criminal proceedings. Because of the difference between his inquiry and the other proceedings, their outcome could not have been decisive for the Acting Director-General. Accordingly, he was justified in refusing to renew the licence.

CONSUMER GUARANTEES ACT 1993

This Act continues to produce arguments in the District Courts. Two should be mentioned. *Cooper v Ashley & Johnson Motors Ltd* [1997] DCR 170 discusses the purpose of the Act, that which a purchaser of goods may do and duties of a vendor and purchaser, under the Act. Judge G V Hubble considered that the Act vested the consumer with new rights focused on reasonable consumer expectations. A consumer electing to have repairs carried out by a vendor might not prejudice a subsequent right to reject the goods. In order to reach a conclusion that for the purpose of s 18(3) because of defects there had been a failure of substantial character as defined by s 21, it was not necessary to determine whether the vehicle departed in one or more significant respects from the description, that technically there might have been more than one owner, that the mileage might have been greater than indicated, or that the vehicle could hardly be described as a good one.

Section 20(3) provided that the rules relating to loss of right to reject found also in s 20 applied notwithstanding the provisions found in s 37 Sale of Goods Act 1908. Section 20(3) plainly imposed its own regime.

Time to reject would begin to run as soon as it could be said that the goods had a "substantial defect", the substance of which was known by the consumer. The "accumulation of small defects" approach had currency in New Zealand, s 21(b) clearly contemplating a multiplicity of faults which individually went beyond mere trivia. Where the failure of a substantial character is in the form of a latent defect but could be proved to have existed at the time of sale, time would not begin to run until that defect had not only been identified but had been identified so that the consumer could be said to be "fully acquainted with the nature and extent of the failure". Section 22(2) which required a consumer to return rejected goods to the supplier was silent as to when the goods must be returned, and it would not be unreasonable for a consumer to retain those goods until the purchase price was in fact refunded.

A consumer having elected to do repairs himself without giving a vendor an opportunity of doing them at its own cost within a reasonable time, could not pursue a claim for the cost of those repairs.

The judgment delves into the intricacies of the Act and no doubt will be of assistance to practitioners considering the issue of proceedings under the Act.

Judge F W M McElrea in *Dallimore Motors Ltd v Gourley* [1997] DCR 681 dealt with the Act on appeal from the Motor Vehicles Disputes Tribunal. His Honour (inter alia) considered that as a matter of policy it would be most undesirable if the District Courts were able to deal with appeals on a basis not available to the Tribunal appealed from. Because the Disputes Tribunal's statutory jurisdiction was found in s 98 Motor Vehicle Dealer's Act 1975 and did not include the Act unless it was referred in writing to the Tribunal under s 108 Motor Vehicle Dealer's Act, the Tribunal did not have power to consider the provisions of the Act, and on appeal the District Court could not apply that Act.

That particular finding is of importance and needs to be taken into account, because as in *Stephens v Chevron Motor Corp Ltd* [1996] DCR 1, it appeared that the Christchurch Motor Vehicle Disputes Tribunal applied the Consumer Guarantees Act 1993. What is not clear from that decision is whether the Christchurch Tribunal was given jurisdiction under its Act pursuant to s 108. Accordingly, in using *Stephens*, regard must be had to that.

MEDICAL PRACTITIONERS ACT 1995

Appeals from the Medical Practitioners Disciplinary Tribunal are now to the District Court. Judge G R Joyce QC in *ZX v Medical Practitioners Disciplinary Tribunal* [1997] DCR 638 dealt with the first appeal from the Tribunal to the District Court. The appellant doctor and patient complainant had jointly applied to the Tribunal for an order that the hearing of the charges be held in private. Section 106(1) of the Act contained a presumption in favour of public hearings. However, this could be departed from if the Tribunal was satisfied that it was desirable to do so. One of the factors to which the Tribunal was to have regard was the privacy of the complainant. Nevertheless after considering the relevant statutory provisions the Tribunal declined the application on the ground that the facts and circumstances of the case did not justify the Tribunal from departing from the statutory presumption of public hearings. The Tribunal added that "only the most compelling reasons" would suffice to displace that presumption. Further, it was the Tribunal's intention to publicly notify the fact of its sitting in the small centre from which the appellant and complainant came.

Judge Joyce found the approach of the Tribunal that "only the most compelling reasons" would suffice to displace the presumption in the Act added a gloss to the statute which would not otherwise be there. In the process the Tribunal indicated criteria for which the statute did not provide. The statutory language required no reconstruction and the better and proper course was simply to abide and apply such language.

His Honour found that the hearing should be held in private, the public interest in access being outweighed by a combination of –

- (a) The application coming from both the appellant and the complainant;
- (b) The nature of the complaint and that both the appellant and the complainant lived in a relatively small centre;
- (c) The complainant's personal details might be discussed in the public arena;
- (d) The alleged offending was not of a most serious kind;
- (e) The lack of confidence as to whether the suppression of names and details would uphold the appellant's general reputation and complainant's privacy.

SUBMARINE CABLES AND PIPELINES PROTECTION ACT 1996

Judge C J Thompson in *Martin v Seafresh New Zealand Ltd* [1997] DCR 425 dealt with informations charging that the defendant committed offences against s 13 of the Act in that it conducted fishing operations within a protected area. The fishing vessel "Seafire" was fishing for hoki in Cook Strait. While the net was being brought aboard in sections, each section being emptied of fish, the vessel was seen to be within the area of Cook Strait protected for the purpose of preventing damage to power transmission and fibre optic cables.

The defendant submitted that it was a reasonable mistake by the master of the vessel to believe that the activity of bringing in and emptying the net was not a fishing operation; any breach was unintentional because when the net was secured, the vessel was outside the protected area and drifted into it while the net was brought on board; and that there was a defence of necessity because while bringing in the net the vessel could not be manoeuvred.

The defendant further submitted that the only way to avoid the breach was to dump the fish back which in itself could have been a breach of the Fisheries Act.

His Honour found that the process of bringing the fish into the vessel was a necessary and integral part of the activity of "fishing" on the ordinary and natural meaning of that word.

His Honour also concluded that defences of reasonable mistake and necessity were not available as the scheme of the Act made it clear the offence in question was one of strict liability, mens rea not having to be proved. The only defence was a statutory defence set out in s 14(2).

DOMESTIC VIOLENCE ACT 1995

Judges have been obliged to consider the meaning of expressions used in the Act and as well have had to consider the question of the status of prosecutions under the Act ie whether the Act provided offences of absolute liability, strict liability or offences involving mens rea.

Judge P J Keane in *Police v Adams* [1997] DCR 282 had to consider the meaning of the word "accost" in s 49(1)(b). He concluded that it meant to approach someone in an offensive way, to annoy, bother, nab, buttonhole, greet,

address or salute. He said it followed that there would be an accosting if a person consciously and deliberately approached another, who had the protection of an order under the Act in any of the ways specified as meaning "accost", thus finding a mental element was required.

Judge D R Brown in *Police v Cameron* [1997] DCR 286 had to deal with a defendant who had been separated from his wife and children since early 1996. In September of that year he wrote a letter to his wife and in October a letter to his daughter. Such letters constituted breaches of a protection order made under the Act. The defendant though was the subject of a non-molestation order obtained under the Domestic Protection Act 1982, that Act being repealed from 1 July 1996. The non-molestation order at that date was deemed to be a protection order under the Act. Although the non-molestation order had been served on the defendant in February 1996, no copy of the deemed order was served on him after 1 July 1996. There was no prohibition under the non-molestation order against writing letters to a separated spouse or children, a different situation from that under the Act.

His Honour decided that the offence of breaching a protection order was an offence which required proof of mens rea which would necessarily include proof that the defendant was aware of the order and its terms. □

continued from p 127

The cost efficient structure

It is not necessary to examine all the Rugby League markets in detail to see that the cost efficient structure for producing a Rugby League competition cannot involve discrete contracting in perfectly competitive spot markets (ie allocation of resources in purely competitive markets). Such an option would mean that every club would have to go into a spot market for players before each game and buy the players for that one game; that each competition organiser would have to go into a spot market for teams before every round of the competition and buy the teams for that round; and that each entertainment provider would have to go into a spot market for "rounds of the spectacle" and buy that specific round. The transaction costs of such a process, and the costs created by the associated uncertainty, would be prohibitively high, and would almost certainly drive away sponsors and other sources of revenue.

Thus, at the very least, a Rugby League competition needs a structure in which there is a network of continuous contracts in and between the various markets. At the most it might require a vertically integrated firm in which all assets were pooled and all clubs and players became employees of a single firm. In between there are various forms of joint venture.

However, to say that there is a need for continuous contracting or vertical integration, or joint ventures, in order to produce Rugby League does not mean that it is cost effective to suppress competition in every market. Competition in output markets is certainly desirable provided that the game is not a natural monopoly (ie provided that the entire output of Rugby League competitions is not produced at least cost by one firm). Moreover, competition in input markets will remain and should remain in the absence of full vertical integration, albeit that the competition may be somewhat constrained by continuous contracting. In this

latter case the constraints, to be consistent with competition law, cannot include exclusionary provisions as defined under the Trade Practices Act.

Logically therefore, both in terms of competition law and in terms of economic theory, the trial Judge, in the absence of any evidence of vertical integration or natural monopoly, should have encouraged competition in output markets; he should have encouraged continuous contracting in input markets where the purpose of the contracts was not deemed exclusionary; and, within the constraints of the continuous contracting, he should have encouraged competition in input and ancillary markets.

The fact that he did not and the fact that it has taken a very expensive appeal and many thousands of pages of evidence and reasoning to reach the same conclusions as a short piece of economic reasoning, reflects sadly on the lack of importance which seems to attach itself to economic training amongst those members of the legal profession who are involved in competition law. A reading of Coase and a few other authors would have saved them all a lot of time and money. Moreover such a reading would have provided a ready answer to Warren Pengilley's question about potential mergers in a future output market in which there is more than one buyer and more than one seller.

Such a merger should be allowed provided it can be demonstrated that the market is a natural monopoly ie that the market is one in which for reasons of scale the entire output of the industry can be supplied at least cost by a single firm. The fact that competition had taken place between two firms and that no equilibrium had been reached, would reinforce the idea that the market was a natural monopoly. It would, however, also provide evidence that the market was "contestable", in the sense that there was nothing stopping potential entrants from challenging the incumbent monopolist. Such contestability is essential to efficiency in markets in which there is only one firm. □

EXPLAINING EVIDENCE LOGICALLY

Bernard Robertson and Tony Vignaux

examine the latest in a line of confusing English Court of Appeal decisions on DNA

In *Dennis John Adams (No 2)* (CA)(Crim Div) 16 October 1997, the English Court of Appeal considered for the third time the admissibility of instruction on the use of Bayes Theorem to combine items of evidence. This was the first time that matter had been properly argued but the Court, including on this occasion the Lord Chief Justice, preferred the uninstructed comments of their brethren to the argument put before them. The Court drew comfort from a favourable comment on one of the two previous cases in the Cases and Comments section of Crim LR but did not consider any of the unfavourable comment.

In *Adams*, the prosecution evidence was treated as consisting only of a DNA analysis for which a very high likelihood ratio was given. Other items of evidence, such as the failure of the victim to pick out the accused on an ID parade, tended to favour the accused. The defence expert witness, Professor P Donnelly, gave the jury instruction on how to use Bayes Theorem to combine the defence evidence with the prosecution's DNA evidence so as to reduce the level of probability of guilt below that required for conviction. After conviction, the central issue on appeal became the admissibility of this instruction. Detailed analysis of the Court of Appeal's judgment in *Adams (No 1)* can be found in our article at [1997] NZLJ 210. We discuss the second case in the series, *Doheny*, at [1997] NZLJ 247. *Adams* was subsequently reconvicted and appealed again to the Court of Appeal.

All three judgments assume that Bayes Theorem is a technical matter appropriate for expert evidence. The Court in *Adams (No 2)* also agreed that Bayes Theorem could not be faulted "so long as it is applied to appropriate subject matter". The judgment assumes a clear distinction between scientific evidence, to which the Bayesian method can be applied and non-scientific evidence to which it cannot.

But there is no such clear distinction. While DNA evidence may be highly "statistical", other scientific evidence, such as fibre analysis, is less so. Nor is there any reason in principle why less quantitative evidence such as eye-witness identification should not be subjected to statistical analysis.

There cannot be two different ways of thinking about evidence. There can be only one logical approach which is not limited to particular "subject matter". Bayesian reasoning is merely the formalisation of that generally applicable logical approach.

That being the case, we doubt that such reasoning is properly a matter for expert evidence. There is clearly no objection to counsel suggesting to jurors how they should

combine and compare items of evidence in informal terms so it is hard to see why there should be any objection to counsel doing the same in formal terms. In fact, the logical rectitude of this form of reasoning should be a matter of general education and knowledge and therefore of judicial notice.

Whether formal instruction of the jury would be a wise approach is another matter but the Court's fears that instruction on the use of Bayes Theorem would confuse and distract the jury do not seem to have been borne out. The jury convicted *Adams* and the Court of Appeal was content that there had been no miscarriage of justice.

Guidelines for juries on DNA evidence

The Court sets down guidelines on how juries should approach cases involving DNA evidence. The Court suggests that "perhaps" the jury will apply the DNA evidence to the population of the UK and consider how many people are not excluded by the DNA evidence of being the source of the mark. They would then consider whether the defendant was one of those people and go on ask themselves whether the defendant was the perpetrator by considering the other evidence in the case.

Two points arise from this suggestion:

First, this approach is not improper but it is unnecessarily prescriptive. Logically, the order in which the evidence is considered does not matter and it seems unusual for the Court to prescribe one. It is even more unusual for the Court to suggest, as it does, that, if this particular item of evidence is not accepted, that will be the end of the case. The Court's advice seems even less sensible when applied to evidence producing lower likelihood ratios, such as ordinary blood grouping. It makes little sense to say that there could be half a million men in the UK who match the mark or could have been the father and then to consider the remaining evidence in the case. It seems more sensible to use the other evidence in the case to narrow down the group of suspects and then use the scientific evidence to single out the perpetrator. There is no reason in principle why this should not be done with evidence such as DNA which produces very high likelihood ratios.

Second, the Court, yet again, provides no guidance at all as to *how* the final stage, the assessment of the non-scientific evidence and its combination with the scientific evidence, is to be done. As we wrote earlier, any such advice would either have to comply with the requirements of Bayesian reasoning, or be illogical.

THE PRESENTATION OF SCIENTIFIC EVIDENCE

Nor did the Court give guidance as to how scientific evidence is to be presented. This presumably means that we are thrown back on the two previous judgments and the concept invented in them: the "random occurrence ratio". This was interpreted in a newspaper article by one of the counsel involved as ruling out evidence in the form of a likelihood ratio. We are told that, at Crown Court level, confusion is now reigning, different Judges making different rulings on whether likelihood ratios may be used or not.

The likelihood ratio is the correct way to present such evidence. In New Zealand this is usually done by saying "I have considered two alternatives, first that the accused is the source of [one of] the mark[s] and secondly that a randomly selected New Zealander is the source. I find that the evidence is X thousand [million etc] times more likely if the accused is the source of the mark than if a randomly selected New Zealander is". This has two overwhelming practical advantages. The first is that the likelihood ratio is potentially capable of dealing with all situations whereas the frequency (or "random occurrence ratio") will only produce a correct answer where one suspect is compared with one mark. And the second is that evidence expressed in this form can logically be combined with other evidence. Using frequencies requires an intermediate step in reasoning. Significance tests and probabilities of paternity cannot logically be combined with other evidence at all.

Britain and New Zealand have led the world in the application of likelihood ratios to scientific evidence. In its second report on DNA evidence, the US National Research Council has grasped their advantages compared to earlier methods and European jurisdictions are also adopting their use. There is no longer any major controversy in the forensic scientific world between these methods of presentation and the previous statistical methods. The English Court of Appeal has attempted to lay down guidelines of general application after hearing argument in a case concerning the comparison of a single suspect with a single sample using outdated technology. By so doing, the Court has unwittingly ignored the advances of the last few years and caused needless confusion.

The three rulings do not forbid using likelihood ratios to present scientific evidence. But what they apparently do is to prevent a witness from explaining what the likelihood ratio means. The witness may give a figure, whether it be 100 or 1 million, but is not allowed to explain its logical use. And the explanation the Court has attempted will be of use only where a single suspect is compared with a single mark. It will be of no use where there are multiple marks at the scene of a crime or in other non-standard cases such as where a blood stain, believed to be from someone who has disappeared, is compared with the blood of relatives to determine identity.

Further worries arise when considering other forms of evidence such as psychological evidence in child sexual abuse cases. The clearest way of exposing the flaws in many of the "syndromes" presented as evidence that a child has been abused is analysis using likelihood ratios. The law reports are filled with instances in which psychologists have committed the "prosecutor's fallacy" and thus misled the Court. It is not clear whether the defence would now be allowed to explain what is logically wrong with such evidence.

THE FUTURE

So far as DNA is concerned, this discussion is becoming academic. When the sample quality is good, modern methods produce likelihood ratios approaching, and even exceeding, the population of the world. As a result the FBI has recently adopted a rule that it will give a positive identification (as with fingerprint evidence) when the likelihood ratio exceeds 260 billion. (Presumably, creating odds of at least 1000 to 1 against there being a repetition of the profile in the USA). Though we recognise the administrative efficiency of this step we do not wholeheartedly support it for various reasons.

Analysis of many other forms of scientific evidence has been illuminated by the likelihood ratio approach. Glass, transferred fibres and conventional blood-typing have all been reanalysed with the result that the first two, in particular, have been found to be much more useful evidence than was previously realised. Likewise, other forms of evidence can be effectively debunked. Increased understanding of less tractable forms of evidence such as fingerprints, document examination and identification parades is gained by subjecting them to a standard method of logical analysis common to all forms of evidence. This clarification is being threatened by the English Courts which appear to wish to make particular ad hoc rules for particular forms of evidence.

LEARNING TO RIDE A BIKE

Likelihood ratios are the logical and efficient way to analyse and present scientific evidence. This logical approach also provides the yardstick against which instructions to juries on considering any other evidence should be measured. This does not necessarily mean that it is sensible to give the jury formal instruction in logic. The analogy, as we have said before, is with a parent teaching a child to ride a bicycle. Neither parent nor child requires formal instruction in the laws of mechanics. But if the parent's instructions do not comply with them, the child will fall off.

There is a far simpler ground on which such formal instruction could be ruled out. If juries are to be instructed in how to apply Bayes Theorem to non-scientific evidence in a case where scientific evidence is present, there would be no reason why such instruction should not be given in respect of non-scientific evidence alone, ie in every criminal case. This would clearly induce "vexation, expense and delay".

CONCLUSIONS

- There is no clear distinction between scientific and non-scientific evidence;
- Bayes Theorem is merely a formalisation of logic and common sense;
- Bayes Theorem is therefore not appropriate matter for evidence but for general education and judicial notice;
- It is not necessarily appropriate to instruct juries in formal logic;
- Instructions given to juries must comply with the requirements of logic;
- The cumulative effect of these three Court of Appeal judgments is to replace coherence and consistency in forensic science with confusion.

Bernard Robertson and Tony Vignaux are the authors of *Interpreting Evidence: Evaluating Forensic Science in the courtroom*, published by John Wiley and Son Ltd (UK), 1995, where these matters will be found more fully discussed. □

UPDATES ON YOUR MATERIALS

STUDENT COMPANION

edited by

Morag McDowell

CRIMINAL LAW

Morag McDowell

Preventive detention

In light of increased use of preventive detention it is timely that the Court of Appeal (sitting with five Judges) in *R v Leitch* [1998] 1 NZLR 420 reviewed the sentence and matters relevant to its imposition.

In addition to analysis of the tests required by s 75 Criminal Justice Act 1985 (in particular as to the meanings of "satisfied" and "expedient") the Court listed the factors relevant to a s 75 assessment. They include: the nature, gravity and time span of the offending; victim impact; response to rehabilitation efforts; time lapse between offences; steps taken to avoid re-offending; remorse and responsibility; predilection for offending having regard to professional risk assessment.

The most common ground of appeal against preventive detention is that, as an indeterminate sentence, it is manifestly excessive in the circumstances. The Court therefore, placed emphasis on the factors to be weighed in the exercise of the sentencing Court's discretion. The protective purpose of preventive detention must be a foremost consideration and, in particular, the sentencing Court must consider whether public protection could be met by a finite sentence. "If compared with an available finite sentence, preventive detention would be longer than necessary to meet the objectives, the indeterminate sentence would be manifestly excessive." The Court also noted that concern for public safety might enable the imposition of a higher-than-usual finite sentence without the need to resort to preventive detention. However, it was stressed that preventive detention should not be burdened by a rebuttable presumption that a finite sentence is to be preferred.

Leitch responds to criticism that a failure to set firm guidelines in this area has resulted in inconsistencies in the application of the sentence and unfair results to particular offenders (see Meek J "The Revival of Preventive Detention in New Zealand

1986-93" (1995) 28 ANZJ of Crim 225). However, one important aspect of the sentence was not fully analysed by the Court; that risk prediction (particularly long-term) is notoriously difficult and unreliable. The Court assumed that psychiatrists occupy an appropriate predictive role – an assumption that has been challenged by psychiatrists worldwide. Moreover, the Court did not assess the impact of psychiatric reports on the exercise of the sentencing Court's discretion. A recent study concluded – "there is a close concurrence between a psychiatric opinion that there is a substantial risk of re-offending and the Court making an order of preventive detention". (Simpson AIF "Psychiatrist's Role in Preventive Detention" unpublished.) Whilst many would consider it appropriate for the Court to rely on psychiatric opinion, this study could lead to the conclusion that those other factors relevant to the exercise of the discretion (outlined in *Leitch*), in practice, seem to be of secondary importance.

Jury composition

The Crimes Amendment Act (No 3) 1997 enables a Court to proceed with a trial in the event that a juror is unable to continue. The Court (after having regard to the interests of justice) has the option of discharging the jury without their having given a verdict, or proceeding with a jury of less than 12. The Court may proceed with fewer than 11 jurors in two situations: where the prosecutor and accused consent or; if the Court considers that there are exceptional circumstances relating to the case which warrant the trial proceeding. The Court may proceed with fewer than ten jurors only if the prosecutor and the accused consent. The verdict of a jury with fewer than 12 members will have the same effect as the verdict of 12 jurors.

Self-defence

R v Kneale (CA 72/97, 16 December 1997) is significant for the Court of Appeal's analysis of whether self-defence can only be concerned with physical attack or physical threat as compared to emotional or psycho-

logical attack or threat. The case involved a domestic dispute in which the appellant punched his wife in the face to prevent her from removing their four-year-old daughter from the family property. He asserted a s 48 Crimes Act 1961 defence (use of reasonable force in the defence of another) claiming that his wife had a history of mental illness and that he perceived a threat of psychiatric injury to the child. One ground of appeal against conviction was that the trial Judge had erred in law in summing up that the issue of defence of another was limited to the threat of physical attack only.

The judgment canvasses recent authority from the United Kingdom in which the House of Lords has confirmed the analysis of the English Court of Appeal (*R v Chan-Fook* [1994] 1 WLR 689) that the phrase "actual bodily harm" is capable of including psychiatric injury. The Canadian Supreme Court has also determined that "serious bodily harm" includes psychological hurt or injury (*R v McGraw* [1991] 3 SCR 72). In New Zealand several references have been made to these findings but not in the context of self-defence. The Court noted that s 48 is expressed in wider terms than the infliction of actual bodily harm. It concluded that the harm which a person anticipates against another should not be limited to physical harm – "Every person consists of both mind and body. It would be artificial and out of tune with current thinking to limit the harm to physical aspects ...". The Court did however, emphasise that a relatively high threshold of psychological harm must be met (more than mere emotions), with a sound evidentiary basis requiring expert evidence.

MEDICAL LAW

Morag McDowell

Shortland v Northland Health discussed above as an example of judicial review.

The decision by Northland Health not to give dialysis to an elderly man with end stage renal failure had been subject to legal challenge twice in the High Court and before the Human Rights Commission. This Court of Appeal application alleged that the decision

was unlawful on two grounds: that it breached the requirements of good medical practice (as defined in the landmark judgment of *Auckland Area Health Board v Attorney-General* [1993] 1 NZLJ 235) and; that it breached s 8 Bill of Rights Act.

In support of the first ground it was argued that NH had breached its duties to provide the necessities of life without lawful excuse. The Court carefully analysed the *Auckland Area Health Board* case affirming Thomas J's decision that discontinuance of a life support system would not be unlawful if the discontinuance was in accordance with good medical practice. In assessing the four criteria laid down by Thomas J as to what amounted to "good medical practice" the Court of Appeal stressed that the criteria were framed for that one situation and that each case may require additional or different criteria. It was established that NH had filled the first two criteria of acting in good faith in the best interests of the patient and that the clinicians had conformed with prevailing medical standards. The third criterion (consultation with medical specialists and an ethical body) was held not to apply to the present situation as the issues were essentially clinical not ethical. The Court further held that whilst the fourth criterion requiring the informed consent of the patient's family was appropriate for the *Auckland Area Health Board* case, it was not appropriate in the present circumstances. To require the consent of the patient's family would give the family the power to require treatment to be given or continue irrespective of the clinical judgment of the doctors involved – a proposition which the law could not countenance. (The Court did not express that it would also have had serious resource repercussions.)

Crown Health Enterprises can take comfort in the fact that clinical guidelines (enabling appropriate allocation of limited health resources) have withstood legal challenge. The case stands in marked contrast to the 1995 McKeown affair in which media and public pressure appeared to force a change in clinical decision.

In *Ellison v L* (CA287/96, 19 November 1997, Richardson P, Keith J, Blanchard J) the Court of Appeal affirmed the principles relevant to an action in exemplary damages for personal injury. The appellant sought leave to bring an exemplary damages claim against her dentist who, she alleged, was negligent in his treatment thus causing an infection. The Court affirmed the High Court's refusal of leave finding that the claim fell well short of the standard required for exemplary damages. The Accident Rehabilitation and Compensation Insurance Act 1992 does not bar claims for exemplary damages. Such damages are designed to

punish a defendant for high-handed disregard of the plaintiff's rights, acting in bad faith, or acting in an outrageous manner. Although it might be said that the dentist was professionally negligent, his conduct clearly did not meet such a high threshold. "Negligence simpliciter will never suffice ... exemplary damages are only awarded in serious and exceptional cases."

It was also noted that punishment of outrageous behaviour can be adequately achieved by a modest penalty. Awards are not intended to compensate. The claim for \$250,000 was entirely unrealistic and practitioners were warned against bringing "unattainable claims" which give the appearance of being brought in *terrorem*.

In *Director-General of Social Welfare v L* (HC (Auck) M 708/97 5 November 1997, Salmon J) a two-year-old boy was placed under the guardianship of the High Court (pursuant to s 9 Guardianship Act 1968) to enable treatment for suspected testicular cancer. The child's parents held the firm belief that their son did not have cancer, that the removal of his testicle would prevent him from having children, and that they could cure him with Cambodian herbal treatments. The medical evidence showed a 99 per cent chance that the child had a malignant tumour – to be confirmed by biopsy – and that the child's only chance of survival was removal of the testicle followed by chemotherapy. There was no evidence to support the contention that the parent's herbal remedies would cure the cancer. The case involved a clearcut life/death situation leaving the Court no option but to make the guardianship orders. The child's best interests clearly overrode the parent's objections.

EQUITY

Andrew Butler

Specific performance

Cooperative Insurance v Argyll Stores Ltd [1998] AC 1 (HL(E))

The appellant defendants were supermarket tenants in a shopping centre run by the respondent plaintiffs. The supermarket was by far the largest shop and its greatest attraction. Under the lease the appellants had covenanted to keep the premises open for retail trade during normal shopping hours. However, the supermarket was running at a loss and in breach of the covenant the appellants closed down their premises. They admitted to a breach of covenant and agreed to be assessed for damages for such breach. However, the Court of Appeal ordered that the covenant be specifically performed. The appellants appealed this order.

The House of Lords (Lord Hoffmann delivering judgment) allowed the appeal.

Lord Hoffmann:

- reaffirmed the basic principle that specific performance will not issue where damages at common law are an adequate remedy;
- noted that Courts were reluctant to make an order for specific performance where there would be a possibility of having to give an indefinite series of rulings in order to ensure execution of the order;
- This in turn was influenced by a desire to avoid the heavy-handed instrument of punishment for contempt (the remedy in default of obedience to the order) and to avoid the expense of litigation in constantly calling on the Court to ensure compliance. Moreover, many such covenants can only be given effect to by imprecise orders which also increase litigation and supervision costs;
- in many "carry-on-business" cases specific performance would unjustly enrich the plaintiff – the defendant would be forced to carry on a loss-making enterprise and suffer a detriment greater than that gained by the plaintiff from a breach of contract;
- "the purpose of the law of contract is not to punish wrongdoing but to satisfy the expectations of the party entitled to performance";
- specific performance would "yoke together the parties in a continuing hostile relationship".

His Lordship concluded that it was sound practice to advise clients in such circumstances that specific performance would not issue to force continuing on a business.

Lord Hoffmann distinguished the carry-on-business cases from cases where specific performance is sought to achieve a result. In the latter case specific performance might well be allowed, because supervision is much less onerous: if called on to rule the Court only has to examine the finished work and decide whether it complies with the order.

To the extent that the decision rests upon the notion that equity will only act where the common law is inadequate the judgment is unfortunate. Now that in New Zealand there has been a distinct trend towards the fusion of law and equity, the emphasis must be on selection of the most appropriate remedy from a Court's armoury. Moreover, can it really be argued that requiring the defendant to perform an obligation to which the defendant had actually agreed unjustly enriches the plaintiff? Where is the "unjust" factor? There is no windfall to the plaintiff – it is only gaining what it bargained for. That said, the House of Lords has provided some principled factors to tell against an award of specific performance in the carrying-on-business cases and has distinguished those from the

achievement of results cases. To this extent, its judgment is to be welcomed.

COMPANY LAW

Andrew Beck

Company names

In *Dr Rust Ltd v Registrar of Companies* (1997) 8 NZCLC 261, 501, Dr Rust appealed against the decision by the Registrar to allow The Rust Doctor Ltd to retain its name. The Court therefore had to decide whether the names were "almost identical": s 22(2) Companies Act 1993.

Fisher J held that the Registrar had been correct, and that the names were not almost identical. The Court followed the decisions in *Flight Centre (NZ) Ltd v Registrar* (1994) 7 NZCLC 260,612 and *Stanley-Hunt Earthmovers Ltd v Registrar* (1997) 8 NZCLC 261,403, concluding that the purpose of the Registrar's inquiry is whether the companies are distinguishable. The fact that members of the public had been confused is not relevant to the Registrar's decision, and it is not appropriate to present evidence to this effect.

Each case requires determination on its own facts, and requires common sense to be applied. The only case to have succeeded thus far in forcing a change of name is *Stanley-Hunt Earthmovers*, where the only distinguishing feature was a date. It seems that a very high degree of similarity is required in order to fall foul of s 22.

Voidable transactions

Transactions with a company which has subsequently been put into liquidation may be protected if they were "in the ordinary course of business". This all-important phrase has been the subject of two significant decisions.

In *Re Modern Terrazzo Ltd* (in liquidation) [1998] 1 NZLR 160, the company had made payments to its accountant and lawyer within the six months before liquidation, as well as approving the drawings of its managing director. The liquidator gave notice seeking to set all these aside.

Fisher J held that the payments to the professionals were not protected because the services related chiefly to the termination of the business, and the accountants knew that payment to them had been expedited to give them an advantage over other creditors. One of the payments to the managing director was held valid, because it was company practice to confirm drawings in arrears. Another payment was invalid because it did not conform with past practice, and had been accelerated to the knowledge of the director.

The Court also made important statements regarding the approach to be taken

to determining what is in the ordinary course of business, holding that it had to be determined in context. Although an objective approach is required, past practices may be taken into account, and the focus has to be on the affairs of companies as going concerns.

The analysis of Fisher J was approved by the Privy Council in *Countrywide Banking Corporation Ltd v Dean* (1998) 8 NZCLC 261, 505. C B Sizzlers Ltd was in financial difficulty, and owed substantial rent arrears to Countrywide. The business was put on the market in a deal which included the assignment of the lease. Countrywide would only consent to the assignment on condition that all rent arrears were paid. Shortly after paying these, Sizzlers was put into liquidation.

Countrywide produced evidence that it was virtually invariable practice for a landlord to require payment of arrears as a precondition for consent to assignment of a lease, and that it was entirely usual for a lessor to be paid arrears from the sale of a tenant's business. The transaction was nevertheless set aside.

Although the Privy Council was unwilling to adopt any particular test, Gault J held that it was inappropriate to follow blindly decisions which had been made in other statutory contexts. He put forward the following guidelines:

- The transaction must be examined in the "actual setting" in which it took place;
- The transaction must be viewed objectively, and must be "such that it would be viewed by an objective outsider as having taken place in the ordinary course of business";
- There may be reference to business practices in the commercial world in general, but the focus must be the ordinary operational activities of businesses as going concerns, not responses to abnormal financial difficulties;
- The prior practices of the particular company may be looked at, especially past dealings with the creditor concerned.

In the circumstances, the Privy Council held that it was open to the High Court to find that the transaction was not in the ordinary course of business, because the company was, to the knowledge of the creditor, disposing of its business. Likewise, the fact that the payment was made up of long-standing arrears justified the conclusion of the Court of Appeal.

The difficult question of the policy behind the sections was not addressed; it seems clear, however, that there is an intention to allow creditors to go on trading with com-

panies until it becomes obvious that liquidation is a real possibility. Creditors who ought to have been alerted to this by the way in which a transaction has been carried out run the risk that the transaction will eventually be set aside.

Receivers and employment contracts

Section 32 Receiverships Act 1993 makes a receiver personally liable for wages and salaries in respect of employment contracts unless notice of termination is lawfully given within 14 days of the appointment of the receiver. The question which arose in *Re Weddel NZ Ltd* [1998] 1 NZLR 30, was whether such notice has to be in accordance with the terms of the contract concerned.

The Court of Appeal held that this is not the meaning of "lawfully given". The idea is that employees should be given prompt notice of whether their employment will continue, not to bind the receiver to contracts with long notice periods. Notice is therefore given "lawfully" if it complies with the terms of the receiver's appointment and the Act itself. Where an employment contract provides for a longer notice period, the employee will be a creditor to the extent that he or she is entitled to compensation for breach of the contract.

LAND LAW

Julia Pedley

Legislation

The controversial Maori Reserved Land Amendment Act 1997, which amends the law governing leases of Maori reserved lands, came into force on 1 January 1998. The Act

- aims to place owners and lessees of Maori reserved land in a more commercially based relationship;
- provides for a phased move to market rents, (based on a fair annual rental for the unimproved value of the land), and seven-year rent reviews;
- provides owners with a right of first refusal to purchase the lessee's interest at market value if the lessee wishes to transfer an interest by sale, will, gift, or on intestacy, (subject to some exceptions);
- provides lessees with a right of first refusal to purchase the land at market value should the owners wish to sell.

However, if the land is Maori freehold land, then this is subject to the right of first refusal of the whanaunga of the lessors. The legislation also provides for compensation to be paid to owners and lessees and affords the parties the freedom to negotiate their own arrangements.

Lawyers' conveyancing monopoly

The Conveyancers Bill, a member's Bill of Labour MP Phil Goff, aims to amend the Law Practitioners Act 1982, which currently confines the undertaking of conveyancing transactions to members of the legal profession. The proposed change would remove the conveyancing monopoly held by lawyers through the establishment of conveyancers, enabling non-lawyers to undertake conveyancing work. Consumers would be protected by the creation of a Conveyancers Board, which would have responsibility for the registration of conveyancers, maintenance of standards and disciplinary matters. Registered conveyancers would be required to hold annual practising certificates which would be issued by the Board. In addition, conveyancers would be required to be properly qualified, maintain trust accounts, have professional indemnity insurance and contribute to a Fidelity Guarantee Fund.

By requiring registration, the Bill ensures that conveyancing work may only be undertaken by those persons registered as a conveyancer and holding a current practising certificate, or, by persons holding a current practising certificate as a barrister or solicitor or as both, or a person acting under the supervision of such a holder. Similar provisions already exist in some Australian states and in England.

The Bill also amends the Real Estate Agents Act 1976 to allow solicitors to undertake the work of real estate agents, (currently prohibited by the provisions of the Act. Solicitors carrying out such work, will be deemed to be acting as solicitors (thereby remaining subject to the Law Practitioners Act 1982) and not acting as real estate agents (subject to the Real Estate Agents Act 1976). Such a proposal, if it becomes law, would reverse the Court of Appeal decision in *Lewis v REINZ* [1995] 3 NZLR 385, thereby allowing lawyers to operate property centres.

The Select Committee is due to report back in May. Readers will be kept informed of developments.

Case law

Pakuranga Park Village Trust v Fenton (CA 61/97, 18 November 1997)

The Court of Appeal reversed Baragwanath J's ruling (unrep, HC Auckland, CP 269/96, 23 December 1996), that a proposed sale of land resulting in the loss of an existing bowling green and conversion of an open space into a new bowling green would materially prejudice the interests of the holders of participatory securities as residents in a retirement village.

On appeal, the Court analysed the duty imposed by the Securities Act 1978 and the Securities Regulations 1983 upon the statutory supervisor (who had consented to the

sale), and held that in this case the statutory duty had been met. Delivering judgment, Keith J stated that in ascertaining whether there had been a breach of the deed of the licence to occupy, the Court found that the statutory supervisor had exercised reasonable diligence in its process and reasoning when considering the depositors' security interests.

On the issue of whether the proposed sale and consequential changes to the bowling green amounted to a change in the facilities of the retirement village, the Court took a different view to that of Baragwanath J, and found that the proposed changes did not result in an alteration to the basic nature and scope of the facilities and therefore, no breach had occurred of the residents' licences to occupy.

Town & Country Marketing Ltd v McCallum (1998) 3 NZ ConvC 192, 698.

In 1974, new certificates of title were issued for some land upon which four units has been built. The land was subject to a restrictive covenant against building above a certain height. The covenant was not however, brought down onto the new titles. When Mrs McCallum, who had purchased one of the units in 1995, sought to add a second storey on her unit, the plaintiff, (whose land was the dominant land), informed her of the existence of the restrictive covenant and sought an injunction.

Paterson J canvasses the issue of whether actual, constructive or imputed notice of the restrictive covenant on the part of the defendant would make her bound by its terms when set against the indefeasibility principles contained in ss 62 and 182 Land Transfer Act 1952, (providing there was no fraud on the part of the defendant which would deny her the right to indefeasibility). On the evidence, Paterson J was unwilling to accept that Mrs McCallum, at the time of her purchase, had notice (either actual or constructive), of the restrictive covenant and in the absence of such could not be bound by it.

The judgment gives detailed analysis of the indefeasibility provisions in the LTA and the effect of ss 126A(1)(b) and (1)(c) Property Law Act 1952.

Paterson J further held that even if the defendant had had notice of the existence of the restrictive covenant, because her conduct did not amount to fraud, the doctrine of indefeasibility would have entitled her to ignore it. Furthermore, the restrictive covenant should have been brought down onto the titles to the units, this was a case where the Registrar's powers of correction under ss 80 and 81 LTA did not apply.

The ruling emphasises the need for a prudent owner (where new titles are being issued on servient land) to make sure that

the restrictive covenant has been brought down onto those titles.

EMPLOYMENT LAW

Graham Rossiter

Redundancy dismissal

In *Clemow v McKechine & Pacific (NZ) Ltd* (AEC 95/97, 4-9-97, Judge Travis), the employee received assurances about the security of his position. He was nevertheless informed (after a decision by the employer that there would not be sufficient work available to justify retention of his position) that his employment would terminate in six months' time. The employer decided that because of the length of notice and the appellant's lump sum entitlement from its superannuation scheme an additional payment of compensation was not necessary. The Court held that:

the employer's failure to consult with the grievant meant that the latter had not received fair and reasonable treatment. Although consultation might not be necessary if no useful purpose would be served by it, for example where the enterprise itself had failed, consultation with an employee and consideration of alternatives may be required as a matter of fairness.

Neither the payment of the employee's superannuation entitlement or the notice period given could eliminate the employer's obligation to pay redundancy compensation in accordance with its own policy. The latter point is significant as the Chief Judge had in *Bilderbeck v Brighthouse Ltd* [1993] 2 ERNZ 74, 93, commented that it is open to an employer in a redundancy situation to "seek to mitigate and even to eliminate the (redundancy) compensatory payment by giving an extended period of notice".

In *Guardall Alarms NZ Ltd v Lightfoot* (AEC 127/97, 28-10-97, Judge Colgan), the employee had been employed by the employer for eight years and at the time of his dismissal was an accounts manager earning \$43,500 pa. Unlike *Clemow*, the redundancy termination was effective almost immediately. The Court upheld the findings of the Employment Tribunal that: there had been no adequate consultation on the part of the employer; the payment of one week's notice made by the employer was "woefully inadequate", three months' notice would have been reasonable; and notice of termination of employment and compensation for redundancy were separate matters. (The employer had argued that the payment by it of redundancy compensation of four week's pay for the first year of service and one week's pay for each succeeding year should be taken as being in payment of the balance of the notice due to the employee.) □

WHEN IS A JUDGMENT NOT A JUDGMENT?

LITIGATION

edited by
Andrew Beck

At first sight, the decision of the Court of Appeal in *Bell-Booth v Bell-Booth* unreported, 11 March 1998, CA195/97 is simply a technical interpretation of one of the Rules of Court. At another level, however, it raises important questions as to where the rules begin and end, and to what extent common law concepts have to be imported. The fundamental issue in this case is the concept of "judgment".

Bell-Booth

The issue to be decided in *Bell-Booth* was whether the High Court had "given judgment" in respect of an appeal from the District Court. The appeal had been argued before Temm J. Before judgment could be given in the ordinary way, he fell ill. Counsel assembled in Chambers, and the judgment was relayed telephonically by Temm J to a Court-taker, with the indication that reasons would be provided later. He died before those reasons could be given.

In an application for a declaration that judgment had been given ((1997) 11 PRNZ 149) Smellie J held that judgment had not been given in terms of the rules because there had been no physical manifestation of the Judge, and no reasons for judgment. He held that the judgment was a nullity, and ordered a rehearing: see [1997] NZLJ 430. He held that R 5 was inapplicable, because the judgment was not a legally valid act and could therefore not be regularised.

On appeal, the Court of Appeal reached a different conclusion. Thomas J considered the wording of R 540, and noted immediately that it required the close attention of the Rules Committee because it does not recognise the way in which many interlocutory orders are dealt with in practice.

Had the judgment been set aside and a rehearing ordered, the situation would have been clarified for all the parties, and further procedural steps would have been unnecessary. The clear message would also have been given that a judgment without reasons is not acceptable

The present case, however, involved a Court decision, and the rule was clearly applicable. Judgment should therefore have been given in open Court, or by written judgment as provided for in the rule. This was also the conclusion which had been reached by Smellie J. The crucial difference in the way in which the Court of Appeal approached the question was in viewing the non-compliance with the rule as merely an irregularity.

Thomas J held that the judgment as read out to the parties could not simply be ignored: it was an irrevocable judicial act, which would have started the time period for calculating appeal rights. The provisions of R 540 had not been complied with, but R 5 rendered this an irregularity. The fact that reasons for judgment had not been given could not alter this conclusion.

Unfortunately, however, this could not resolve the underlying problem, which is that a judgment with no reasons is almost worse than useless. This

was fully recognised by Thomas J, who stressed the fundamental importance of reasons in the common law and the legal system as a whole. As a result, he made it clear that an application for leave to appeal against the decision of Temm J would be a mere formality, and accepted the contention that the respondent's appeal rights were effectively rendered nugatory without reasons for judgment.

The Court of Appeal described the victory of the appellant as a Pyrrhic one because it seemed inevitable that a rehearing in the High Court would eventually be required, as Smellie J had foreseen. As no costs were awarded in the Court of Appeal, and the costs order of the hearing before Smellie J was not reversed, any taste of victory could have been no more than fleeting.

The concept of judgment

One is left with the feeling that this was a rather unsatisfactory conclusion. On the one hand, the Court treated a rule defining the time of giving judgment as a mere technicality. On the other, it confirms that reasons for judgments are fundamental, and the absence of reasons is a ground for appeal.

It seems to me that, if it is accepted that the failure to give reasons was merely an irregularity, the most appropriate course of action would have been to set the judgment aside under R 5(2)(a)(iii). The Court clearly recognised that the irregularity was of the gravest nature, and it is difficult to think of a situation which more clearly requires the intervention of the Court. Had the judgment been set aside and a rehearing ordered, the situation would have been clarified for all the parties, and further procedural steps would have been unnecessary. The clear mes-

sage would also have been given that a judgment without reasons is not acceptable in the justice system.

It is also far from obvious that what happened in this case is simply a question of non-compliance with the rules. Rule 540 is not directed at the definition of "judgment" but at determining the time at which judgment is given. The nature of a judgment is a question of common law, as recognised by the Court of Appeal. Where a decision is announced, with the indication that reasons are to follow, the actual result alone is an incomplete representation of the decision. The only situation recognised by the rules where the process can be completed by another Judge is where judgment has already been signed: R 543. The intention seems to be that, in other cases, a rehearing will be required: R 543(3).

There are further problems in interpreting non-compliance with definitional rules as irregularities. Rule 540 defines when judgment is given. If the rule is not complied with, who is to say when judgment is given? The Court of Appeal held that Temm J's judgment was "undoubtedly given" (p 6), but that presupposes what is meant by a judgment. The possibility of a judgment

without reasons certainly exists, but would be highly unusual in the High Court. It was definitely not the case here. If the reasons were to form an integral part of the judgment, then it was not given. The concept of irregularity seems designed for rules laying down requirements which demand compliance, rather than those which define concepts.

Reform of the rule

The other issue mentioned by the Court of Appeal was the necessity for R 540 to be revisited by the Rules Committee. It is true that R 539 defines "judgment" so as to include "order", but it is clear that RR 540-544 are not intended to cover interlocutory matters. Interlocutory applications are covered by their own set of rules in Part II, and those rules include provision for sealing in R 267. Rule 540 refers to judgments in "open Court" which patently excludes Chambers matters; R 541 contains rules for sealing which are different to those in R 267, and the intention seems to be that RR 540-544 are to apply to Court – as opposed to Chambers – decisions. Thus the transcription of the reasons for the decision

in *Stott v Tuck* (1997) 10 PRNZ 649 (an application for review of an interim injunction granted ex parte) would not be irregular: see [1997] NZLJ 430.

Whatever the position may be, the rules do not seem to cater for modern practice. Clarification of the position would certainly be helpful, and the opportunity could be used to deal with the proper position of reasons for judgment as well. Now that appeal times have been considerable shortened, it is undesirable to have any delay between a judgment and the reasons for judgment. It also seems to be the current practice to provide reasons together with the decision so that these types of difficulties are avoided.

The other point relied on by Smellie J was the necessity for some physical manifestation of the Judge in order for judgment to be pronounced. The Court of Appeal did not address this issue, and it would appear by implication that the Court did not consider this to be a significant aspect of giving judgment. That would accord with the growing trend to use new forms of communication, which frequently do not involve any physical manifestation of the judicial officer.

RULE 426A: FULL CIRCLE?

The Court of Appeal has once again expressed an opinion on R 426A of the High Court Rules, and indicated its apparent dislike of that rule. The classical statement of the Court's position is that which was adopted by a Bench of five Judges in *McEvoy v Dallison* (1997) 10 PRNZ 291. The essence of the approach is that the rule is simply a tool to foster good "case management" and is not designed to be a major hurdle for genuine litigants to overcome: see [1997] NZLJ 203.

The *McEvoy* approach was generally reaffirmed in the recent decision of *Commerce Commission v Giltrap City Ltd* unreported, 16 December 1997, CA114/97, but additional glosses have rather complicated the position. Thomas J, who delivered the judgments in *McEvoy* and the other leading decision of *New Zealand Kiwifruit Marketing Board v Waikato Valley Co-operative Dairies Ltd* (1997) 10 PRNZ 431, was also a member of the Court in the *Giltrap* case. The decision was, however, delivered by Tipping J.

Giltrap

In 1994, the Commerce Commission commenced proceedings against eight defendants in respect of a price-determination arrangement alleged to contravene the Commerce Act 1986. Settlement negotiations took place with all defendants apart from the two present respondents, and no formal steps were taken for two years. As a result of this delay, the High Court struck out the proceedings under RR 477 and 478 of the High Court Rules.

In the High Court, attention was focused on R 426A. Robertson J was satisfied that there was a proper issue to be tried, but held that there were "other factors" which required the Court's intervention. In particular, he noted that there had been a deliberate decision not to proceed while settlement negotiations were in train.

On appeal, the Court of Appeal was concerned that the High Court had not expressly considered the elements of a R 478 application: whether the delay was inexcusable, whether there had

been serious prejudice, or where the interests of justice lay. It was not prepared to infer that this process had been undertaken, and therefore embarked on its own consideration of these matters.

The Court considered that the Commission had essentially acted reasonably. It had kept the respondents in touch with what was happening, and had invited them to join in the settlement before it was perfected. The Court could see no particular prejudice as a result of the delay which had occurred, and decided that there was no reason why a fair trial should not be possible. The appeal was accordingly allowed.

What is of particular significance is the Court's reconciliation of RR 426A and 478. Tipping J held that:

Essentially, leave should be granted under R 426A unless the case is such that an order under R 478 striking out for want of prosecution would be justified.

The inference to be drawn from this is that the inquiries under the two rules

are the same. Whether there is a proper issue to be tried requires an investigation as to whether striking out for want of prosecution is justified.

Reconciliation with *McEvoy*

That is not what the Court of Appeal said in *McEvoy v Dallison*. At p 298, Thomas J said of R 426A that:

It cannot be thought that such a rule envisages an examination by the Court of the merits, whether of the facts or law. ... Matters of fact or questions of law, if they are to be more closely examined at an interlocutory stage, are better examined in the context of rules such as RR 477 and 478.

The Court accepted that matters such as prejudice could not be "entirely excluded from consideration in all circumstances" but stated that prejudice should properly be considered in a R 478 application. In the circumstances of *New Zealand Kiwifruit Marketing Board v Waikato Valley Cooperative Dairies Ltd* (1997) 10 PRNZ 431, the Court of Appeal disapproved of the significance ascribed to prejudice by the High Court Judge in refusing leave.

Regarding the relationship between RR 426A and 478, in *McEvoy*, the Court said, at 299:

It is to be presumed, therefore, that the new rule was intended to serve a different function from the earlier rules, and that it was not intended to either duplicate or usurp the function of those rules.

Yet the Court accepted (at 299) that leave might be refused under R 426A in circumstances where the applicant had "forfeited his or her right of access to the processes of the Court". The possibility of leave being refused was again referred to in the *Waikato Dairies* case, in the context of a second application under R 426A. Leave was in fact refused to proceed against one defendant in *Pearman v Carr* (1997) 10 PRNZ 507, although no direct consideration was given to whether the requirements of R 478 would have been satisfied. (To my mind they were not, because there was no specific prejudice as a result of the delay, but the Court regarded the worsening medical condition of the defendant as evidence of "significant and unusual prejudice".)

The future of R 426A

It should not be forgotten that R 426A(2) is expressed in the imperative: leave "shall not be given" unless the Court is satisfied that there is a proper issue to be tried. The onus is on the applicant for leave. If the requirements of R 478 have to be satisfied before leave is refused, they should properly be addressed by the applicant. This was basically the approach adopted by the High Court in the line of cases following *Sullivan v Atchison* [1995] 2 NZLR 22, which was disapproved by the Court of Appeal in *McEvoy* when it decided that the purpose of the rule was case management.

It is now difficult to see precisely where R 426A is headed. It seems abundantly clear that leave is unlikely to be refused except in the most egre-

gious situations. For the most part, defendants will be wasting their time even considering opposition unless they are concurrently making an application under R 478. As far as plaintiffs are concerned, however, the waters are rather murky. Should the question of prejudice be addressed, or is it simply to be ignored unless it is raised by a defendant? Is the expiry of a limitation period relevant to the application? Should any evidence be adduced in support?

I have previously suggested that R 426A might have run its course, and would likely be overtaken by case management practices. It seems that this may have been premature. Despite the fact that the Auckland Courts have been operating a case management system for some years now, a case such as the *Giltrap* one was permitted to linger inactive in the system for a couple of years. It is not adequate to respond that the defendant was content to sit and wait; and settlement negotiations with other parties do not justify tardiness in litigation, especially where penalties are involved. Two years of negotiations does in any event seem rather protracted.

The time may well be ripe for a consideration of what case management rules and rules such as R 426A are really designed to achieve, and for a clear and uniform system to be put in place. It is unsatisfactory to have a very fluid and provisional approach for any length of time, and litigants are entitled to know what the system demands of them.

DELAYS IN LEGAL AID

The consequences of a delay in a decision on an application for legal aid can be quite severe, as demonstrated in *M v C* unreported, Master Venning, 26 February 1998, HC Dunedin CP 19/97. The case has, I confess, proved something of an object lesson to counsel.

Background to the decision

The intending plaintiff sought leave to commence proceedings for sexual abuse suffered as a child. Leave was sought pursuant to s 4(7) of the Limitation Act 1950, the argument being that the cause of action accrued, or that

the plaintiff's disability ceased sometime in 1993. The application for leave was made in April 1997, and an application for legal aid was submitted some weeks later.

The application was set down for hearing in July, but at that stage the legal aid question was unresolved, and the matter was adjourned. The defendant, meanwhile, had applied for and been granted legal aid. After further adjournments, the application was finally set down for hearing in December 1997. Pressure was brought to bear on the legal aid committee as the date for hearing drew nearer, but it became clear that no decision would be made before the fixture.

A decision had to be made and, in the interests of finality and good case management, the intending plaintiff decided to proceed, making it clear to the Court that the application for legal aid remained outstanding. The application for leave to proceed was dismissed, and the question of costs accordingly became an issue.

The case was an unusual one, because it involved two impecunious parties, who both satisfied the financial threshold for legal aid. If the plaintiff's application were ultimately to be granted, there would be no jurisdiction to award costs in the absence of exceptional circumstances. It was accordingly submitted that no costs order

should be made prior to the determination of legal aid.

The costs award

Master Venning refused to accede to this. He said:

In my view there was ample time for the intending plaintiff to resolve the issue of a grant of legal aid. The intending plaintiff chose to pursue the application in the absence of legal aid and must bear the consequences of that decision.

The defendant's actual costs were \$9,649.10. The Master awarded costs against the plaintiff of \$4,000 together with disbursements of \$1,754.08.

One would certainly imagine that six or seven months is enough time to resolve an application for legal aid, but that power does not rest with the applicant. Short of applying for an order of mandamus, there is not much an applicant for legal aid can do.

In fact, legal aid was finally refused on 5 March 1998, on the grounds that the applicant had insufficient prospects of success. This seems a safe enough conclusion in the light of Master Venning's decision on the application for leave, but that cannot be relevant to the committee's decision. That decision is

currently under appeal, which raises the question as to the proper course of action for a plaintiff caught in this dilemma.

In the light of the costs award made by Master Venning, it seems clear that an applicant should on no account agree to proceed before the legal aid question has been decided. If a refusal of legal aid is to be appealed, then the outcome of the appeal will have to be awaited before any hearing of the substantive matter. The Court could of course refuse to grant an adjournment on the grounds that the legal aid question had not been resolved, but this would more than likely provide valid grounds for an appeal.

It is suggested that there is no reason why a costs order cannot be deferred pending legal aid. This would be one way of keeping the system running even where legal aid decisions are slow, and it would certainly solve enormous problems where legal aid is granted subsequently.

Operation of the legal aid system

There is, however, a more fundamental issue at stake. Legal aid is a vital part of the justice system, and impecunious litigants have a right to know at an

early stage whether they will be entitled to its assistance. It is entirely unsatisfactory to be required to operate in a Court system which demands a high degree of efficiency in the processing of litigation, when a party seeking legal aid is unable to move from first base. It is also unfair to have pressure placed to bring a matter to a hearing when there are delays for which a party is not responsible. Something is wrong with a system which produces situations of this nature, and it is vital that the legal aid process produce swift decisions, especially where limitation issues are involved.

The final irony is that the costs order was made in favour of a legally aided party. The matter has been settled, but it is instructive to consider what the consequences would have been otherwise. The legal aid authority would end up recouping its costs from someone acknowledged to be unable to fund litigation. This factor was not considered to be relevant by Master Venning in making a decision on costs. It is suggested, however, that practical results like this must be of concern. Proceedings for enforcement of the costs order would have been a further charge on legal aid, and would in all likelihood have borne no fruit.

APPEALING OLD JUDGMENTS UNDER NEW RULES

The new Court of Appeal (Civil) Rules 1997 came into force on 1 October 1997. They apply generally to all appeals to the Court of Appeal, whether commenced before or after that date. There are no transitional provisions, although some of the rules apply only to appeals commenced under the new rules. One of the most significant changes brought about by the rules is the uniform 28 days for appeal, considerably shorter than the three month period allowed for appeals from final judgments under the Court of Appeal Rules 1955: see generally on the new rules [1997] NZLJ 349.

In *Accolade Autohire Ltd v Aero-max Ltd* unreported, 23 February 1998, CA275/97, the inevitable question arose: what is the time limit for appeal where judgment was given in the period leading up to the commencement of the new rules? In that case, the proceeding in the High Court had been

dismissed on 9 September 1997, judgment was sealed on 15 September 1997, and the notice of appeal was filed on 5 December 1997.

The Court of Appeal held that the three month period continued to apply because the appeal rights were established at the latest at the date of judgment. Those rights included a three month time limit, which should not be removed retrospectively unless the amending legislation clearly so provided.

The argument that time limits are merely matters of procedure rather than rights was addressed by the Court, but held that to accept it would "attach too much force to labels". The Court concluded that it would be unfair and unjust to deprive a party in these circumstances of its rights to appeal, and they had three months to exercise that right. A surprisingly large number of authorities were cited by the Court to justify its conclusions.

The result is undoubtedly in accordance with justice, even though it may unduly favour parties where judgment was given shortly before commencement of the new rules. Further difficulties could arise in such situations where the application of other rules is in issue. For instance, there is no indication as to when the notice of appeal in this case was served on the respondent or the Registrar of the High Court. All of these events have to take place before the appeal is "brought" in terms of R 7.

One might, perhaps, be forgiven for gaining the impression that it would have been simpler to provide expressly for the case of time limits for appeals from judgments given before the commencement of the rules (as in the case of R 10 - abandonment of appeal for lack of proper progress) rather than leaving it to a rather complex process of statutory interpretation. □

BRIBERY IN COMMERCE

Frank Quin, an Auckland lawyer

discusses criminal liability for corruption in the private sector

INTRODUCTION

This article considers the adequacy of New Zealand's criminal law in relation to the payment of bribes in the public and private sectors to facilitate commercial transactions. The principal repositories of this criminal law are the Secret Commissions Act 1910 and certain provisions of the Crimes Act 1961. The assessment is that, while the existing criminal law remains appropriately focused, there is difficulty with the meaning of the word "corruptly" in the relevant offences. This goes to the heart of the criminal sanctions against bribery in this country and should be addressed by the Legislature.

Whilst New Zealand has long prided itself on being free of institutionalised corruption in both the public and private sectors, this has not always been the case. In moving the introduction of the Secret Commissions Bill in October 1910, the Prime Minister Sir Joseph Ward stated (at 152 NZPD 659):

This Bill proposes to render it illegal for agents to secretly accept payments or other valuable considerations from third persons in respect to the business of their principals and, as I have said, there is reason to believe this system is in operation in this country to a large extent.

And a 1920 textbook, *The Law Relating to Secret Commissions and Bribes* by Albert Crew, contains in an appendix a 1911 commentary on the then recently enacted Secret Commissions Act 1910 by the Department of Commerce and Labour. The Act was thought to have proved effective in:

eliminating an abuse that had cost companies in this country large sums of money every year in the payment of gratuities and commissions for business turned their way through the influence of officials of local concerns from which trade was solicited.

The Secret Commissions Act 1910 might thus be described as both timely and of enduring effect. Yet it would be a mistake to suppose that New Zealand has acquired over the ensuing years some natural immunity to the forces of corruption in the marketplace. Growth in our international trade and the constant search for new markets is bringing ever increasing contact with countries in Asia, South America and Eastern Europe where institutionalised corruption is notorious. Likewise, it is reasonable to suppose that immigration and investment from such countries carries the risk of a tolerance, or at least ambivalence, towards such practices being imported into the domestic marketplace.

Perception of corruption in New Zealand

In July 1997, the international probity watchdog Transparency International released its third annual "Corruption Perception Index". This seeks to measure the *perception* of corruption in the countries surveyed, as gleaned from a number of different polls and surveys amongst residents of,

or people dealing with, those countries. In this most recent index, New Zealand has slipped from first to fourth of the 52 countries surveyed. This does not mean that there is any more corruption in this country than in the previous two years when New Zealand topped the index. Rather, by application of a nominal rating to the necessarily subjective responses in the surveys utilised, New Zealand's score had slipped – albeit slightly – from closest to the perfect ten employed by the Index to fourth closest (now behind three Scandinavian countries).

Doubtless it is possible to take issue with the methodology, of which interested readers with Internet access can learn more at Transparency International's web site (<http://www.transparency.de>). While no reasons are offered for the reduction in New Zealand's rating, undoubtedly the *perception* of corruption in a country will be influenced by media stories quite apart from any personal experience of respondents. And it is in the nature of media reporting that allegations tend to receive more coverage than outcomes.

In New Zealand over the last few years, there has been extensive media coverage of alleged (and in some instances proven) fraudulent practices by listed company chief executives, heads of the Audit Office and Accident Compensation Corporation and District Court Judges. All were prosecutions by the Serious Fraud Office, whose publicised activities and high media profile could themselves have heightened perceptions of "institutional" wrongdoing. Allegations of corrupt practices levelled at the heads of the Serious Fraud Office and Inland Revenue Department featured in the lengthy, and intensively reported, "winebox" Commission of Inquiry (only to be discredited in the Commission's report). And there have been at least two reported criminal prosecutions where the Crown alleged the payment of bribes to facilitate business transactions (*R v McDonald* [1993] 3 NZLR 354, considered below, and *R v Hufflett* [1994] 2 NZLR 143). It is perhaps the cumulative effect of such instances which has produced the slippage in New Zealand's rating on the Transparency International index.

The Crimes Act

Part VI of the Crimes Act 1961 is entitled "Crimes Affecting the Administration of Law and Justice". It contains, in ss 100 to 105A, penal sanctions against corruptly giving and accepting bribes in relation to Judges and Court officers, ministers of the Crown and members of Parliament, prosecutors and other law enforcement personnel, and Crown and local body "officials". The soliciting or acceptance of bribes by such functionaries is treated as twice as serious (14 years' imprisonment for Judges and ministers and seven years in other cases) as the offering or making of such payments.

All these Crimes Act provisions have the potential to apply to bribery aimed at private sector business activities. A Judge may be targeted in respect of commercial litigation, a prosecutor or departmental official over an environmental

breach, a local body official in respect of a planning application or a contract to be awarded by the local body. Such examples are typically the stuff of corrupt practices in other countries.

The Secret Commissions Act

However, the Crimes Act provisions cannot apply to purely "private sector" bribery, by which is meant payments to an employee or agent of a company to induce or reward favourable treatment of the payer in a business relationship. The only statute which criminalises such conduct is the Secret Commissions Act 1910.

It would be fair to say that neither the existence nor the content of the Secret Commissions Act 1910 is widely known in the business community today. Prosecutions under the Act have been infrequent. In response to the writer's request for information, the Crown Law Office advised that, in the period since 1981, consideration has been given to 15 prospective prosecutions referred for the Attorney-General's consent. Nine prosecutions were approved, resulting in one conviction (on a guilty plea), four acquittals and one stay of proceedings. The outcome of the remaining three prosecutions was unknown. Data on prosecutions under the Act prior to 1981 was described as being "in a less easily retrievable form".

It is apparent that the Secret Commissions Act was inspired by the English Prevention of Corruption Act of 1906. Similar legislation based on the English statute was adopted over the same period in Australia, Canada and South Africa. In introducing the Bill, Sir Joseph Ward described it as containing "the best features" of these antecedents. Certainly, there are differences but the wording of the principal offence provisions in the Secret Commissions Act plainly derives from the English legislation. Perhaps reflecting its limited use, there have been few amendments to the Act over the years.

Sections 3 and 4 create the principal offences of "corruptly" giving to, or receiving by, an agent of any valuable consideration as an "inducement or reward" for the agent acting in some way in relation to, or for showing favour in respect of, his principal's business. The term "agent" extends to employees and to representatives of both central and local government organisations. Unlike the Crimes Act offences, the same penalty applies to both payment and receipt contrary to the Act. Conviction on indictment carries a maximum penalty of two years' imprisonment or a fine of \$1000 (\$2000 for a corporation). The consent of the Attorney-General is required for a prosecution.

Other sections create offences by an agent in failing to disclose an interest in the principal's contract, giving or delivering false receipts, invoices, etc, and receiving an undisclosed reward for advising persons to enter into contracts.

"Corruptly" - Useless appendage or critical ingredient?

In both of the primary offences in ss 3 and 4 of the Secret Commissions Act, the description of the prohibited conduct is introduced by the word "corruptly". As noted earlier, the same term is employed in the Crimes Act offences. In the second edition of *Adams, Criminal Law and Practice in New Zealand* (published in 1971 and largely written by Sir Francis Adams himself), it is doubted whether, in respect of the Crimes Act provisions, the word "corruptly" added any ingredient to the crime. For example, a Judge accepting a bribe "can hardly be said to act otherwise than 'corruptly'"

and, in such a case, the word may well be regarded as a mere 'designation' of his act". (*Ibid*, at para 821.)

In relation to ss 3 and 4 of the Secret Commissions Act, the meaning and effect of "corruptly" was considered by Williamson J in *R v McDonald* [1993] 3 NZLR 354. In this case, M had been indicted for making, and H for accepting, a payment alleged by the Crown to have taken the form of money paid by M directly to a car dealer of part of the purchase price for a motor home acquired by H. The Crown alleged that M was either inducing H to show favour to M's company in respect of its dealings with H's employer or rewarding H for past favours.

In applying to be discharged under s 347 of the Crimes Act, both accused pointed to steps supposedly taken by M, with the assistance of the car dealer, to conceal from H the fact of M's contribution to the purchase price of the motor home. This evidence, adduced at the preliminary hearing, was the basis for a submission that, if there was a credible possibility that H was indeed ignorant of M's benefaction, the Crown could not prove that the payment was either an inducement or a reward for favours or that the payment was made (and by the same token accepted) "corruptly".

In a short judgment, Williamson J held that the function of "corruptly" in ss 3 and 4 of the Secret Commissions Act was to indicate the "mental ingredient" which the accused must have when making or accepting the payment:

... namely that degree of deliberate criminal intent necessary not only to perform the act itself but also to do it for the purpose of influencing another person or to be influenced to the detriment of a third party's business.

Williamson J observed that the presence or otherwise of such intent would have to be ascertained by way of inference from proven facts, for which purpose it was necessary for the trial to proceed. The application under s 347 was accordingly denied. (It should however be noted that both accused were subsequently acquitted.)

With respect, it must be questioned whether the meaning thus given to "corruptly" in ss 3 and 4 of the Secret Commissions Act is sustainable. Arguably, the mens rea of the offences is apparent from the express requirement that the payment be made or accepted "as an inducement or reward". On the face of it, the Crown could satisfy this ingredient only by proving not only that the payment was knowingly made to, and knowingly accepted by, an agent qua the relationship with a principal but also that it was intended by the payer as a means of inducing the agent to act in a certain way or to reward him for having done so.

Perhaps Williamson J meant that "corruptly" added an additional mental ingredient, being the intent of the payer to cause detriment to the principal's business or an intent of the agent/recipient to produce such detriment. But if so, it can reasonably be asked why should such additional burden be imposed on the Crown in the absence of express language to that effect?

Although *McDonald* was concerned solely with the Secret Commissions Act, the current edition of *Adams* cites the decision on the meaning of "corruptly" in the Crimes Act provisions. This is unconvincing since, even accepting the "detriment" requirement in relation to payments made to agents of private firms, it seems an unlikely, and unnecessary, ingredient to be included in crimes relating to the bribery of Judges, politicians and law enforcement officers.

And in relation to the Secret Commissions Act itself, it is not difficult to imagine cases where an agent seeking or accepting a payment to influence his principal's affairs has

no intention of acting to the detriment of the principal or, at least, does not believe that the action which the payment induces will be detrimental. Surely the evil which these offences are aimed at is the inherent likelihood that, in some way or another, there will be detriment to a principal whose agent's fidelity is suborned by acceptance of a "secret commission" from a third party doing business with that principal. It is difficult to avoid the conclusion that a need for the prosecution to prove an intent to cause such detriment is an unwarranted imposition on the reach of the Secret Commissions Act.

Liability for "gratuities"?

A possible justification for this additional mental ingredient is the prospect that, without it, ss 3 and 4 of the Secret Commissions Act might be invoked in the wide range of situations where employees or other agents receive various forms of gratuity from suppliers of goods or services to the principal. The operative term "consideration" is so defined as to clearly embrace non-cash inducements. Examples abound in many industries and, for that matter, professions. These can range from modest gifts at Christmas to feting customer or client representatives at luxury resorts. It would be fatuous to suggest that such largesse is not aimed at maintaining and embellishing the business relationship. Equally, it would be surprising to hear it suggested that such practices inevitably constitute offences under ss 3 and 4 of the Secret Commissions Act.

However, the risk of ss 3 and 4 casting a net over what should otherwise be considered unobjectionable practices was the specific reason for the requirement, in s 12 of the Act, that the Attorney-General's consent be obtained for a prosecution. In moving the Bill's second reading, the then Attorney-General, Dr Findlay, noted (at 153 NZPD 453) that the House had been furnished with "illustrations of how impossible it is to draft an effective clause which will not hit some case that does not deserve to be punished". The solution was "to throw on the shoulders of some officer – here the Attorney-General – the duty of seeing that the case ... is one which deserves to be punished".

OTHER COUNTRIES

Canada

In delivering judgment in *McDonald*, Williamson J did not consider the then recently reported decision of the Supreme Court of Canada in *Kelly v The Queen* [1992] 2 SCR 170, on precisely the same issue and in respect of a penal provision sharing common origins with ss 3 and 4 of the Secret Commissions Act. There the appellant, an investment adviser, had been convicted in respect of commissions received from the promoter of certain investment products on the sale of such products by the appellant's company to its clients. The thrust of the prosecution case had been that the offence lay in concealment from those clients, or at least non-disclosure, of the commission payments. The central ground of appeal was that the commissions, received over a period of several years, had been neither paid nor accepted "corruptly".

The Supreme Court held by a majority that the word "corruptly" adds to the *actus reus* of the crime in the Canadian Criminal Code: "corruptly" means "secretly or without the requisite disclosure". The attendant *mens rea* is

a requirement for the agent, in accepting the commission, to be aware that its payment and receipt is unknown to his principal.

In a robust dissent, Sopinka J would not accept that non-disclosure is the meaning of "corruptly" in the wording of the crime. What this term connoted was *mala fides*, which will most easily be satisfied through proof of dishonesty. Whilst non-disclosure of the commission might be a "strong indicator" of such dishonesty, equally it may amount to no more than a breach of a duty owed by an agent to the

principal in a commercial relationship. It should not however, in Sopinka J's view, inevitably elevate non-disclosure of the commission to a criminal offence.

It is unfortunate that, in respect of similarly worded offences sharing a common origin, Courts in New Zealand and Canada should have arrived at such different views on the meaning to be given to the word "corruptly" in relation to payments made to agents to influence them in respect of the affairs of their principals. And, with respect, the views of neither the majority nor the dissent in *Kelly* are any more satisfying

than that of Williamson J in *McDonald*. As to the majority view it can plausibly be asked why, if non-disclosure of the payment was intended to be an essential ingredient of the offence, this was not expressly stated in the statutory wording? Similarly, if the legislative intent had been that "corruptly" means "dishonestly", it would have been a simple (and obvious) thing to expressly say so.

England and Australia

To compound the problem, neither the New Zealand nor the Canadian view appears to accord with the position which has been taken in England and Australia.

In England, which has what might be termed the "parent" statute in the Prevention of Corruption Act 1906 (expanded by the Act of 1916), the current judicial view appears to remain that expressed by the Court of Appeal in *R v Wellburn* (1979) 69 Cr App R 254. In *McDonald*, Williamson J briefly noted but rejected this case in the New Zealand context.

In *Wellburn*, the Court of Appeal expressly disapproved earlier English cases which had equated "corruptly" with "dishonestly". Rather, its meaning was as stated in *Cooper v Slade* (1857) 6 H L Cas 746, namely, deliberately doing an act which the law prohibits as "tending to corrupt". It was specifically with reference to this dictum that Sir Francis Adams thought that "corruptly" added nothing to the Crimes Act offences and was at most a "mere designation" of the prohibited conduct. In *McDonald*, Williamson J considered the *Wellburn* definition "unhelpful" as begging the question of what is meant by "corrupt".

R v Dillon [1982] VR 434 is an Australian case noted briefly in *McDonald*. This was a *voir dire* judgment on how the jury would be directed as to the meaning of "corruptly" in the Victorian Crimes Act equivalent of ss 3 and 4 of the Secret Commissions Act, the origins of which likewise are to be found in the English statute. Brooking J held that a payment to an agent would be made "corruptly" if paid with the *intent* that it should result in the prohibited conduct, namely, causing the agent to show favour to the payer in respect of the principal's affairs. The agent would receive the

payment "corruptly" if it was proved that in accepting the payment he *believed* the payer to have that intent, irrespective of whether the agent intended to act in the way expected.

Brooking J plainly saw his formulation as being consistent with the *Wellburn* approach, without formally adopting that approach. It is also apparent that Brooking J was alive to the prospect that his formulation would impose liability in cases where the agent's defence is that acceptance of the bribe was motivated by a desire to "entrap" the payer (as, for example, in *R v Smith* [1960] 1 All ER 256 (CA)).

What makes bribery "corrupt"?

If the question is asked, "what makes bribery corrupt?", the lay response might well be that bribery is inherently "corrupt" and that, as considered by Sir Francis Adams, the addition of the word "corruptly" adds nothing to either the Crimes Act or the Secret Commissions Act offences. But as a matter of law the next question which must be asked is, what is "bribery"? At least in the context of the Secret Commissions Act, that can be answered by saying that bribery is the conduct prohibited by ss 3 and 4 of the Act.

The attraction of this approach is that it avoids what is considered to be the unwarranted ingredient introduced by the *McDonald* formulation, namely, the need for the Crown to prove that the payer and the agent intended that the payment should cause the agent to act to the detriment of the principal's business. This requirement has not been identified in the other countries having similar legislation and *McDonald* should not, with respect, be followed in New Zealand.

What then of those other approaches? There is a certain attraction in the proposition that the essence of criminality in relation to bribes lies in concealment of the payment from the principal. Our statute is after all titled the Secret Commissions Act. It is thus problematic that concealment is not spelt out as an ingredient of the primary offences under ss 3 and 4. And it must be doubtful whether the Courts in New Zealand have the constitutional mandate to undertake the legislative process employed by the Canadian Supreme Court in *Kelly*. There the majority not only ruled that "corruptly" means non-disclosure by the agent but went on to prescribe rules as to the nature of the requisite disclosure and the requisite timing if criminal liability is to be avoided.

As recognised by the dissent in *Kelly*, there are difficulties with the proposition that it is the fact of concealment which renders criminal what might, from a civil law perspective, be legitimate behaviour. In all probability, the conduct found to be criminal in *Kelly* is, or in the past has been, commonplace in New Zealand in relation to the marketing of investment and insurance products. Notably, the recently operative Investment Advisers (Disclosure) Act 1996 compels disclosure by such "agents" of remuneration to be taken from client payments but requires disclosure of third party remuneration only on request by the client.

Additionally, a requirement that a payment will be made or received "corruptly" only where there is concealment from the principal raises the question of who is to be treated as the principal for this purpose. Where receipt, or the offer,

of a bribe is disclosed by an employee of a listed company to its chief executive who is himself "on the take" and who for that reason acquiesces in the practice, will there have been disclosure to the "principal"? Is it feasible to legislate a rule which would require disclosure to the board of directors or even the shareholders in such a situation?

If the word "corruptly" does constitute an ingredient of the offences in ss 3 and 4 of the Secret Commissions Act, it is difficult to go beyond the formulation of that ingredient in the Australian case of *Dillon*. Thus, a payment will be

made corruptly when the payer intends that it should operate as an inducement or reward to the agent to act in a certain way in relation to the principal's business. It will be received corruptly when the agent believes the payer to have that intent. Concealment from (or non-disclosure to) the principal will usually be a feature of the conduct but should not be an ingredient which the Crown must prove. The prospect that the sections might reach what is considered to be the acceptable offering and receipt of "gratuities" should be, as was intended, addressed by the need for the Attorney-General's consent to a prosecution. And finally, the criminal law would be (tolerably) clear that the way for well-intentioned recipients of offers

of bribes to bring the offender to book is not to entrap by accepting payment (since a defence of "innocent" receipt would fail) but to report the overture to the police.

It might be asserted that in reality the *Dillon* formulation leaves no role for "corruptly" at all since, as noted earlier, the need to establish such mens rea is implicit in the requirement in ss 3 and 4 that both payment and receipt must operate as "an inducement or reward". But such criticism would go more to the existing statutory language than to what should be the substantive basis for criminality in respect of bribes in the domestic marketplace. In truth, and reflecting its antiquity, the Secret Commissions Act 1910 is cumbersome in its drafting and would benefit from the improvements in statutory drafting over the ensuing years. At the very least, there should be legislative annulment of the meaning given to "corruptly" in *McDonald*.

Footnote

This commentary leaves for later consideration two further issues in relation to bribery in commerce. First, the question of domestic criminal liability for bribery in other countries. New Zealand's participation in a recent OECD agreement on the subject requires the enactment in this country of legislation imposing sanctions against foreign corrupt practices by New Zealand citizens. The writer intends to comment on the draft legislation in a subsequent issue of the *New Zealand Law Journal*.

Secondly, the implications of the Privy Council decision in *Attorney-General for Hong Kong v Reid* [1994] 1 NZLR 1, which overturned long-standing authority to the contrary in holding that bribes become the property of the principal upon receipt by the agent. On the face of it, *Reid* paves the way for theft charges to now be brought against agents who fail to account to their principals for the bribe. But in turn such prospect challenges the underlying integrity of our criminal law in relation to theft. □

The prospect that the sections might reach what is considered to be the acceptable offering and receipt of "gratuities" should be, as was intended, addressed by the need for the Attorney-General's consent to a prosecution

PRIVATE PROSECUTIONS: ACCESS TO JUSTICE

Bill Hodge, The University of Auckland

examines the legal background to a recent controversy

INTRODUCTION

"The ability of private entities and individuals to commence a prosecution is a safeguard against the misuse of public power." So say the Law Commissioners in their excellent discussion paper, *Criminal Prosecution* (1997) at p 136. One might add that private prosecutions are also a safeguard against the non-use as well as misuse, of public power.

Scenario no 1

Ex-constable runs down young man near housing estate in North of England. Victim suffers irreversible brain damage. Driver admits impact, but claims inevitable accident. Local constabulary refuse to prosecute, saying, with some justification, that there is insufficient evidence to prove intent. On advice of local solicitor, mother of victim travels to London, to see famous barrister, one of Her Majesty's Counsel. Famous barrister advises that prosecution is difficult, more evidence is necessary. More evidence comes to hand, famous barrister travels to North of England and successfully privately prosecutes ex-constable, gains conviction for attempted murder.

Scenario no 2

Fifty-one people drown in the Thames River when the captain of an overloaded party boat fails to keep a proper lookout, and a much larger commercial barge runs it down. The police charge the captain with a minor offence under a shipping statute. Surviving spouse brings private prosecutions for manslaughter against several defendants, including the owners. The prosecution is allowed to proceed.

The first scenario was presented on the nation's TV screens, on Saturday night, 30 August 1997, as "Best of British: Kavanagh QC", a typically polished British courtroom drama – a complete fiction, but life imitates art, and vice versa.

The second scenario is *R v Bow Street Stipendiary Magistrate and Glogg, exp South Coast Shipping Co Ltd*, noted at [1993] Crim LR 221, not only a therapeutic day in Court for the next of kin, but also a catharsis for the nation, in lieu of a public inquiry.

However odd it may appear to us today, the "office" of private prosecutor is the historic fabric and driving instigator of criminal law; indeed, the English and the Americans managed a sophisticated criminal procedure without the aid of routine public prosecution until quite recently. The survival of the private prosecutor in New Zealand, expressed in both Part II (Summary) and Part V (Indictable) of the Summary Proceedings Act 1957, is not an esoteric fossil, but

a manifestation of the mainstream of historic process, and an exciting window of opportunity for non-professionals to access the increasingly closed shop of justice.

This short article will note the prosecutor's role in legal history and consider current policy issues, particularly as raised by the Law Commission's *Criminal Prosecution*. It will be concluded that justice and the professional personnel who operate the machinery are increasingly opaque to the public gaze – and anything that enables popular participation, active involvement, or a sense of ownership in justice is a good thing. As an English barrister wrote:

Historically all prosecutions were private and the traditional theory has been that the prosecuting police officer is simply a citizen in uniform. The right of private prosecution is a fundamental constitutional right. Monopoly power in the state is bad. The right represents an ultimate safeguard for the citizen against inaction, inertia, capriciousness, incompetence, bias, or corruption on the part of the public prosecution authorities. (Samuels, "Non-Crown Prosecutions: Prosecutions by Non-Police Agencies and by Private Individuals", [1986] Crim LR 33.

HISTORICAL NOTE

The rise of the professional prosecutor would seem to be associated with a law of evidence, a law for which the medieval jury had no need. The early jury was self-informed, or self-informing, and active. They "came to Court more to speak than to listen". Langbein, "The Origins of Public Prosecution at Common Law", (1973) 17 Am J Leg His. 313,314. Whether by cause, or by effect, the decline of that participant jury and its replacement by a static, passive, and ignorant jury panel was paralleled by the development of the rules of calling evidence, proof of fact, and a priest-like class of experts who were masters of those mysteries. There is no space here to review in depth this process of professional capture, but a few historical references may suffice. By the nineteenth century, the prosecutor's role was necessarily characterised by expertise and experience – no longer a job for an amateur. The trial itself had ceased to be "a running altercation between accused and accusers". (Langbein, *op cit*, p 317) But still, according to Holdsworth, the prospect of public prosecutors was rejected in the 1850s because:

... concentrating the work of prosecuting counsel in a few hands might impair the independence of the Bar and deprive the junior members of the profession of a school for commencing the practice of their profession.

(Holdsworth, *A History of English Law*, Vol XV, pp 160-61.)

Holdsworth also refers to Stephen, who had this to say (*History of the Criminal Law*, 1883):

In England and so far as I know, in England and some English colonies alone, the prosecution of offences is left entirely to private persons or to public officers who act in their capacity of private persons and who have hardly any legal powers – those which belong to private persons Every private person has exactly the same right to institute any criminal prosecution as the Attorney-General. Vol 1, p 493.

In the United States, a similar process evolved rapidly in the 19th century; according to Professor Friedman –

In the beginning, there were no actors in the system who spent their working lives in criminal justice. There were no police, professional prosecutors, public defenders. ... there were also few full-time criminals. *Crime and Punishment in American History* (1993) p 67.

More relevantly, Friedman speaks of a systemic professionalisation:

As we have noted, one of the great master-trends in the history of criminal justice is the shift from private to public, and from lay to professional. *op cit*, p 174.

More recently, in England, private prosecution continues to play a significant legal role. In *Lund v Thompson* [1958] 3 All ER 356 Diplock J, as he was then, interpreted the Road Traffic Act 1930 as embracing perforce a private prosecution for driving without due care. In that case, a letter from the police advising the defendant that prosecution would not be pursued could not bar anyone else from prosecuting: the police officer “is exercising the right of any member of the public to lay an information and to prosecute an offence”.

In *R v Commissioner of Police, exp Blackburn* [1968] 2 QB 118, [1968] 1 All ER 763, both Salmon and Edmund Davies LJ referred to the argument advanced by the Commissioner that the applicant Blackburn “was free to start private prosecutions of his own and fight the gambling empires, possibly up to House of Lords, single handed” (145, 774). (Neither Judge found such a course, while undoubtedly lawful, to be “convenient, beneficial or appropriate” – the police were held to have a duty to the public to prosecute the gaming laws.)

Perhaps the best known endorsement was that of Lord Diplock in *Gouriet*, where he asserted that private prosecutions were “a useful constitutional safeguard against capricious, corrupt, or biased failure or refusal of those authorities to prosecute offenders against the criminal law”. *Gouriet v UPW* [1978] AC 435, 498, [1977] 3 All ER 70, 97. (Perhaps Lord Diplock recalled the Road Traffic matter in *Lund v Thompson*, supra, he had decided exactly 20 years previously.)

In New Zealand, it will suffice to refer to s 13 of the Summary Proceedings Act 1957: “Except where it is expressly otherwise provided by any Act, *any person may lay an information for an offence*”. [Emphasis added.] In Part V of the same Act, establishing the preliminary hearing of indictable offences, s 13 is made applicable to the committal process. (See also the statutory predecessors, such as the

Justices of the Peace Act 1927, s 49, where the prescribed form in the First Schedule assumes, helpfully, that the suspect [A.B.] to be a labourer and the informant [C.D.] to be a merchant.)

POLICY AND PRINCIPLES

Happily the Law Commissioners recognise the historic significance and constitutional importance of the citizen's right to prosecute: *Criminal Prosecution*, p 138. I would go further. In my submission, private prosecution is not simply an

historic default position on the procedural desktop, nor only the theoretical high ground of constitutional theory. It is in fact a pragmatic window of opportunity for the public to participate in a fundamental state service. The alternative is for citizens with a grievance – that is, the victims of crime – to institute self-help measures and “to take the law into their own hands” in extra-curricular fashion.

The halls of justice in the New Zealand-British model, are walled in by increasingly opaque professionalism, with only a narrow window of public participation. Let us compare the American model, with its elements of

crude Jeffersonian democracy, and the traditional British model, as practised in New Zealand.

In the United States, professional capture of the prosecutorial function has been completed; only the District Attorney, or the equivalent state official, may seek a true bill of indictment from the grand jury. On the other hand, popular involvement is intense, since those attorneys, at county and state level, are elected to office, and election campaigns are frequently fought along law and order lines, with the incumbent standing on a record of successful convictions. Judges too, in forty of the fifty state systems, are exposed to the ballot box – and they may well engage in active fundraising, and TV advertising campaigns, with a focus on sentencing regimes and capital punishment. (See, for example, the symposium issue of the 1988 Southern California Law Review, Volume 61 at pp 1555 – 1969, for varying views on the California judicial elections of 1986.) For all its flaws, the result is popular oversight of the Courts, a democratic wind blowing through the corridors of justice, and a popular appreciation that justice is not a closed shop. At the federal level, of course, there are no judicial elections, but the Senate must advise and consent to all presidential appointments to federal Courts; in the case of Supreme Court nominees, the hearings of the Senate Judiciary Committee are both public and potentially lacerating. (See the discussion of “Borking” in Hodge, “Lions under the Throne” in *Courts and Policy* (Grey and McClintock eds, Brooker's 1995) at p 112.) The result is enhanced public awareness of the Court, its membership and their identities, if not their jurisprudence.

In New Zealand, on the other hand, judicial appointments are cards held tight to the executive chest. According to a former Minister of Justice and Attorney-General those invariably consulted included the Solicitor-General, the President of the Law Society, the Chief Justice and the Chief District Court Judge, but rarely anyone outside that coterie. (See Palmer, “Judicial Selection and Accountability” in *Courts and Policy*, supra, p 11, at 43-47.)

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Surprisingly, even with the advent of MMP the New Zealand Parliament has raised no standing Judicial Appointments Committee, so the process remains a paradigm of secrecy, mystery, and opacity. And recent events have reminded us that neither the public nor their elected representatives, as Parliamentarians, play any role in the possible removal of District Court Judges.

Of special relevance to criminal prosecutions is the office of Crown Solicitor, appointed by the Solicitor-General by processes even more secret and totally opaque to the interested public. I hasten to add, however, that I am not here arguing for elections to the Bench, or law and order campaigns for gang-busting Crown Solicitors.

The traditional British system, while it might be well served by some daylight, has consistently delivered office-holders of the highest standard in New Zealand. It must be agreed, however, that opportunities for public involvement, or even informed speculation in the selection and appointment of Crown Solicitors, the Solicitor-General, and Judges is nil.

VICTIMOLOGY

Particular features of the legal system, peculiar to New Zealand, suggest that victims of crime have especial claims to the prosecution machinery in this jurisdiction. Persons suffering personal injury have had no access to the civil Courts since 1974, when ACC first gripped our legal system. Families suffering the death of a loved one have neither a wrongful death claim, nor an action for punitive damages (*In re Chase* [1989] 1 NZLR 325). (Coroners' inquests can assume some of the therapeutic need for a day in Court, and such procedures have been forced to carry much weight since the bar on wrongful death by accident actions, but such an inquest is no substitute for a trial and condign punishment.)

Merchants, home owners, employees, insurance companies and property owners, subject to shoplifting, burglary, pilferage, fraudulent claims, and theft generally may find that property crimes – unless they reach Serious Fraud Office criteria – are downgraded and de-prioritised to near extinction.

There are many cases where the appearance of justice requires that the pathways of justice not be monopolised by state agencies:

- A bus driver takes his open two decker high profile London bus through a low profile motorway underpass with fatal results for an upper deck passenger;
- Constables untrained in mental health matters accidentally suffocate a disturbed young man en route to hospital;
- A hospital employee negligently fails to drain poisonous cleaning liquid from fluid exchange dialysis equipment;
- A householder shoots and kills a fleeing burglar.

In my own experience, having walked through avenues of legal redress with members of a grieving family in several such situations, I can say (anecdotal) that the opportunity of private prosecution, and the availability in theory of that opportunity, itself enabled a therapeutic consideration of the issues. Had that window been shut, then bitterness and frustration would have intensified, and emotional closure not been possible.

While insurance companies and merchants may have less conspicuous emotional needs, they do have a "right to justice", at least by implication in s 27 of the Bill of Rights, as a legal person under s 29 of the NZBORA. And we should

not forget that justice, a day in Court, peace-keeping in the broad sense, and protection from internal enemies are fundamental obligations of the sovereign. As Cooke, McMullin, and Ongley JJ said in *NZ Drivers' Association v NZ Road Carriers* [1982] 1 NZLR 374, 390:

[W]e have reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of Law for the determination of their rights.

CONTROL MECHANISMS

It is, of course, appropriate to have statutory brakes at hand for runaway prosecutions. In the United Kingdom, such controls were imposed in the Vexatious Indictments Act 1859 and the Vexatious Actions Act 1896. (See, today, the Administration of Justice (Misc Provisions) Act 1933, s 2(7), and the Supreme Court Act 1981 s 42(1).) In New Zealand, vexatious civil litigants are subject to the harness of s 88A of the Judicature Act 1908, while several "stays" are available on the criminal side. Summary proceedings are subject to s 77A of the Summary Proceedings Act, and committals can be stayed in s 173 of the same Act. Where the indictment was not timeously stayed, a second opportunity is created in the Crimes Act, s 378. These powers vest in the Attorney-General and the Solicitor-General. See one of the more recent, politically necessary stays, in *Amery v Solicitor-General* [1987] 2 NZLR 292 (Amery's attempted prosecution of convicted French agents Marfant and Prieur, presumably aimed at forestalling their bargained departure from New Zealand). In *Tindal v Muldoon*, noted at [1984] NZ Recent Law 197, the Solicitor-General stayed a private prosecution brought against the Prime Minister, the Attorney-General, and a Superintendent of Police. See also the discussion of the stay at Doyle and Hodge, *Criminal Procedure in NZ* (3rd ed, 1991) p 76. It is said there that "even the limited use of the stay provisions is a controversial and often political question". One might presume that the most legitimate use of a stay is to protect from private prosecution a criminal suspect who has given evidence against a co-offender, in exchange for immunity from prosecution.

In addition to such statutory machinery, the privately prosecuted defendant, if acquitted, may bring a tort action for malicious prosecution. See for example an insured's tort action against an insurance company, responsible for the prosecution of an allegedly fraudulent claim. The Court of Appeal, in *Commercial Union Assurance Co of NZ v Lamont* [1989] 3 NZLR 187 allowed the insurance company's appeal against a High Court judgment, in part, because of the policy of encouraging members of the community (including insurance companies) to assist in "investigating and prosecuting apparent breaches of the criminal law".

It must be admitted that the plaintiff who sues for malicious prosecution has, prima facie, an uphill task. That is as it should be. The law would be in a parlous state if acquitted persons [those who "get off"] and those convicted persons who succeed on appeal enjoyed a garden path to compensation.

A third deterrent is the Costs in Criminal Cases Act 1967, which applies against both Crown (s 7(1)(a)) and private (s 7(1)(b)) prosecutors. Section 5 of that Act contains some useful guidelines, including good faith, sufficient evidence to convict, appropriate consideration of exculpatory evidence, and a reasonable and proper investigation. It might also be noted here that private prosecutors will not receive public subsidy, in the form of legal aid; s 5 of the Legal

Services Act 1991 refers to "any natural person charged with or convicted of any offence". The financial consequences and obligations of the private prosecutor amount to a major restraint on irresponsible or vexatious litigation.

A fourth inherent restraint on private prosecution may be the exclusive language of the enabling statute; the Health and Safety in Employment Act 1992 is an especially attractive option for injured workers and their unions (with increased awareness of financial opportunities in s 28 of the Criminal Justice Act 1985) but s 54 of HASEA limits the prosecutorial role to the OSH Inspectorate. On the other hand, in a related area, the Inspectorate of Awards is now obsolete and any party to a contract of employment may pursue a penalty (up to \$5000) against a breaching party to that contract: Employment Contracts Act 1991, s 52. Other statutes allow private prosecution, but only with the Attorney-General's consent: see, for example, the necessary protection for undercover police officers in the Misuse of Drugs Act 1975, s 34A. See also the useful Appendix F in the Law Commission's *Report on Criminal Prosecution*.

It is submitted that the existing institutional, statutory, and financial restraints on private prosecutions are effective; there is no evidence of abuse, and further controls at this time are both constitutionally dangerous and functionally unnecessary.

SOME MACHINERY PROVISIONS

It seems reasonably clear that private prosecutors will not be able to piggyback on constabular powers, such as those of the Crimes Act, s 315(2) (arrest) and the Summary Proceedings Act, s 198 (search warrant); Parliament has deliberately bestowed those powers expressly and uniquely on constables. On the other hand, judicial processes available in civil litigation – such as the order first described by Lord Denning in the *Anton Piller* case, [1976] Ch 55 – may be available.

Where the police have taken statements, photographs or other evidence, such files would not ordinarily be available to parties who wished to consider or prepare a private prosecution: *R v DPP, ex p Hallas* [1988] Crim LR 316.

But the answer would be different if the prosecution had been commenced, and a police inspector had possession or control of relevant, admissible "statements and exhibits": *R v Gregory Pawsey* [1990] Crim LR 152, distinguishing *Hallas*.

It might be premature to go further down this procedural road, but further questions will clearly arise as to the applicability of the NZ Bill of Rights Act 1990, and the Solicitor-General's Prosecution Guidelines (most recently dated 9 March 1992, and usefully reprinted as Appendix B in the *Report on Criminal Prosecution*). Some preliminary answers must focus on s 3(a) of the NZBORA, which limits the application of the Bill of Rights to acts of the Government of New Zealand, and 3 (b) which makes the Bill of Rights applicable to "public functions". In any event, most violations of the criminal procedure sections will amount to some unwarranted and thus unjustified trespass, and remediable at common law. Similarly, infringements on "the public interest" pursuant to the Solicitor-General's Guidelines can be answered, if in no other way, by a stay.

RECENT DEVELOPMENTS

In England, the police in *Blackburn's* case were unwilling to prosecute gambling cases; they even suggested that their deliberate refusal was excused by Blackburn's constitutional right to prosecute privately. In New Zealand, there is no

constabular unwillingness to prosecute, but the police say – at least those on the front lines and those speaking for the union have said – that some property crimes, insurance fraud, theft by employees, and minor white collar crime have been de-prioritised down to and off the end of the back of the prosecution queue. At some point, the quantum of de-prioritisation must reach the quality of unconstitutional refusal, as condemned by Lord Diplock in *Gouriet*.

Now if a firm of private prosecutors can investigate, brief witnesses, gather video or other surveillance evidence, and build up a file which sustains prima facie guilt, there can be nothing unworthy about that activity. The question then becomes, How does that file get to and through the Court? Do the private prosecutors continue to carry the ball or do they return to "normal" channels, such as the firms of Crown Solicitors?

Unfortunately, the Solicitor-General, or his deputy, stepped athwart these channels in July 1997 by instructing their solicitors, at least those at Meredith Connell & Co, Luke Cunningham & Clere, and Raymond Donnelly & Co, not to accept instructions from private prosecutors, in the name of "conflict of interest".

In my respectful opinion, the learned Solicitor-General has, at best, confused the true nature of conflict of interest, or, at worst, simply camouflaged an underlying, resource-based refusal to prosecute. Any law firm, including those taking instructions from the Crown, must constantly deal with potential conflicts of interest. A firm dealing in family law, for example, might find that two partners had inadvertently been retained by opposing parties in a domestic dispute. A true conflict of interest is constituted by the simultaneous opposing interest of two masters, or the opposition of self-interest and one master; private prosecutions and police prosecutions are parallel tracks, or two coaches on the same track. The common goal is justice, and the prosecution of those who transgress the law. As has been said, justice is not like a hospital bed or kidney dialysis unit, a user-specific commodity in limited supply. It is an aspiration which we should approach maximally. Perhaps the fundamental flaw here, whether in the Solicitor-General's office, or in the Law Commission, is the failure to appreciate the historic high ground and inherent rights of access to justice. Whether private prosecutors instruct Crown Solicitors, or retain barristers off the rank, their pursuit of justice should not be trammelled, albeit their energies may embarrass the institutional persona of the Police or Government funders. There may indeed be some financial incentive for those involved with private prosecutors; in my view, that is a complete red herring. It is a fact that those involved with criminal prosecutions, be they Crown Solicitors, defence counsel, or Judges, have always been financially compensated for their work in the service of justice.

CONCLUSIONS

It has been suggested here that the private prosecution is not a medieval anachronism but is rather a useful weapon for the pursuit of justice. Justice must not only be seen to be done, it must be done, and if by no one else, then by the victims themselves. Private prosecutions have the constitutional high ground, therapeutic value for the victims, and genuine practical significance. Access to justice is a good thing, and the few participatory windows of access should be opened wider, not closed down. Just as war is too important to be left to the generals, so justice is too important to be monopolised by the Crown. □

TECHNOLOGICAL CROSS DRESSING AND COPYRIGHT

Louise Longdin, University of Auckland

finds copyright protection for computer software confusing and inconsistent

In 1993 New Zealand along with other GATT members became a party to the *Agreement on Trade-Related Aspects of Intellectual Property Rights including Trading Counterfeit Goods* ("TRIPS"). Among its objectives were the removal of impediments to international trade caused by different treatment (or non-treatment) of computer programs and electronic databases under national laws. TRIPS signatories took on obligations to implement minimum standards for protecting these valuable forms of investment. The common thread linking such largely utilitarian products is that while they usually involve a long costly process of research, development and marketing they are relatively easy and cheap to copy, reverse engineer or adapt. In seeking to comply with TRIPS, however, New Zealand has introduced new uncertainties to its statute book while failing to remove some old ones. Much of the difficulty is traceable to the legislature's attempt to future proof the Copyright Act 1994 by introducing a voraciously expansive definition of "compilation" while at the same time maintaining strict silence as to the meaning of "computer program". In the result, the term "compilation" may now protect not only databases but also the computer programs which drive them. The same drafting technique extends protection to "computer programs" compiled by "object-oriented" technology, suites of computer programs and even various non-literal elements which facilitate communication between programs and their users at the visual, audio and tactile level. Works construed as electronic "compilations" are absorbed into the traditional copyright regime for "literary works" which, while in many respects more generous than that especially tailored for "computer programs", provides far harsher treatment in matters of infringement. None of these outcomes appears to be the result of a conscious policy choice. Nor is the problem static. If the 1994 statute put New Zealand at odds with other jurisdictions, the gap now threatens to widen as our trading partners are addressing these issues directly. (Witness the European approach as laid down in the *Council Directive on the Legal Protection of Databases* No 96/9/EC implemented by the United Kingdom in its Copyright and Rights in Databases Regulations 1997.)

TRIPS AND THE 1994 ACT

Under TRIPS (Part II, s 1 Art 10(1)) New Zealand is obliged to treat computer programs as literary works whether or not they are in source or object code form. It is left to signatories' discretion to address the vexed issue of whether this protection should extend to the so-called "non-literal elements" surrounding the use of computer programs, that is to say to screen displays, interface specifications and command hierarchies. New Zealand has chosen not to fill this diplomatic

silence with any express legislative provision. On the subject of compilations, however, we have been positively garrulous. Nothing in TRIPS requires electronic, or indeed any other, compilations to be protected as "literary works". Art 10(2) simply states that: "Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations are protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself". This makes it clear that digital data is most emphatically not to be protected for its own sake.

The TRIPS induced reforms produce several surprising (and probably unintended) outcomes. Partly attributable to lack of foresight, they are also the result of a conviction on the part of the statute's framers that terms of art are best avoided in intellectual property statutes because they carry a high risk of unravelling when confronted by some unforeseen technological breakthrough. However commendable this aim in general terms, the framers have pursued it too doggedly perhaps. There is no doubt that the Copyright Act 1994 meets the minimum TRIPS objective of ensuring that computer programs and electronic (or indeed any other) compilations of data or other material no longer have their basic credentials challenged for membership of the copyright club. That both are now admitted through the same literary works front door is plain from the definition of a "literary work" in s 2. The term is stated to mean:

Any work, other than a dramatic or musical work, that is written spoken or sung:

but which is then extended to include:

- (a) a table or compilation; and
- (b) a computer program.

While this might seem a straightforward enough way of complying with the TRIPS requirements, close analysis reveals that the various parts of the definition do not mesh. Bringing them together is bound to produce tensions even in the best drafted statutes. Even though the statute studiously avoids any definition of computer program and leaves Judges to confront unaided a concept capable of being stretched to cover anything from the simple electronic controls of an exercise bike to IBM's champion chess player Deep Blue, its framers must have been uneasily aware that even the most tolerant judicial elastic would snap if the term "computer program" were sought to be extended to cover the electronic databases which TRIPS now obliged them to protect. Given their concern to avoid creating a new special copyright category for developing multimedia technologies (and in which they felt fortified by a similar response in those

overseas jurisdictions which had considered the matter, Department of Justice, *Comments on Submissions on the Copyright Bill*, 3 November 1994, 2), the framers of the Act hoped instead to kill both the database and multimedia birds using the same hitherto undefined compilation stone. To that end they introduced into s 2 of the Act a multi-layered and open textured definition of the latter:

"Compilation" includes:

- (a) A compilation consisting wholly of works or parts of works; and
- (b) A compilation consisting partly of works or parts of works; and
- (c) A compilation of data other than works or parts of works.

The overly neat symmetry and seeming simplicity of this legislative *haiku* mask very real complexities whose consequences were left unexplored in the general haste surrounding the passage of the legislation. Most notably:

- The categories created are cumulative heads of protection not disjunctive alternatives.
- A compilation under one category may be a work for the purposes of another, thus opening up the legislative possibility of a compilation of compilations.
- The "works" to which the definition refers include but are not confined to literary works.

While the compilation definition is certainly wide enough to embrace not only the traditional hard copy categories of collections, anthologies, casebooks and the like but also their digitalised counterparts as mandated by TRIPS, it does so by sliding over the distinction between the program which drives the database or multimedia work and the content of the new composite product. This is easy enough to do in the digital stream of ones and zeros to which both the program's own set of instructions and all the information it manipulates (text, sounds, music, film, graphics, photographs, often including material subject to copyright in its own right) are reduced. The result is no less unfortunate for all that. It allows a variety of technological hangers on to gain entry into the literary works sanctum via the "compilation" annexe including some who would not be at all acceptable if they were to simply front up clad in their non-digitalised attire. It also allows entry by that means to other works more accustomed (and still entitled) to entrance through the "computer program" goods entrance. These various entrants are investigated below along with the copyright implications of their entry.

TECHNOLOGICAL CROSS DRESSING

It is a general principle of New Zealand copyright law (and that of most jurisdictions) that the categories of protected subject matter are not exclusive except in those rare instances where the statute expressly so provides. Putative copyright holders are seldom put to their election and may validly seek protection under any head or heads fitting the facts of their case. The same logic applies to sub-sets of protected subject matter. In a digital world this opens up opportunities for multiple (and in some cases excessive protection). Some examples of technological cross dressing:

Non-literal elements

The phrase "look and feel" has been used in a great many United States copyright cases since the mid 1980s to describe both the behaviour of programs and their non-literal elements. This expressive, if somewhat vague, terminology is

used to embrace all those distinctive aspects of the technology which users tend to associate with running a particular computer program because they can discern and interact with them. In a strict technical sense they are external to the program, a separation with which many copyright regimes find it difficult to deal. Nor is the language of look and feel itself particularly apt for legislative purposes. Strictly speaking, the "look" of a program includes the screen display and visible elements of the user interface and the program's outputs while the program's "feel" relates to less concrete or visible features responsible for its general structure, sequence and organisation, or the dynamics of its operational style or program flow, as generally recognised by users. The "feel" of a program may include its mouse, joystick, track ball, light pen or pressure point, function keypad, the menu command structure, file formats, and data structures. Since screen displays may well involve artwork as well as sound and animation features, the so-called "look" elements and the so-called "feel" elements often overlap in reality into a seamless hendiadys rather like "rock and roll". Again screen displays themselves are not convincingly described as "computer programs" involving as they do output rather than input. Their road to copyright protection lies via the statutory definition in s 2 of a "film" as: "[A] recording on any medium from which a moving image may by any means be produced". That this might be the case was suggested by way of obiter by Ferris J in *John Richardson Computers Ltd v Flanders* [1993] FSR 497, 499. He also posited that screen displays could qualify as "artistic works" in so far as they were photographs or reproductions of drawings. Again some audible aspects of program interfaces might be protectable as "sound recordings".

The ability of computer programs and various elements associated with them to cross dress themselves as "compilations" effectively preempts the policy debate as to whether and to what extent non-literal elements should be protected in the first place. It is one thing to say that these elements where manifested in graphic user interfaces, command hierarchies and screen displays may enjoy copyright protection in their own right as "artistic works", "films", "sound recordings" or "photographs". It is quite another to aver that a combination of the program and some or all of these elements may be construed and protected as a literary work in the guise of a "compilation".

Digitised musical works

One of the more bizarre products of the compilation definition is that it allows musical and dramatic works through the "literary work" door although these particular entrants would find it impossible to gain admission in their own right (because they are expressly singled out for exclusion in the first part of the "literary work" definition). They can pass unchallenged over the threshold once magically (if temporarily) zapped by electronic sorcery into digital attire. Also susceptible to the shape changer's art are collections of recordings of musical performances on a compact disc and compilations comprised of photographs or films in digital form. (It is assumed here that the process of digitalisation produces an output which will meet the Act's fixation requirement for literary works as set out in s 15 of the Act.)

Databases and their programs

All electronic databases require computer programs to digest, organise and maintain their contents as well as to facilitate searches, manipulation and extraction of their

contents by users. It is here that the compilation definition most spectacularly chases its own tail. The third limb, it will be remembered, carefully locks out of its own internal ambit compilations of data where that data consists of works or parts of works. This excludes computer programs which drive electronic databases as works protectable in their own right and would, if it stood alone, prevent any cross dressing. The third limb does not stand alone, however, but must be read in conjunction with the other two. When this is done it becomes apparent that the first limb is capacious enough to accommodate both a third limb compilation (ie the database minus its program) and "any other work" (ie the driving and organising program of the database). This decidedly anomalous state of affairs stands in stark contrast to the United Kingdom legislation. The Designs and Patents Act 1988 as amended by the 1997 Regulations adopts the two pronged approach of:

- giving databases a discrete statutory identity of their own. They are exhaustively defined in s 3A both for copyright purposes and in furtherance of the new sui generis database right as:
 - A collection of independent works, data or other materials which –
 - (a) are arranged in a systematic or methodical way, and
 - (b) are individually accessible by electronic or other means.
- expressly excluding any overlap between this new copyright category and compilations.

Whatever the primary motivation for this change may have been (it appears to have been introduced largely to erect a cordon sanitaire between the higher civilian originality threshold of personal intellectual creativity introduced for copyrightable databases under the Database Directive and by TRIPS and the lower threshold which would continue to apply to other heads of copyright protection) it has the beneficial side effect of preventing cross dressing between these two categories and for that reason alone merits future consideration by New Zealand legislators.

Suites of "computer programs"

A suite of computer programs commonly takes the form of a set of stand alone application programs sold together as a software package comprising a spread sheet, word processing program, electronic mail system and graphics. As Jacob J mused in *Ibcos Computers Ltd v Barclays Mercantile Highland Finance Ltd* [1994] FSR 275, 290:

There is no reason why a compilation of computer programs should not itself acquire a separate copyright. Someone might, for instance, produce a selection of games on a disk. If there was enough originality in that selection it would surely be afforded copyright. The games might be wholly separated or they might have linking elements, eg common joystick control programs. In my view it is all a question of degree, just as in the case of any other compilation.

The first limb of the New Zealand compilation definition appears to have turned such judicial musings into legislated reality. Australian legislators have to date been more cautious. That country's copyright statute operates through two conceptually distinct sub-sets of "literary work": first, "a table or compilation" and secondly, "a computer program or compilation of computer programs" (Copyright Act 1968 (Cth) s 1), thus effectively excluding computer programs and compilations of these works from the first head because they

are earmarked by name for protection under the second. In New Zealand suites of computer programs are likely candidates for cross dressing, being statutorily invisible in their own right they are easily absorbed into the general opacity of the compilation definition's first limb.

Object-oriented technology

The second limb of "compilation" easily encompasses a computer program which has been put together from several programs or parts of programs via "object-oriented" technology. Nowadays, programs tend more and more to be designed by programmers or teams selecting, arranging and coordinating the operation of pre-existing, self-contained programs or portions of code called "objects", hence the technology has become known as "object-orientated" design. The constituent elements may or may not be protected discretely as "computer programs". Alternatively, "object-orientated" design may involve programmers or teams combining and integrating pre-existing programs or parts of programs by writing new original portions of code or interfaces. (See Wilkins, "Protecting Computer Programs as Compilations under *Computer Associates v Altai*" (1994) 104 Yale Law Journal 435, 444-449). Both these methods of program creation are capable of producing protectable "compilations" of computer programs in terms of the statute.

To claim that a particular computer program is a "compilation" of other programs or parts of programs, one need only show that, in creating the composite product, the programmer made a choice from a range of available programming techniques, data structures and problem solving algorithms in such a manner that the final selection of the constituent elements was not dictated either by function and efficiency concerns or by programming conventions. That done protection could not be denied. Once again this could not occur under the more principled Australian statute.

THE POLICY DOWNSIDE

The framers' aversion to creating new heads of protectable subject matter would be understandable if it were accompanied by equal resolution to ensure that, once accepted for copyright, protection all categories of works would as far as possible be governed by uniform rules in matters of ownership, infringement, exploitation and moral rights. There is little sign of this, however, in the legislation as enacted. Peppered throughout the Act are provisions intended to cater for the technological fluidity and relatively depersonalised authorship of computer programs. Those who hold copyright in electronic compilations may choose between protection under the idiosyncratic "computer program" umbrella or the traditional regime designed for hard copy works but now available to all literary works without distinction. No such choice is available to holders of copyright in computer programs created from scratch, however. This arbitrary state of affairs is not only conceptually untidy but allows users or copyright owners to seek to gain tactical leverage in litigation by having works admitted as either "compilations" or "computer programs" simpliciter. Such strategic behaviour has little to do with the social policy underlying the Act. It can only occur because the statute treats works tagged as "computer programs" differently from those tagged as "compilations".

First ownership

Electronic cross dressing has serious copyright implications in relation to first ownership of a commissioned "computer

program". The problem arises because of the uneven way in which the legislature has chosen to depart from the general principle that first ownership lies with the author. Under s 21(3) a person who commissions (and pays for or agrees to pay for) the creation of a "computer program" or "film" (this last may also cover a computerised video game) thereby acquires copyright in the work "made in pursuance of that commission", unless the parties agree to the contrary under s 21(4). None of this applies to compilations. This is likely to cause particular difficulty in the case of electronic databases and multimedia works. A Court which proceeds down the ordinary "computer program" road would uncouple the computer "engine" from its digitised data or multimedia "carriages" and allocate ownership between author and commissioner accordingly. One which took the "compilation" path, on the other hand, would seek to find an author for the composite "train" with whom ownership would remain. That person would not be the commissioner.

Back up copies

Section 80 provides for a back up defence which allows lawful users of "computer programs" to copy them in case they may be lost, destroyed or rendered unusable, unless they have been given explicit notice to the contrary by the copyright owners at the time of acquisition. Persons with a right to use a database or multimedia work driven by a computer program and who make a back up copy of the digital "compilation" against the advent of the same vicissitudes are given no such indulgence.

Moral rights

The right of paternity (the right to be identified as author) and integrity (the right to not have one's work subject to derogatory treatment) are denied to the authors of "computer programs" leaving them only with the various forms of the false attribution right protected under ss 101 and 102. Authors of "compilations" of programs or parts of programs, on the other hand, do not have their moral rights cut back in this way. The creators of electronic databases are also the beneficiaries of this legislative largesse.

Rental rights

In compliance with Art 11 in Part II of TRIPS, the framers of the 1994 Act introduced via the somewhat backhanded mechanism of the extended definition of public issue contained in ss 9(2) and (3) commercial rental rights for the owners of copyright in computer programs, sound recordings and films (remembering here that "films" may well cover computerised video games). No such rental rights are provided for literary works in general or compilations in particular. This leaves the owners of the copyright in end product databases and multimedia works to the uncertain mercies of the law of contract and the vagaries of encryption technology as bolstered by s 226 (which prohibits devices designed to circumvent copy-protection). Nothing in the statute prevents legitimate purchasers of such works from renting them on. True, the owners of constituent computer programs, sound recordings and films will be able to enforce rental rights to the extent that these have a separate copyright identity. Even this protection may be lost, however. In relation to computer programs the proviso to s 9(2) may preclude the assertion of rental rights where:

- (a) The program is incorporated into any other thing, and
- (b) The rental of the program is not the principal or one of the principal purposes of the rental, and

- (c) The program cannot be readily copied by the hirer.

No doubt the framers intended this proviso to deal with the situation where programs are included in the controls of whiteware and video players and so it does. It cannot be confined to such situations, however, unless "thing" in para (a) is read down so that it applies only to physical objects rather than choses in action and other intangibles. Absent such a restrictive interpretation (for which the statute gives no warrant) the proviso effectively excludes protection for programs which drive rented multimedia works and databases. (In such cases although useful to users they are unlikely to be held to be the chief motivation for the rental as far as hirers are concerned. Nor are they demonstrably easily reproducible by the hirers personally whatever more technically adept persons are capable of.)

What the statute makes (relatively) explicit in s 9(2) may also be implicit in relation to films and sound recordings by virtue of s 9(3) which provides that:

The issue of copies of a work to the public, in relation to sound recordings and films, includes the rental of copies of those works to the public.

Here it might be argued the words "those works" refer to what is intended (in an objective sense) to be hired out. In most cases this will be the end product database or multimedia work not its constituent films or sound recordings. In denying rental rights to the owners of electronic databases and digital encyclopedias the framers seem to have been gambling that current business practices could be projected indefinitely into the future. It is no doubt true, as they state (Justice, *Comments*, op cit 12) that electronic databases are presently commercially largely exploited either through access agreements or the acquisition of non-returnable CD-ROMS (returnability being the sine qua non of rental as that term is defined in s 2 of the statute). This should not be inflated into an immutable law of nature, however. (Tax driven leasing arrangements are but one counterfactual which springs to mind.) Statutes need to be proofed against changes in marketing practice just as much as against technical innovation. The suggestion that Parliament might return to this particular matter "some years hence" would seem to be the antithesis of the future proofing proclaimed as a virtue elsewhere in the *Comments*.

CONCLUSION

It is not this writer's case that copyright cross dressing is never without policy justification. Indeed there is one context in which it may allow Courts to bypass some increasingly sterile technical arguments which beset Judges in the United States, United Kingdom, Canada and Australia. As we have seen the ability of computer programs and various elements associated with them to cross dress themselves as "compilations" may render nugatory the need for judicial debate on the protection of non-literal elements. Nonetheless this benefit is far outweighed by the general uncertainty which cross dressing allows to be introduced into the construction of the Act, uncertainty which in almost all cases has no discernible social or economic rationale. By selectively departing in an unexamined way from the principle of uniform treatment, the framers have introduced inconsistencies into the Act without any overarching principle by which they may be resolved. The resulting jockeying for forensic advantage between owners and putative infringers promises to be unsettling and might, with more attention to statutory design, have been avoided. □

POLICE COMPLAINTS, PRIVACY, AND OFFICERS' RIGHTS

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reviews contrasting decisions on the Police Complaints Authority's powers

This article discusses the Police Complaints Act in light of two recent High Court decisions. The cases provide two different interpretations of the Act with regard to the function of the Authority and the effect of an investigation of a complaint. The consequences for both complainants and suspect police officers are examined.

INTRODUCTION

The Police Complaints Authority Act 1988 ("the Act") was introduced for the principal purpose of establishing an independent Police Complaints Authority ("the Authority"). Prior to the Act, police themselves had often investigated complaints against officers. In other cases, the Ombudsman investigated, and in serious matters an independent person was appointed. Early in the term of the Fourth Labour Government, the Minister of Police established an Officials' Committee to prepare a report on the matter. The Committee was chaired by Sir David Beattie, and included representatives from various Ministries and Departments. The report emphasised that a fair system was required to balance police morale and public confidence. As a result it was agreed by Cabinet that a new and separate system was required. When moving the resulting Bill in the House in 1988, the then Minister of Justice, Geoffrey Palmer said (at 486 NZPD 2007):

[T]he primary function of [the Authority] will be the investigation and resolution of complaints against the Police. For the first time, members of the public who have a complaint against the Police will be able to take their case to an independent authority, rather than to the Police themselves. ... The present system, whereby the Police investigate complaints against police members, is fundamentally flawed.

In light of that, members of the public may well be surprised to know that after the passing of the Act, police are still involved in investigating complaints. The Authority now has a strong supervisory role in any investigation of the Police. This does not, however, eliminate police from the process. In the vast majority of cases, investigation of the complaint is carried out by police on behalf of the Authority.

This fact raises the legal issue of who actually carries out any particular investigation. Is an investigation a police investigation, or an Authority investigation, or a police investigation but overseen by the Authority? The matter is

important for several reasons, two of which I wish to focus on here. The first problem is that the Act provides for secrecy in respect of material generated as the result of the complaint. This has implications for a complainant, especially if they are a defendant in a criminal matter, but also for pursuing a civil action against police.

The second issue I am interested in concerns the fact that the Act provides protection to persons who give information to the Authority in an investigation. If a police officer is involved as the subject of a complaint, it may be that they can avoid providing information by claiming privilege, or else defeat the investigation by relying on parts of the Act which prevent material being subsequently used.

THE SCHEME OF THE ACT

It is helpful to set out the basic scheme of the Act. Section 12 sets out the functions of the Authority. They include receiving complaints alleging misconduct or neglect of duty by any member of the Police, and the investigation of any apparent conduct of that nature by a member of the Police. Both the Authority and the Commissioner of Police ("Commissioner") are required to notify each other of the receipt of complaints.

Once the Authority receives the complaint, it has the options provided in s 17. It may:

- (a) Investigate the complaint itself, whether or not the Police have commenced a police investigation;
- (b) Defer action until the receipt of a report from the Commissioner on a police investigation of the complaint;
- (c) Oversee a police investigation of the complaint;
- (d) Decide, in accordance with s 18 of this Act, to take no action on the complaint.

The Authority has powers under the Act to take no further action in some circumstances. This may occur where the complaint is trivial or vexatious, where there is another more appropriate remedy, or where investigation is not otherwise necessary. The supervisory powers are set out in s 19:

19. Subsequent powers in relation to complaint –

The Authority may at any time–

- (a) Review a police investigation of a complaint;
- (b) Decide to investigate a complaint itself;

- (c) Where it oversees a police investigation, give such directions to the Police concerning the investigation as it thinks fit;
- (d) Direct the Police to re-open an investigation, and thereafter oversee the investigation;
- (e) Direct the Police to reconsider their proposals for action on a complaint;
- (f) Decide, in accordance with s 18 of this Act, to take no further action on the complaint;
- (g) Decide that no action by the Authority is required on the ground that it considers that the outcome of a police investigation is satisfactory.

The Act goes on to give the Authority certain investigatory powers, and provides certain protections. Those of importance here are contained in ss 24, 25, and 32. Section 24 gives the Authority the power to require information and documents from any person, where the Authority is of the opinion that the person can give that information, or that the information is relevant to an investigation. It can summon and examine on oath any person for that purpose.

Section 25 protects such a person, granting them in relation to the giving of information to the Authority the same privileges as a person has in any Court. This applies to the answering of questions and the production of documents and other things. The section goes on to provide that no statement made, or answer given, by any person in the course of any investigation by or proceedings before the Authority, shall be admissible in evidence against that or any other person in any Court or in any inquiry or other proceeding; and no evidence in respect of proceedings before the Authority shall be given against any person.

Section 32 requires the Authority and those holding an appointment thereunder to maintain secrecy. They may not communicate any matter which comes to their knowledge in the exercise of their functions, except to carry out the purpose of the Act.

THE LEGAL NATURE OF AN INVESTIGATION

To return now to the central issue posed earlier: who or what, in legal terms, carries out an investigation? Paterson J considered the issue in *Campbell v Attorney-General* (HC, Gisborne CP 2/96, 13 June 1997). The context was a civil action involving a situation which had prompted a complaint to the Authority. The complaint investigation was carried out by the Police. As a result a police file was created which C sought during the civil disclosure process. The Attorney-General resisted, relying on the secrecy provisions in the Act. It was argued for C that if the procedure under s 17(1)(b) was adopted, then the investigation was not that of the Authority but of the Police. In this case, that would mean that the file was discoverable.

Paterson J considered s 17, which gave the Authority the four options outlined above. His Honour concluded at p 4 that:

Notwithstanding that the investigation was in this case carried out by the Police, it was an investigation made as a result of a complaint made "under this Act" to the Authority. The Authority exercised its discretion under s 17, and asked the Commissioner to conduct a police investigation of the complaint. This investigation was accordingly carried out by the Police and the necessary report was supplied to the Authority pursuant to s 20 of the Act. Section 20(1) requires the Commissioner as soon

as practicable, and in no case later than two months, after the completion of a police investigation of a complaint, to report to the Authority. It is necessary when reporting to the Authority that the Commissioner supply accompanying material sufficient to enable the Authority to assess the adequacy of the police investigation: s 20(2). ... It follows, in my view, that a police investigation carried out under s 17(1)(b) of the Act as a result of a complaint made under the Act, is an investigation carried out for and on behalf of the Authority. (Emphasis in original.)

As a result, Paterson J ruled that the documents generated during the investigation were covered by the secrecy provisions in the Act. C was therefore unsuccessful in her claim for discovery. The conclusion to be drawn is that when the police investigate for the Authority, provisions of the Act apply notwithstanding the fact that the Authority itself is not directly involved.

This decision, however, is to be contrasted with the more recent one in *Attorney-General v District Court at Nelson and Hekkenberg* (HC, Nelson CP 6/96, 2 September 1997, Gallen J). In that case, H, a remand prisoner at Addington, was transferred with others to Nelson Police Station, presumably for a Court appearance. Police discovered a blade in the transport van, and determined to search the prisoners. H declined to be searched and an incident occurred where it is alleged he assaulted a police officer. H was charged with this, while he in turn made a complaint to the Authority. H sought criminal discovery, and was given the material on the ordinary police file, but was refused material relating to the investigation by the Authority. The Authority subsequently advised that it did not uphold any of H's allegations and gave reasons.

In the District Court in December 1995, the Judge accepted H's argument that the defence was disadvantaged by being denied access to information the Police held, and ordered that no fixture be allocated until discovery of the complaint material was given. The day before this judgment the Authority had forwarded the file to the Police. It bore a police file number. When the matter came before the Judge again in April 1996, the Police advised him that they could not comply with his direction to release the file, as they had returned it to the Authority. As Gallen J recounted at p 4:

The Judge took the view from the letter [from the Authority] that the file number was a New Zealand Police file reference and he noted that the ownership of the file seemed to be regarded by the Police Complaints Authority as vested in the Police. He considered that in the circumstances the subsequent return of the material to the Police Complaints Authority by the Police had to be regarded (p 3) "... as a deliberate action designed to enable the Police to say, 'we cannot comply with the disclosure requirement because we do not have possession of the documents'".

The Judge therefore took the view that this was an obstruction of the defendant's rights under s 24(4) New Zealand Bill of Rights Act 1990, and a device to render nugatory a decision of the Court. The informations were permanently stayed.

As a consequence, the Attorney-General on behalf of the Police bought proceedings for a review of that decision. The issue before the High Court was whether the Police are under an obligation to disclose material collected or obtained during an investigation made in relation to a complaint, or whether in effect the material was covered by s 32. The

Privacy Commissioner made application to be added to the parties, and was heard during the proceedings. Interestingly, the Authority was not independently represented, counsel for the Attorney-General effectively arguing both for the Police and the Authority.

It was clear that if the material sought by H was obtained by the Authority during the course of an investigation carried out by it pursuant to s 17, then the protective provisions would apply, and H could not have the material disclosed. Both H and the Privacy Commissioner, however, took the position that the information concerned was obtained by a police investigation. They argued that the protective provisions only applied to investigations undertaken by the Authority itself, and not those where police investigate. In this case, the Authority had written to H and advised him that it had received the complaint and had asked the Commissioner to arrange a police investigation of the complaint. The Attorney-General took the position that the police investigation was carried out by them as agents of the Authority, so that the whole investigation must be seen as having been an action of the Authority. Thus the material was protected.

Gallen J referred to the decision of Paterson J in *Campbell* (supra). In effect, H and the Privacy Commissioner contended that the decision there was wrong, while the Attorney-General argued it was correct, although too narrowly expressed. The Privacy Commissioner argued that s 32 only applies to the Authority and any person holding office or appointment under it. Section 10 allows for such appointments, and s 36 allows for delegation, but only to persons appointed under s 10. Members of the Police are not appointed under s 10, and accordingly they are not acting as the Authority. Consequently the secrecy provisions do not apply.

His Honour opined that there was a degree of ambiguity in the Act, but that the position contended for by H and the Privacy Commissioner was correct. Gallen J looked closely at s 17, where he found that s 17(1)(a) contemplated an investigation independent of the Police. The power to defer action until the outcome of a police investigation under s 17(1)(b) "... suggests that the Authority awaits the outcome of a police investigation, rather than acts through the Police". (at p 13). Similarly, s 17(1)(c) must refer to a separate investigation. There was further support in this conclusion from s 19, which deals with subsequent powers in relation to a complaint. It "... is much more in accord with a situation where there is a completely separate and independent police investigation than an investigation initiated by the Authority in which the Police act as an agent". (ibid).

Gallen J felt that s 20, which requires the Commissioner to report the outcome of a police investigation to the Authority, supported the view that the investigation was independent. If the police were acting as agents for the Authority, there would be little point in having them report the outcome determined by the Police. Nor would there be any need for them to have to supply sufficient material for the Authority to assess whether the decision arrived at was acceptable.

At p 15 His Honour concluded:

In Police Service Board v Morris the High Court of Australia held that the privilege could apply to a statutory provision which required members of a police force to answer questions tending to show the commission by them of disciplinary offences

A survey of the provisions of the Act therefore would suggest that where the term "police investigation" is referred to in the majority of cases, it contemplates an independent police investigation rather than one carried out on behalf of the Authority. The scheme of the Act there appears to be that the Authority may carry out investigations itself or it may await the outcome of or oversee an investigation by the Police, following which it has specific powers including re-investigation. On the basis of that pattern it seems more likely to me that s 17(1)(b) contemplates awaiting the outcome of a separate police investigation, rather than the use of the police to carry out an investigation for the Authority. If that is so, bearing in mind the restriction on delegation s 32 cannot apply to the police investigation, nor can s 24(5) [sic].

Accordingly Gallen J held that the Act only provided protection against discovery in the case of investigations by the Authority. Since the investigation in the present case was by the Police, there was no protection. The application for review was dismissed.

DISCUSSION

As mentioned earlier, the contrasting decisions have an effect on two classes of person who deal with the Authority, or the police investigating a complaint. The first class of person is the complainant, who may well be a defendant in a related criminal action. Gallen J accepted that there was force in the Attorney-General's contention that confidentiality was a matter of significance for the Authority, however he said at p 16 that:

Against that must be balanced the rights of a person at risk of a criminal conviction where relevant information may not be before the Court. In such a situation the Authority may ensure that such protection as is necessary is obtained by the Authority conducting the investigation itself, which in serious cases I am informed that it does.

The effect of this ruling is that complainants who are also defendants should be able to obtain discovery of the police file regarding the complaint. This is contrary to the ruling in *Campbell*, which said, in the context of a civil case, that the plaintiff-complainant could not gain discovery of the material. There is nothing in either judgment which limits the principles set out to one category of case (civil or criminal), but during the reading of the Bill, reference was made to the issue. The Minister discussed the sections which allow the Authority to obtain information, but pointed out that s 25 limits the subsequent use of that information. He said (at 486 NZPD 2008) that "[t]he idea is that matters traversed during an investigation are not available for use in subsequent litigation". Reference was made to this comment in *Campbell*, Paterson J saying at p 10 that the policy considerations would be defeated if access was available to material generated. These considerations included encouraging witnesses to be frank, and allowing investigating officers to provide a candid report.

The other class of persons concerned is the suspect police officer. Under the *Campbell* decision, which held that an

investigation by police was on behalf of the Authority, there was an argument that the suspect police officer could rely on the privilege against self-incrimination in s 25. In the Australian case of *Police Service Board v Morris* (1985) 156 CLR 397 (HCA) the High Court of Australia held that the privilege could apply to a statutory provision which required members of a police force to answer questions tending to show the commission by them of disciplinary offences.

In that case M was a police officer. He was questioned as to his whereabouts by a superior officer investigating a complaint. M declined to answer the questions, and was subsequently charged under the Police Regulations 1957 (Vict) with disobeying a lawful order. The majority held that the privilege might apply to a statutory provision which required police officers to answer questions, where that answer might expose them to disciplinary penalties. Gibbs CJ stated at p 403 that "... it is now accepted that the privilege is capable of application in non-judicial proceedings ...". The judgments, however, make it clear that the application of the privilege depends on the statute in question. The Court had no difficulty in concluding that the effective running of a police force meant the privilege should not apply. The majority considered that the clear wording of the Victorian statute excluded the privilege in this case. Thus M was obliged to answer the question, even though that might incriminate him. Of course, if a privilege is expressly retained in a statute, then it would be available.

The effect of all this would be that a New Zealand Police officer, who was the subject of a complaint, could invoke the privilege when questioned by a superior officer. This is because *Campbell* says that such an investigation is on behalf of the Authority, and therefore the Act applies. Since the Act retains the privilege, a police officer can therefore rely on it. If *Hekkenberg* is correct, however, there is a complete reversal. Because the investigation is an independent one, the officer could not rely on the privilege. Gallen J, in *Hekkenberg* at p 16 said as much:

I am concerned for the position of a police constable who may be required to give information during the course of a police investigation by the order of a superior, but the Act clearly contemplates that such investigations will take place other than when initiated by the Authority and there could be no degree of protection provided by the Act in such cases.

Gallen J did not go further than this, and the issue was not raised in *Campbell*. Following *Hekkenberg*, it would seem that the only way that a suspect police officer could invoke the privilege would be if the Authority was conducting its own investigation.

On policy grounds, *Hekkenberg* is probably preferable to *Campbell* on this point. What the Act set out to achieve was a low key but credible investigation. The purpose of the Act is "... to make better provision for the investigation and resolution of complaints against the Police by establishing an independent Police Complaints Authority". It seems from reading *Hansard* that it was not contemplated that police would continue to investigate these matters once the Authority was established. The Minister thought the Authority would be dealing with all complaints (486 NZPD 2008): "The investigation will be conducted in private, and the

authority may obtain information from such persons as it thinks fit". Later the Minister discussed "... whether there should be a right to legal representation for a member of the Police being questioned by the authority. The advice given to the select committee was that the right of representation would lead only to undesirable formality and polarisation and would prolong the investigation" (my emphasis). The concern was clearly on establishing an independent and credible alternative to the methods available at that time.

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The situation at present is that a person can make a complaint regarding the actions of a constable. At the same time that constable may be prosecuting the complainant. The complaint is investigated by another police officer. If the complainant has a previous record, this will be known to the Police, who will also know the background to the affair. If the incident involved, for example, an assault on a police officer by a person with previous convictions, it defies imagination to suggest that the police investigator can be conducting an independent investigation, as the Act requires. Yet this is the situation that has developed, and the decision in *Campbell* would mean that the complainant would have no access to the file generated. Non-disclosure would be acceptable if the complainant knew that the investigation was truly independent. The Police seem to prefer the outcome of *Campbell* rather than *Hekkenberg*. They oppose the latter case, because it allows the complainant in this scenario the information gathered in an investigation. It seems to this writer that if police are going to continue to investigate complaints, especially where they prosecute the complainant, then *Hekkenberg* disclosure is the price they must pay.

CONCLUSION

This article discusses two contrasting High Court decisions, which arrive at completely different interpretations of the Act. It is understood that the Police are seeking approval to take the *Hekkenberg* decision to the Court of Appeal. The motivation for that would appear to be a reluctance to give out information to complainant-defendants in criminal cases. If the *Hekkenberg* decision is overturned, however, and *Campbell* preferred the effect may well be that suspect police officers could thwart the Act by invoking the privilege against self-incrimination, and the privacy provisions. If officers can avoid adverse findings by remaining silent, then complaints under the Act seem pointless.

The decision in *Campbell* is preferable to *Hekkenberg*, however, on the point that material generated should not be available. The Act was designed to encourage people to give information without recrimination. The problem is that the Police are still involved in the investigation process, which was not the aim of the Act. What is clearly needed is an amendment to the Act. It should be the case that where the Police are prosecuting a complainant, only the Authority may investigate the complaint. This would give effect to the aim of the Act, and avoid the difficulties with police investigating their own officers, who are in turn prosecuting the complainant. The decision in *Campbell* would then work to prevent re-litigation of the complaint. The result might well be a rejuvenation of the Authority. It would certainly need more staff (and thus more funding) to carry out investigations if the Police were no longer to do this task. This is, after all, what the Authority was designed to do. □