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HUMAN RIGHTS ANNIVERSARY

This year marks the fiftieth anniversary of the Universal Declaration of Human Rights. A number of events have been and are being held to commemorate the event. One of the first is the campaign launched by Amnesty International supported by The Body Shop.

There is room for scepticism about Bills of Rights. Our rights come from us ourselves and not from parliaments and governments. We create and recognise our rights by the way we deal with one another and the expectations that we express, even if we do not always live up to them.

Historically, it was the role of the Judges to declare and ratify those rights in the course of the decisions that they made when resolving disputes between private parties.

Today we have fallen into a different model. Our rights we now see as derived from an Act of Parliament and the Judges we see as the delegates of parliament. Sad to say, Judges have enthusiastically taken up this role. They see themselves today as an arm of the state (itself a conception foreign to English legal systems), not as a body standing between the citizen and the exercise of public power.

International Covenants on Human Rights are merely legislation on a different plane. They are the product of governments, which cannot be the source of individual rights. But the Universal Declaration is not an international covenant of that order. It is avowedly aspirational, not legislative. Aspiration is one of the qualities which makes us civilised human beings. And as an expression of aspiration, the Universal Declaration deserves to be treated generously.

The Universal Declaration represents an expression of what the drafters saw as natural and proper. At its root is the concept of a society based on respect for individual rights.

This was the society which had just won a war of catastrophic proportions against centrally directed societies. It was also the society that was in the process of competing out every other society with which it came into contact.

So why has the language of individual rights become the common currency of humankind? Quite simply, the culture based on individual rights has delivered the goods.

It is obvious that the culture based on individual rights, and only that culture, has achieved economic growth on a scale and for a period of time unparalleled in history. For an approximation one has to return to the Roman Republic which was also a polity built on individual rights and property and a belief in the spontaneous order.

But there are those who say that there are values other than economic growth to be taken into account; that more personal and spiritual values are important. A moment's thought will reveal however, that on almost every count it is the culture based on respect for individual rights that has delivered those goods too.

Three hundred years ago the lot of the ordinary person was pretty much the same throughout the world. Life consisted of the backbreaking toil of scratching from the soil sufficient to feed the family, subject to the vagaries of weather, war and disease. Travel meant walking a few miles to the nearest market. People worked until they dropped, usually about the age of thirty or forty. Infant mortality was so great that a dozen or more pregnancies were required to guarantee sufficient children to look after the few who lived beyond the age at which they could usefully work. The only other life of which people would have had any inkling was that portrayed in Bible stories or traditional tales.

Today, there are still people whose lives are much as described. They are all in countries which fail to conform to standards of liberty that New Zealanders take for granted, especially in the economic sphere.

Meanwhile, in societies based on respect for the rights contained in the first part of the Universal Declaration, life has changed beyond measure. The ordinary American, Briton or New Zealander today can contemplate retirement, a period when personal goals can be focused upon untrammelled by the need to earn a living from week to week.

The ordinary New Zealander is taller, healthier and longer lived than ever before and in this respect society is more equal then ever before. Specialisation allows today's citizen a wider choice of how to achieve personal potential than ever before and education, foreign travel and even television mean that the ordinary person has a greater idea of the choices open than ever before.

The number of hours per week expendable at individual discretion has doubled in the last fifty years as people find that their material needs are more or less met and spend more of their lives pursuing other values.

Freedom of speech and freedom of choice mean that the ordinary citizen is confronted with a choice of lifestyles, rather than a state religion.

The current failing is that most of these freedoms, where they exist, end at national frontiers. This cannot be right, since we have established above that these freedoms are not governments' to give or take away. But taken away they are, in the name of national sovereignty.

Elisabeth Hoffman of Amnesty International recently identified national sovereignty as the shield behind which governments hide their abuses from international gaze. Efforts to deal with human rights abuses of all sorts, and the problem of prisoners of conscience in particular, founder on the barrier reef of respect for national sovereignty.

So what is national sovereignty for? What benefit does it bring? The only answer is that it enables governments to interfere with the economy, and it is in the name of economic management that many human rights abuses are justified today. The solution is obvious. ❑

LETTERS

RE: CHILD SEXUAL ABUSE ACCOMMODATION SYNDROME

It was reassuring to hear from Law Commissioner Judge Margaret Lee [1998] NZLJ 78 that Child Sexual Abuse Accommodation Syndrome (CSAAS) evidence should not be used diagnostically, and that behaviours such as a child's delayed disclosure or retraction of abuse allegations should be presented to the jury as neither proving nor disproving that the child has been abused. In this case, the neutral and balanced statement for an expert witness to make is that such behaviour is consistent with abuse, and equally consistent with no abuse having occurred. For an expert to simply state that a child's behaviour is consistent with abuse without this qualification effectively introduces a bias, and what members of a jury may well hear is that the expert believes that the abuse did occur.

Judge Lee rightly points out that it would be unethical to conduct controlled experiments to test whether subjecting children to sexual abuse results in the child exhibiting certain behaviours which could then be said to be diagnostic of sexual abuse. However, it is not unethical to carry out naturalistic (non-experimental) research, based on the observations of people known to have been sexually abused in the past and compared with a matched group who have not been sexually abused. A number of such studies have been conducted, both in New Zealand and overseas, and have failed to demonstrate any specific behavioural indicators of past sexual abuse.

Felicity Goodyear-Smith
Department of Psychiatry and Behavioural Science
University of Auckland

RE DE FACTO RELATIONSHIPS (PROPERTY) BILL

After more than 20 years of the Courts being unable to differentiate between two key expressions in the Matrimonial Property Act, namely those associated with *"acquiring property"* on the one hand and *"receiving the proceeds of the disposition of property"* on the other, it is, to me, incredible that Government still uses both expressions in the new De Facto Relationship (Property) Bill.

I am not a lawyer and I may not have kept up with the latest legal findings but I would like to challenge the legal profession to come up with an acceptable answer, or at least one better than that which the Rt Hon The Chief Justice ordered by declaration on 7 December 1984:

1 THAT the meaning of the words "the proceeds of the disposition of any property" ... is "the money or consideration received from getting rid of any property".
2 THAT the meaning of the words "property acquired" ... is "property got or received in any manner whatsoever".

Quite clearly the second declaration embraces the first, which is therefore redundant.

In view of the fact that the Court of Appeal considered that the small subsection of the Matrimonial Property Act s 8(e) was the pivot about which all else in the Act was designed to turn (and that same subsection uses both phrases) isn't it time that someone sorted the direction in which the Act really does point before another injustice is inflicted upon the public?

The Court of Appeal once stated that s 8(e) means exactly what it says, and I agree, but did Their Honours understand what it means? If they couldn't tell the difference between the two phrases how could they possibly know?

The new Bill must not perpetuate the error.

Anthony F Reid
Christchurch
(litigant in *Reid v Reid*)

THIRTY PIECES OF SILVER

Your editorial in the April issue concerning Dr Molloy and Thirty Pieces of Silver in my view does a disservice to Dr Molloy. The points you seize on give a distorted view when taken in isolation.

I would have thought that there are more fundamental points raised in his book which should be addressed such as:

1 The irreconcilability of the public's expectations of lawyers – probity, trust, fair dealing – with claims that a duty to a client, or the chosen wealthy client, justifies conniving at, or indeed initiating, schemes and structures which have no other purpose than, for example, to dishonestly ("with intention to defraud" – Tompkins J in the Equiticorp defendants trial) conceal transactions or their real nature or their proceeds.
2 When such schemes involve blatant dishonesty the victims are the unsuspecting investors, usually people of modest means, whether in syndicates or public companies. The entrepreneurs invariably in such cases have the resources and the money, or at least access to someone else's money, to pay for "high-powered" law firms to create the schemes for them, and the use of whose name in promotional material is designed to assure the innocent investor that that firm's reputation and standing is something the investor can rely on; that everything is and will be on the level and above board and that their interests are, and will continue to be, safeguarded when in fact that will only be the case if and so long as it suits the promoters and their advisers.
3 Such firms apparently regard it as quite acceptable at the same time, unbeknownst to the small investor, to be devising or instrumental in furthering parallel schemes devised to profit promoters at the expense of those investors.
4 Some lawyers in some large firms apparently consider it legitimate, as well as charging excessive fees, also to be personally profiting as promoters or parties personally

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EVENTS

Father Andrew speaks from within his symbolic cage

Margaret Bedggood of Amnesty International and Ashleigh Ogilvie-Lee of The Body Shop NZ make the first marks

HUMAN RIGHTS CAMPAIGN LAUNCH

Monday 11 May saw the world-wide launch of a campaign by Amnesty International, backed by The Body Shop, to commemorate the 50th anniversary of the signing of the Universal Declaration of Human Rights. The campaign will culminate in the unveiling of a huge montage at the Paris celebrations on 10 December.

Amnesty International's campaign is to get people round the world to "Get Up, Sign Up" to create a massive pledge of support for the Universal Declaration. The Body Shop is simultaneously running the "Make Your Mark" campaign to collect thumbprints from supporters. "Make Your Mark" aims to raise awareness of the fact that fifty years after the UDHR was signed a large number of people remain imprisoned or persecuted for their beliefs.

The New Zealand campaign was opened at a ceremony at Te Papa at 8.30 am, making it the first in the world. The New Zealand branch of Amnesty International and The Body Shop New Zealand have adopted the case of Dita Sari, a political prisoner in Indonesia.

Present at the ceremony were The Hon Don McKinnon MP, Minister of Foreign Affairs, The Hon Nick Smith MP, Minister for Conservation and the Hon John Luxton MP, Minister for Commerce.

Father Andrew Nguyen Huu Le was hustled into a cage by a hooded hit squad, from which he spoke of the experience of twelve years' incarceration in a communist concentration camp in Viet-Nam. Today Father Andrew is Roman Catholic Chaplain to the Vietnamese community in Auckland and he called on New Zealanders to count their blessings and to remember those still imprisoned overseas for their beliefs.

After Sir Howard Morrison and Sir Peter Blake had spoken, the ministers and ambassadors present went up to sign their names and make their marks, led by Professor Margaret Bedggood, Dean of Waikato Law School and new chairperson of Amnesty International New Zealand. The campaign will run throughout the country with books open for signature and thumbprinting at all Body Shops.

AUCKLAND MEDIATION MONTH LAUNCH

Auckland District Law Society Mediation Month was launched by the Minister of Justice, The Hon Doug Graham MP, at a breakfast at the Kermadec Restaurant in Auckland Friday 1 May, attended by 90 Judges, lawyers, business and community leaders.

Mr Graham saw mediation as one of a number of initiatives to reduce Court caseloads. He talked about the quality of justice administered by the Courts and identified three areas where mediation may assist in achieving the goal of a more efficient Court system, namely:

Optimising judicial time by removing cases appropriate for mediation from the judicial system and thereby reducing delays;

Offering accessibility to disputants by lowering legal costs through quicker resolution and reducing the cultural alienation which some ethnic communities may experience in the formal setting of a courtroom; and

Arguably offering a better quality of justice for the parties by concentrating on the parties' needs and interests to formulate acceptable solutions rather than focusing on a determination of legal rights and wrongs.

Mr Graham stressed that mediation is not in his opinion better than litigation but rather involved an assessment of whether the dispute in question is best suited to that method of dispute resolution.

He highlighted the importance of the process taking into account factors such as the participants' age, ethnicity, gender, religion and personal experience to ensure the process is culturally sensitive and appropriate to the participants' needs. Other situations, such as where there requires the complex determination of legal rights, may be best dealt with in a formal adversarial system.

"The challenge for the Court system", said Mr Graham, "is to continue to encourage mediation in appropriate instances without compromising its inherent voluntary nature".

Judith Collins, the President of ADLS also spoke in support of mediation and while acknowledging that not all disputes were suitable for mediation she emphasised that in her own practice she aimed to resolve disputes before Court.

She concluded "delivering justice is not about notches in the belt, wins on the board for the lawyer. It is about resolving disputes to the satisfaction of the participants and ensuring access to justice for all. Access to justice is an issue for all practitioners".

The launch marks the start of a month of intensive mediation events, including role plays and presentations on mediation for law firms and their clients, presentations to a number of Rotary and Kiwanis clubs, a Chambernet breakfast hosted by the Auckland Regional Chamber of Commerce and presentations at a number of Citizens Advice Bureaux.

The theme of Mediation Month is "Talk before Court" and a panel of experienced mediators are offering to carry out mediations through the mediation month scheme at a reduced rate. Interest in this scheme has been high and the 0800 LETS MEDIATE phone has been very active for the past month and anticipates even more activity during the month itself. ❑

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to such parallel schemes or, perhaps even worse, in secret, intermediate and totally unjustifiable deals that divert profits that properly belong to the investors for their own gain or purposes.

5 Dr Molloy cites a passage from a decision of the UK Court of Appeal (in *Bolton v Law Society* [1994 2 All ER 491-492]) that "it is required of lawyers practising in this country that they should discharge their professional duties with integrity, probity and complete trustworthiness" and that any solicitor who is shown not to have so discharged his duties "must expect severe sanctions" to be imposed by the Law Society Disciplinary Tribunal and that "only in a very unusual and venial case of that kind" would that tribunal be likely to regard as appropriate any order less than suspension."

Are you suggesting that these statements are not applicable to lawyers in this country? If anything less is acceptable should a lawyer be entitled to use that name, let alone be granted the privilege of practising as a lawyer, or under that guise?

6 Is it consistent with a lawyer's position and professional requirements that anything at all, whether or not ethical or honest, can be justified by invoking a duty to some client, no matter what ends that client seeks to achieve and no matter by what means? Or, as you seem to suggest, is that simply how things are (and should be?) in the "free market"?

Does being a partner in a mega-firm exempt a lawyer from the rules which society expects to be rigorously enforced in the case of other practising lawyers?

These are fundamental issues, not simply matters which can be lightly dismissed, as you do by accusing Dr Molloy of making "grandiose statements about professional responsibility". These and other issues he addresses raise far more compelling questions than what you dismissively describe as "some higher ideal of justice".

If lawyers are, and legitimately may be, simply dealers and fixers and compete for profits with their often unwitting clients and others who place their trust in them should they also be able to cloak their actions with some veneer of respectability by at the same time purporting to be practising law? Are ethical standards or codes of conduct simply something lawyers need only pay lip service to, and then only when they themselves are the injured party? Does or should greed, at someone else's expense, excuse anything and everything?

Are the "free market" you describe and professional standards and duties compatible? If "anything goes" is the only rule should not the public be warned? Surely in the free market the public is all the more entitled to expect and be able to rely on lawyers being "professional".

The thunderous silence of our law society is no reassurance to the rest of the profession, let alone the general public.

Recourse to law, by no coincidence, has become the preserve of the privileged and the wealthy and, to a much lesser extent, of the legally aided. To the vast majority in between it is a game they cannot afford to play – as the wealthy and their lawyers know only too well.

All the more the pity that such issues do not appear to interest the Law Society or spark any open debate. The usual apathy appears to reign and sharp practices by the well-connected will no doubt continue to excite not censure but admiration or envy, or at least the usual establishment reaction to not rock the boat.

But for the persistence and dedication of Dr Molloy and the few other lawyers involved, such as Mr Dickie, and the faith placed in them by a group of small investors, the facts would have never been seen, and of course never were intended to see, the light of day. They, and Dr Molloy's book, deserve something better than the sort of treatment evidenced by your editorial. Circumstances and methods may change but these remain very much live issues.

These opinions are, of course, mine alone.

Michael Armstrong
Whangarei

THE TASK OF CORONERS

J G Fogarty QC

review the history and role of the coroner

WHY HAVE CORONERS?

Over the last decade and more, we have witnessed reform of state agencies. This reform has to a large extent been driven by the perception that the state should get out of non-essential tasks. If one were to attempt to list the essential tasks of the state, two would vie for being at the top of the list:

- Defence against foreign invaders;
- Maintenance of internal order, sufficient to maintain an adequate sense of personal security.

Unneeded, unexplained, and accidental deaths fit into the concern of maintenance of internal order and thereby, personal and family security. The first priority of any individual in a community is to stay alive. And parents and children tend to treat the life and death of each other of the same importance. As surviving individuals, we all feel a degree threatened by unexpected death around us.

Almost naturally, all civilised societies provide ways of examining unexpected death. For there is always the potential that unless such deaths are investigated and explained there may be repetition. In our society, we have the office of coroner which has a long history of independent inquiry.

Independence of the coroner is also directly related to the concern for internal security. Given that a cause of death may be unexplained or disputed, it is vital for public confidence in internal order that the inquiry be dispassionate and independent from any influence, including influence from government agencies.

WHERE DID THE OFFICE COME FROM?

"The office of coroner is of great antiquity, and no satisfactory account of its origin can be given. It is said to have existed in the time of the Anglo Saxon kings, but the authority for this statement is doubtful" (*Halsbury's Laws of England*, 4th ed, vol 9, para 1001). The reason for this is the task, rather than the office, being of great antiquity. As I have argued above, all societies have an immediate interest in examining unexpected deaths. It is impossible to conceive of a society which is indifferent to unexpected death. For it is a natural reflection to pass from "look what has happened" to "that could happen to me or my family".

Modern cases tend to discuss the history of the office from the period in which there is reliable evidence of it, in our legal system. This means that the story tends to be picked up from around the beginning of the 13th century. At that time, coroners had a number of duties, and dealing with unnatural deaths was only part of them. (*The Medieval Coroner* R F Hunnisett, Cambridge University Press, 1961, reprinted by Wm W Gaunt & Sons, Inc, 1986) The coroners in the middle ages were closely identified with the county legal system and thereby examined not only the bodies of the dead, but the bodies of victims of assault and rape. They were directly involved in the ancient proceeding of "hue and cry". It is in this context that New Zealand and English cases say that the office of coroner was established principally for the benefit of the state, and arose out of the necessity and desire for information to be provided to the monarch (eg *Leadbeater v Osborne* Anderson J, 15 May 1991, HC Auckland, M2120/89).

In New Zealand the office of coroner is governed by the Coroners Act 1988 ("the Act"). This Act mirrors these basic but important reflections. Consider the first positive obligation in the Act:

> Section 4(1)(a) The following deaths shall be reported:
>
> (a) Every death that appears to have been –
>
> (i) Without known cause; or
>
> (ii) Suicide; or
>
> (iii) Unnatural or violent.

It adds deaths that have occurred while persons are under the care of others: for example surgeons (c); patients and inmates of hospitals and similar institutions (d) – (h), persons in the custody of the Police (i).

Accordingly the answer to the question (where did the office come from?) is that the task of the office will be undertaken in every society. The title given to the person or persons who undertake the task is accidental. It is the task which is of vital concern to the community: to explain unusual death.

WHAT DO CORONERS DO?

Society wants unusual deaths to be examined and explained. In certain cases, governed by Part IV of the Act, the coroner has the power or obligation to hold an inquest.

> Section 15 of the Act defines the purpose of an inquest –
>
> (1) A coroner holds an inquest for the purpose of –
>
> (a) Establishing, so far as is possible –
>
> (i) That a person has died; and
>
> (ii) The person's identity; and
>
> (iii) When and where the person died; and
>
> (iv) The causes of the death; and
>
> (v) The circumstances of the death; and
>
> (b) Making any recommendations or comments on the avoidance of circumstances similar to those in which the death occurred, or on the manner in which any persons should act in such circumstances, that, in the opinion of the coroner, may if drawn to public attention reduce the chances of the occurrence of other deaths in such circumstances.

Therefore, a coroner must hold an inquest to establish as far as possible that a person has died, the person's identity, when and where the person died, the cause of the death, and the circumstances of the death. In *Burns v Legal Services Board*

[1995] 1 NZLR 594 Fraser J held that the coroner is required to make a finding on all matters listed.

In an Australian case *Ex parte Minister of Justice* [1965] NSWR 1598 the Supreme Court of New South Wales considered the difference between the "terminal cause of death", that is the mode of dying, and the "real cause of death", the disease, injury or complication that caused the death. McClemens J said at 1604:

> I think where the Coroners Act speaks of the cause of death it means the real cause of death: namely the disease, injury or complication, not the mode of dying as eg heart failure, asphyxia, asthenia etc

Re Hendrie (HC, Christchurch, CP 445/87, 12 January 1988, Hardie Boys J) and *Suckling v Bradley* (HC, Timaru, CP 6/87, 13 September 1989, Fraser J) apply *ex p Minister of Justice*. If the terminal cause of death directly and consequentially follows from a definable event, the death should be regarded as having been caused by that event.

WHO SHOULD BE CORONERS?

Section 32(1) of the 1988 Act says:

> The Governor-General may from time to time by warrant appoint any person to be a coroner.

This is a very wide power. But note that the appointment is by the Governor-General. Such appointments are a modern manifestation of what used to be regarded as prerogative powers. It is not an appointment by a Minister of the Crown. It is not an appointment from the Executive. It is in that sense not an appointment by a political party who happens to be in power. It is as a matter of form an appointment by the head of state. That is entirely appropriate. The office of coroner is one on which opinion should not be divided upon political lines. Rather, the community as a whole has a common interest in the task of the coroner.

It is also significant that there is no requirement for a coroner to be medically or legally trained. It might have been possible to have developed a tradition whereby coroners were medical practitioners, lawyers or police officers. However, the fact that any person can be appointed to be a coroner does not mean that every person is appropriate and could be appointed a coroner.

The most important quality a coroner can have, to maintain the confidence of the community and thus contribute to maintenance of internal order, is to be independent. Without independence, the community will not have confidence in the coroner in difficult cases.

I want to emphasise this quality of independence. In this country the coroner has to work closely with the Police; the Police largely support the office. But to my mind it is essential that coroners and police understand that the task of police is solely to service the requirements of the coroner.

If a member of the Police is a coroner in a small rural district, he or she is a coroner first, and member of the Police second. Similar observations apply to members of the medical profession.

HOW DO CORONERS WORK?

By inquiry. In this country, and in some other parts of the world known as common law jurisdictions, proceedings by way of inquiry are regarded as unusual and often slightly suspect. For this reason, I mention a couple of aspects about inquiries, if only to remove the possible taint. There is only one goal of an inquiry: getting at the truth. By contrast, the adversarial procedures of trial have evolved from contests. Originally these contests appear to have been a formalised opportunity to extract revenge or for God to exculpate an apparent offender. So in British constitutional history there were such phenomena as trial by battle and trial by ordeal. Interestingly, it seems likely that these trials, the early form of adversarial procedures, took place after the inquiry by the medieval coroner and his jury. The inquiry came first and the trial came second. There are vestiges of this in the American grand jury system. In the middle ages the first task of the coroner was to examine and make an accurate description of the appearance of the body, be it a dead body or a wounded body (in the latter case of a victim). (see Hunnisett) And it was part of the medieval tradition that this be done as soon as possible after the death was discovered or the rape, wounding or mayhem occurred. So in a sense the inquiry or inquest has always been alongside the concept of a trial. It appears to have been logically prior to the trial. And in a sense always more important than the trial. The early concept of trial was not to find out the facts but rather to decide guilt.

Accordingly, have no embarrassment about the process of inquest. It is itself of great antiquity. It is fundamentally a commonsense investigation of the facts to find out the truth. It is not an inferior process.

It is in fact a superior process when measured against the quality of independence. One of the problems that a Judge has with an adversary proceeding is that the Judge cannot direct the focus of the examination. Even though the Judge is independent, he or she is not in control of the process. But with an inquiry, the inquirer is in complete charge of the process. To be sure, the inquirer must deal with interested persons fairly and give them adequate opportunity to be involved. But the quality of the inquiry is the responsibility of the inquirer, in this instance, the coroner.

Lord Lane CJ in *R v South London Coroner, ex parte Thompson* (1982) 126 Sol Jo 625; *The Times*, 9 July 1982 described a coroner's role as follows:

> Once again it should not be forgotten that an inquest is a fact finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no trial, simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a trial.

In the House of Lords, Lord Goff in *R v Attorney-General for Northern Ireland, ex p Devine* [1992] 1 WLR 262, 267 said:

> It is not to be forgotten that a coroner's inquest is not an adversarial process but an inquisition designed to ascertain the true facts.

Hardie Boys J has also commented on this in *Re Hendrie*.

It is not part of the coroner's function to apportion personal blame for the death. This has been discussed in a couple of English cases turning on an interpretation of the Coroner's Rules 1984. Rule 42 provides that:

> No verdict shall be framed in such a way as to appear to determine any question of – (a) criminal liability on the part of a named person, or (b) civil liability.

In *R v West London Coroner, ex parte Gray* [1987] 2 All ER 129 Watkins LJ said that R 42 was complied with so long as on the face of the inquisition the verdict does not give the appearance of identifying by name or otherwise anyone as blameworthy for the cause of death. (at 138) He

was suggesting that it was an exercise in careful framing of the verdict.

In *Matthews v Hunter* [1993] 2 NZLR 683, Heron J acknowledged that in making comments on matters which were not the direct cause of death in the particular case damage to reputation and aggravation of personal suffering may arise. He observed that the generality of such comments should therefore be made clear. (at 687)

These cases acknowledge that an implicit attribution of blame may be unavoidable in order for the coroner to ascertain or explain how the death occurred in the wider events that were the real cause.

How much should the coroner explain?

Section 15(1)(b) is broad. It is a question of judgment as to how far the coroner goes. Obviously the coroner is not there to establish the facts required to be proved before a particular individual is punished. But the coroner should continually bear in mind that his or her task is to allay the concerns of the community as to the cause of death and to draw attention to the community facts, factors or practices which if taken into account or adopted in the future may reduce the chances of other such similar deaths. Section 15(1)(b) should not be read as an add on. Rather, it is central to the very reason why society examines unusual deaths.

Heron J considered s 15(1)(b) quite extensively in *Matthews v Hunter* at 686-688. His Honour acknowledged that under the 1951 Act there was no statutory authorisation for such observations by coroners. He goes on to state:

> The coroner is confined in the making of recommendations or comments to the purposes set out in s 15 which I consider is the proper boundary to draw as to his powers. Recommendations or comments which do not have that purpose would generally be beyond his authority. (at 687.)

However, Heron J says that because s 15 refers to circumstances similar to those in which death occurred, the coroner is not confined to recommendations and comments on the avoidance of circumstances which directly caused the death under consideration, but may recommend and comment on all the other implications of the similar circumstances surrounding the death.

Overall, Heron J advocates a rather expansive view of s 15:

> In exercising the coroner's function described in s 15(1)(b) the Court should in any view not prescribe a test which allows recommendations or comments only where the scope of the recommendations or comments made mirror images the circumstances of the case under consideration. To do so would hinder the useful public voice the coroner represents in pointing out matters of undoubted public interest. Because a state of affairs may be within the law should also not prevent a coroner from making recommendations or comments on avoidance if he feels they may reduce the chances of occurrence of death in similar circumstances.

It is hard to say clearly where a coroner's responsibilities begin and end as to explaining why a person died. That is a good thing. This is because any attempt to define what matters should be treated as the cause of death is necessarily arbitrary. This is because there tends to be a web of cause and effect associated with any event, including human death. In a crude sense it is always possible to define the cause of death in a medical fashion. But the social circumstances of the deceased person will very often naturally fall within an appropriate description of the cause of death. Coroners are well aware of this.

For example: a person may die due to the rupture of a blood vessel causing massive loss of blood. That rupture may be the result of an impact of the deceased person's chest onto a steering wheel. That impact may be the result of a faulty repair to the vehicle's brakes preventing the driver from stopping before an unexpected obstacle. The faulty repair of brakes may be due to the fact that the work was carried out by an unqualified person holding himself out to the world as a qualified mechanic.

The community's interest in such a death is likely to focus on why the brakes failed rather than the particular damage to the integrity of the deceased person's body which caused the loss of life. The potential for that death to be repeated lies not in the medical cause of death but in the risk of brake failure occurring in other vehicles.

It is not the function of coroners to assign legal or moral responsibility for death upon persons. The legal system of our country, in common with other countries, has a variety of mechanisms whereby responsibility, punishment and/or compensation is explored in a manner designed to ensure a fair process to persons who may be accused of being the cause of death.

Therefore, it is important for the coroners to exercise restraint when describing the important but increasingly remote causes of death, as distinct from the immediate cause. However, coroners should not shirk from the responsibility of informing the community of the circumstances which explain the death. But do so in a manner does not assign personal culpability.

In the hypothetical example that I have given, I think that the coroner should go at least as far as identifying brake failure. But how far further is a question of judgment.

Adverse comments

Under s 15(2) the coroner may make adverse comments on the conduct of persons in the circumstances of the case, whether living or dead, provided that the adjournment and notice provisions of the section are complied with.

Concurrent proceedings – criminal liability

The Act makes provision under s 28 for an inquest to be postponed or adjourned where a person has been charged with a criminal offence relating to the death or the circumstances of the death.

JUDICIAL REVIEW

A coroner's verdict is subject to review because it is the exercise of a statutory power of decision. Judicial review covers all preliminary and interlocutory decisions made by the coroner in connection with or in the official course of duty.

The coroner's inquest is subject to all the rules of natural justice. It would appear that *Suckling v Bradley* applies all the rules of natural justice to coroner's inquests as stated in *Re Erebus Royal Commission* [1983] NZLR 662; [1984] 1 AC 808 (PC) namely:

- the coroner must base the decision upon some evidence that has probative value;
- the decision to make the finding must be based upon some material that tends logically to show both the

existence of facts consistent with it, and that the reasoning supporting the finding, if disclosed, is not logically self-contradictory;
- anyone who will be adversely affected by a decision should not be left in the dark about a decision being made;
- a person must not thus be deprived of any opportunity to adduce additional material of probative value which, had it been placed before the coroner, might have deterred the coroner from making the finding; and
- the coroner must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquest whose interests may be adversely affected may wish to place before the coroner.

Bias

The rule against bias goes some way towards ensuring the independence and impartiality of coroners.

Bias was considered in *Re Sutherland* [1994] 2 NZLR 242. Barker ACJ discussed the tests for bias set out by the House of Lords in *R v Gough* [1993] 2 All ER 724:

> whether, having regard to the relevant circumstances, there was a real danger of bias on the part of the person or persons in question, in the sense that he or she might have unfairly regarded with favour or disfavour the case of a party to the issue under consideration.

and by the New Zealand Court of Appeal in *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146:

> the test of bias against a purely judicial officer is whether, in all the circumstances, the parties or the public might reasonably suspect that he was not unprejudiced and impartial.

and concluded that there is probably not much difference between the two approaches. (at 249)

Re Sutherland concerned a legally qualified coroner who knew the deceased and actually identified the body. The Court held that accepting the House of Lords' formulation of the test of bias and considering the matter objectively, there had been a "reasonable danger" of predetermination by the coroner of the cause of death of the deceased. Barker ACJ said at 249:

> A coroner who is legally qualified – particularly one in country districts – may at times have to preside over inquests on former clients; whether such a course is proper will depend on the facts of each case. But on the facts of this case, there must be a real danger that the knowledge of the deceased which the coroner must of necessity acquired over the years of her acquaintance with the deceased could, even subconsciously, have affected her judgment; her pre-knowledge might have rendered her incapable of deciding on a proper verdict purely on the evidence presented before her.

The Court also dealt with s 22 of the Act which permits a coroner who has a personal interest in the matter to authorise another coroner to hold an inquest (s 22(2)). It held that the words "personal interest" in s 22 were not limited to pecuniary interest, and that the coroner should not have sat on the inquest because by virtue of her knowledge of the deceased she had a "personal interest" in the subject matter of the inquest. (at 250)

Bias was also considered in *Matthews v Hunter*. The Court held that the proper test for bias was whether there were circumstances from which a reasonable person would think it likely or probable that the coroner would or did favour one side unfairly at the expense of the other. It said that an action of the coroner in conferring with two witnesses in private is a clear breach of s 25 of the Act and of the audi alteram partem rule because it implies that those witnesses receive the coroner's confidence. The Court further held that provided a judicial officer maintains an open mind to the end there can be no objection to the officer preparing notes in advance of a decision.

Remedies/quashing a finding

Generally, in judicial review proceedings, the main remedy will be to quash the coroner's finding and order a new inquest.

Even if a breach of impartiality is found, the decision of the coroner will not necessarily be quashed.

Although the decision of the coroner was quashed in *Re Sutherland*, in *Matthews v Hunter* the decision of the coroner stood because although the necessary appearance of an impartial hearing had not been achieved, in the overall circumstances there was not such an appearance of partiality as to justify quashing the findings of the coroner. (at 691)

CONCLUSION

In conclusion the following points are clear:
- in New Zealand the purpose of a coroner's inquest is described in s 15 of the Act;
- a distinction can be made between the "terminal cause" of death and the "real cause" of death, and a coroner should find the real cause of death;
- the coroner may make recommendations and comments on circumstances similar to those in which death occurred;
- an inquest is an inquisitorial fact-finding process and is not about finding guilt;
- the coroner may not attribute blame for the death to any person or persons, but sometimes this may be implicit in any general comments made by the coroner. Therefore the generality of such comments which would tend to attribute blame must be made clear;
- a coroner's finding can be subject to judicial review;
- all the rules of natural justice apply to a coroner's inquest;
- a coroner must observe the rule against bias, and this implicitly ensures independence and impartiality on behalf of the coroner; and
- a Court may order that a coroner's finding be quashed and a new inquest ordered.

Note on resources

Cases about coroners which do not interpret the 1988 Act should be treated with care.

The following cases may be referred to:

Matthews v Hunter [1993] 2 NZLR 683
Re Sutherland [1994] 2 NZLR 242
Burns v Legal Services Board [1995] 1 NZLR 594

The texts I used which were particularly helpful were:

Jervis on Coroners, 11th ed, 1993
Margaret Soper, *Coroners*, Vol 8, *Laws of New Zealand* ❑

RULES FOR LOBBYING

The Hon David Caygill, Buddle Findlay

explained to the AIC Administrative Law Conference

Things have changed from the days when everything had to be sorted in Wellington. Then good businesses had to be good lobbyists. The revolutionary decade from 1982 to 1992 seemed to change all that. For a while it seemed that lobbying had become a waste of time. The government knew its own mind or, as many claimed, wasn't listening. Now we have MMP and, some would say, the government is in two minds about everything.

Whatever the government, there are occasions, and there always will be, when you need the government's attention. I want to share some basic rules about how to get that attention. Some of these rules are obvious, but you'd be surprised how often they are broken.

- Identify the issues clearly. That is, work out what you are really trying to achieve and why you need it. Identify also the nature of the change you are seeking, ie are you seeking to change the law or are you after funding, or publicity, or an endorsement etc. Perhaps, on reflection, you don't need to trouble the government at all.
- Identify who is responsible eg:
- Only Parliament can amend or repeal a statute;
- A regulation will require the approval of Cabinet, though it may have later Parliamentary consequences;
- The decision you seek may lie within an individual Minister's discretion;
- Or the discretion may rest with an individual official, such as the Commissioner for Inland Revenue;
- Or the relevant power may lie with some quango (or "Crown agency" as they are called these days) eg the Commerce Commission;
- Determine who you need to talk to. This usually flows from who is responsible, but it's not quite that simple. For example, if a law needs to be changed you will probably need to talk to the relevant Minister. But you should always start with the officials. Don't go cold to a Minister. Officials will see the Minister after you have gone, so it's always wise to have spoken to them first. Sometimes that may be all you need to do;
- Leave a short briefing paper. Conversations often get forgotten and a paper gives something to follow up and something you may expect a reply to.
- Try to identify the officials' objectives. In other words, approach discussions exactly as you would a negotiation, ie by identifying clearly both your own and the other side's objectives. Then seek a mutual solution. NB: These days the government publishes detailed information of the services it is "purchasing" from government departments. These services are provided within a strategic planning framework of *Strategic Result Areas* and *Key Result Areas*. So you ought to be able to relate your objective to the government's.
- Don't try to be political. Avoid arguments like "This will appeal to the voters". Such approaches sound as though you are trying to do something that otherwise lacks justification. Ministers (and MPs) usually have far keener political antennae than you, which is why they are there and you are not. On rare occasions, you will find a Minister who is genuinely uninterested in politics and who will only feel insulted by such arguments.
- You don't always need to go to Wellington. Local departments have considerable discretion. Also their support can often be crucial, eg in many immigration cases or decisions of the Commissioner of Crown Lands.
- Consider the timing of what you are asking. For example, Parliament operates to a three-yearly timetable. The first year is largely occupied with the appointment of new Ministers. Much time passes as they come to grips with their portfolios. The second year is usually the productive year and the third year is often largely written off as everyone prepares for the next elections. There are therefore large periods of the calendar when what you seek may be either too early or too late.
- Also remember, things usually take longer than you expect (or than they would in the private sector). For example, you are doing well if you get a reply from a Minister or a government department inside one month.
- Remember that a letter to a Minister is not really a communication to him personally. It is a communication to his or her department. Most mail will not be seen at all by a Minister as it comes in. It may or may not be read on the way out, ie when he or she signs the letter the department has drafted in reply.
- Individuals matter. That is, the capacity and interests of Ministers vary – as, to a lesser extent, do the capacity and objectives of officials. What seems impossible under one Minister may be perfectly possible under another.
- On the other hand, rankings matter little. While seniority is usually a function of ability, many a young new Minister may be looking to make her/his mark or prepared to listen or help. On the whole politics is Darwinian, ie only the fittest survive.
- The economy also matters. In general, more things are possible when the economy is buoyant. This is a loose relationship however, because when conditions are depressed the government may well be looking for a breakthrough. And when things are going well the government may often be reluctant to muck things up.
- I'm speaking here of big picture issues – ie decisions that affect the whole Cabinet. There is no fixed rule as to what needs to go to Cabinet. The best answer is: anything a Minister's colleagues would expect advance notice of.

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GENDER ANALYSIS AND WOMEN'S ACCESS TO JUSTICE

Stuart Birks, Massey University

questions the Law Commission's approach in an abridged version of a paper published by the Centre for Public Policy Evaluation, Massey University

Over the last three decades ideological doctrines have infiltrated the curricula of many of the larger universities. Spurious academic subjects such as "black studies" and more recently "women's studies", putatively designed to "raise consciousness" and strengthen commitment to credos of "emancipation", manifestly fail to meet the stringent requirements of scholarship: certainly the doctrines of these ideologically inspired "studies" are not regarded by their proponents as provisional and refutable hypotheses. Clearly arrangements being made for their systematic propagation in these circumstances do not comport well with the idea of a university as a forum for open-minded enquiry and impartial scholarship.

(Mishan E J *The Costs of Economic Growth*, 1993, 202)

The Law Commission's Women's Access to Justice project is an application of "gender analysis". Gender analysis is not intended to be open-minded, objective research. It is ideologically inspired and has an in-built political goal. As such, its methodology is suspect.

As will be shown, the New Zealand legal establishment possesses institutional characteristics which can make it particularly vulnerable to capture by well-positioned parties promoting a particular interest. This is illustrated by the current situation.

WHAT IS GENDER ANALYSIS?

In 1996 the Ministry of Women's Affairs issued a publication called, *The Full Picture: Guidelines for Gender Analysis.*

To quote:

> What is gender analysis?
>
> Gender analysis:

- examines the differences in women's and men's lives, including those which lead to social and economic inequity for women, and applies this understanding to policy development and service delivery;
- is concerned with the underlying causes of these inequities;
- aims to achieve positive change for women.

It looks for and attempts to overcome inequities for women, but not for men. The identification of inequities involves the selection of indicators, obtaining the data, and applying value judgments to say whether a higher number is better or worse. There is scope for debate at each of these stages. A balanced approach would accept that the perspectives of all participants must be considered. Gender analysis aims to improve the position of women where they are considered to be disadvantaged, but to do nothing where they are considered to be advantaged. A distorted picture is presented which is likely to result in inappropriate recommendations.

Under "Guidelines for Action" (p 24), there is a subheading, "Consultation". There are five points – four refer to consultation with women. The fifth is to, "Seek the advice and assistance of the Ministry of Women's Affairs".

Not only are the issues selected with a pro-women focus (or perhaps more accurately a feminist focus), but the whole approach to gathering information appears to exclude input from men.

On p 8 there is the claim that,

> Gender analysis provides a basis for robust analysis of the differences between women's and men's lives, and this removes the possibility of analysis being based on incorrect assumptions and stereotypes.

It is difficult to see how this can be the case when there is no provision for equal consultation with men. Also an approach based on gendered groupings will inevitably result in explanations reliant on stereotypes. It is hard to see how such a one-sided and loosely defined approach can possibly meet the claim that it gives "the full picture".

THE WOMEN'S ACCESS TO JUSTICE PROJECT

The terms of reference of the Women's Access to Justice Project state that the Law Commission will examine the response of the legal system to the experiences of women in New Zealand with emphasis on family and domestic relationships, violence against women, and the economic position of women.

There is an emphasis on consultation with women, and an assumption that women are disadvantaged. The language and approach show that this project fits under the umbrella of gender analysis. We can therefore already anticipate many of the weaknesses inherent in the project. In particular, it is looking at the issues from one side only. This would seem to

run counter to a fundamental requirement of law and justice. Joanne Morris, Law Commissioner, has written to me explaining the Law Commission's choice of approach. The main points that I would identify in her letter are that:

- the focus of the project is not on substantive laws but on the legal services which enable the substantive law to be invoked;
- the effects of gender create a more marked set of difficulties for women seeking to access legal services than they do for men. For example:
- women are more vulnerable to poverty or low income because of their gender and,
- having not been participants in the legal system until relatively recently, are more likely to find its manner and style alien and off-putting;
- a male input is obtained in large part because they have received submissions from male lawyers, Judges and others involved in the administration of justice, and their meetings with those who work within the legal system are invariably attended by a majority of men reflecting the composition of the legal profession.

These are addressed in turn.

Men comprise the majority of offenders, but a minority of men offend, and they are generally young. It is hard to see how their experience can be expected to give them an advantage over women in subsequent Court appearances

The focus of the project

To quote two extracts from the terms of reference of the project:

> (i) Priority will be placed on examining the impact of laws
>
> (ii) The Law Commission ... will report to the Minister of Justice concerning: ... specific law reforms ....

The project is clearly intended to have an impact on policy making, to suggest changes to the law, and to influence the background information provided. In addition, changing the process can affect outcomes, and a big impact on judicial decisions and the interpretation of the law can be had without resorting to law changes.

The effects of gender

That the project uncritically builds on a foundation of feminist thinking is evidenced by the explanation given in a paper by Law Commissioner Joanne Morris, "Justice is not blind to the effects of gender". For example:

> it is manifest that men do experience difficulties in dealing with the legal system. But those difficulties are not attributable to men's gender – the socially constructed roles of men and the value placed upon them. ... the compounding effects of gender do seem to distinguish the quality of men's and women's dealings. (pp 7-8)

Unfortunately, as suggested by Mishan in the quote at the beginning of this paper, we are expected to accept these claims on faith as a justification for modifying our legal system.

Gender might be an important influence on perceptions and expectations. This does not mean that women are necessarily the ones who would be disadvantaged, however. For example, a father seeking custody might be required to prove to a sceptical Court that he is a fit parent and also that the mother is unfit. In the context of women's violence, Pearson writes: "Because we won't concede aggression and anger in women, the language we use to describe what they do is much more limited, and much more exonerative." (Pearson P *When She Was Bad: Violent Women and the Myth of Innocence*, 1997, 42)

Poverty or low income?

It is claimed that women have more marked difficulties because of poverty or low income. Presumably this statement is based on national data on incomes of men and women. It should be based on information on the availability of funds to those requiring legal services. These are not the same. For example, it is insufficient to say simply that women are disadvantaged because they earn less than men. There are intra-family reallocations of income, so a woman is more likely to have access to funds from the income of a higher-earning partner. There should also be consideration of the demographics of users of the legal services. Male users are not necessarily representative of men in general.

Alien and off-putting

Men comprise the majority of offenders, but a minority of men offend, and they are generally young. It is hard to see how their experience can be expected to give them an advantage over women in subsequent Court appearances (when contesting custody, for example). Conversely, women's contact with the Court is more likely to be a positive experience and some areas, such as Court ordered counselling, are arguably far more in tune with women's needs and experiences than they are with men's.

In a year, perhaps two per cent of the male European population have cases resulting in conviction (ignoring the possibility of one person having several cases). Perhaps half of these are men under 25. Their experience is supposed to result in all European men, including those with convictions, not finding the legal system "alien and off-putting".

Much of the contact that women have with the legal sector occurs in the Family Court. This contact would commonly arise in the context of disputes with men. The failure of the project to seek a substantial input from men therefore means not only that many of the users of the sector are overlooked, but also that the concerns of one side only are considered.

The Family Court's work involves input from people with various skills besides the law. In particular, it works closely with psychologists, counsellors and social workers. It could be argued that men are more likely to find these people and their approach "alien and off-putting". A large proportion of these workers are women, and their training may not give them an unbiased perspective.

Women may have far more contact and familiarity with important aspects of the system. Those working in these areas may also be more familiar with and sympathetic to women's perspectives.

Men represented by male lawyers

The Law Society has made a submission to the Women's Access to Justice project. The defence of lawyers against criticisms raised by the project is that women who are satisfied would not make submissions. It fails to mention

that men may also have a viewpoint and that men's perspectives may be different from women's. Given this oversight, it is unlikely that law professionals would adequately represent men's views as claimed by Joanne Morris.

Why is the legal establishment vulnerable?

What influence might the Women's Access to Justice project have? Will its recommendations be subject to rigorous scrutiny? Will they be seriously challenged in the Courts and elsewhere? Are errors or biases likely to be speedily identified and corrected?

a woman who shot her partner was given a suspended sentence. One "justification" given is that she "believed she was not being taken seriously"

Specialist issues

In an earlier paper (Birks S and Buurman G (1997) *Is the Legal System an Efficient Regulatory and Dispute Resolution Device? Issues Paper No 1*, Palmerston North: Centre for Public Policy Evaluation, Massey University), Buurman and I suggested that the law fulfils a service to society. It does not exist and operate in isolation. Rather, it is used to address issues which, to be properly understood, require an understanding of other specialisms. If, for example, the law is used to resolve an economic issue, then the arguments used and the decision reached should stand up to critical scrutiny on economic terms. It should therefore be assessed on that basis.

Judges and others in the legal profession may be experts in law, but in areas such as economics and families they are amateurs. They are heavily reliant on appropriate professional support in these and other areas. They may be misled by inappropriate or inaccurate information.

Lack of transparency – menus and plausibility

In *Logan v Robertson* [1995] NZFLR 711 late submission of a husband's affidavit was not permitted because "the directions of the Court were not to be treated as non-binding guidelines". In *Nichols v Nichols* [1996] NZFLR 311 the same Judge allowed late submission on the grounds that "an injustice could have been done to the wife if she had been unable to have the affidavits introduced". No justification for these conflicting approaches is presented. It is as if there is a "menu of principles" which can be drawn from as necessary to support the desired result.

The *Dominion*, 18 December 1997, reports on an appeal in the case of a man convicted of rape. His defence counsel had chosen not to present evidence that he was impotent, claiming that it would have been "dangerous" to run that defence in addition to the chosen approach. This suggests that cases presented to the Court consist of selected pieces of information tailored and interpreted in an attempt to make a "plausible story". The party with the most plausible story then wins. Plausibility will depend on the Judge or jury's preconceived views. Widespread misinformation could therefore have a big effect on Court decisions.

Discretion and pressure

In reference to *Z v Z* [1997] NZFLR 241, Roger Kerr ("Commerce, Certainty and the Courts", [1997] NZLJ 361) refers to "cases ... regarded as merely a trigger for the Judge's social activism ..." (362). At 363 he uses the term "bootstrapping" to refer to "the frequent repetition of comments on unargued matters until they are regarded as representing the law". This sounds remarkably similar to Mishan's "doctrines" as compared to "provisional and refutable hypotheses" in the quote at the start of this paper. If Kerr is correct in his assertion, then doctrines can become part of law without proper investigation or analysis. This is a particular concern if Judges aspire to social activism while being primarily exposed to one-sided information.

A "team" outcome

The outcome of Court action does not depend on Judges alone. There are other participants in the process and effective and appropriate behaviour is also required from them. If, as is suggested in Cotter W B and Roper C, *Report on a Project on Education and Training in Legal Ethics and Professional Responsibility for the Council of Legal Education and the New Zealand Law Society*, (1996, New Zealand Law Society), the professionals working in the legal system have reason to behave in inappropriate ways, and if their respective professional bodies are unable or unwilling to effectively constrain and discourage such behaviour, then Judges will be faced with a particularly challenging task.

Innovation and precedent

Evolution of common law without good information or understanding of relevant areas could be very damaging. If there is no further monitoring of the effects of decisions, it could take a long time for approaches to be identified as unsuitable. Confidentiality as exists in the Family Court can be a factor in extending this process. In the meantime, similar decisions could be made, erroneously, on the assumption that they are appropriate.

There are also issues of cost and uncertainty of outcome. While it might be considered desirable that the law can evolve and adapt to meet society's changing circumstances, the cost of this process increases the financial burden of the particular litigants concerned, perhaps prohibitively.

Background information from the WAJP and elsewhere

Information shapes opinions and influences decisions. This section considers information provided on the areas of incomes, the measurement of unpaid work, the effects of separation, domestic violence, and perspectives of experts, but first the project's claim that the law is biased against women is addressed.

Bias against women?

Joanne Morris, refers in her paper to women's conviction that they, "because of their gender, are at a disadvantage in obtaining justice". She appears to accept the existence of a "systemic gender bias". No evidence is presented in support of this claim. Overseas debate suggests that the reverse may be the case. This debate focuses on questions such as:

- Given a situation, are women as likely as men to be charged with an offence?
- If charged, will the charge be as serious?
- Once charged, are women as likely to be convicted?
- If convicted, will the sentence be as severe?

Reports in the *Evening Standard* suggest that the answers to these questions in New Zealand, in relation to violent offences at least, would be, "No":

- 10 October 1997 – a woman who shot her partner was given a suspended sentence. One "justification" given is that she "believed she was not being taken seriously".
- 3 December 1997 – a sixteen-year-old girl was given a suspended sentence for "smashing the face of a bartender with a beer bottle ... causing severe cuts to the side of his face which needed 32 stitches".
- 2 February 1998 – a seventeen-year-old woman had committed two assaults. The Judge thought the light charges she faced were possibly due to gender. She was sentenced to three weeks in prison.
- The same Judge heard another case on the same day as the above. An eighteen-year-old man participated in a takeaway robbery. The man, "amateurish" and "inexperienced", produced a knife. There was no violence. He was sentenced to four and a half years in prison.

There are indications of possible gender bias in other areas of law also. *The Child Support Review 1994: A Consultative Document* (1994, Inland Revenue Department) specifically addresses the question of gender bias in the Child Support Act. On p 16, the issue of gender discrimination in the legislation is dismissed on the basis that:

> The Act is only concerned with the provision of financial support from absent parents toward their children, not the gender of the liable parent or custodian.

The language is clearly gender neutral. However a bias is apparent. On p 24 it states that:

> a strong disincentive to workforce participation could result if every dollar earned by the custodian over a given threshold resulted in a decrease in child support. As 84 per cent of lone parents are women, structural gender based inequities in the labour market could be worsened.

In other words, the legislation is designed to meet gender-specific objectives. This reasoning also results in people being treated according to some (claimed) average gender-based characteristic. In other words, it is based on gender, not the characteristic itself. This is gender stereotyping.

Incomes

Paragraphs 41 and 42 of the project's *Miscellaneous Paper 10* contain some census data comparing men's and women's incomes. It is stated that "women are over-represented in occupations with low median incomes, such as clerical and service occupations". This is not what we find in the 1996 census. The occupations with low median incomes are service and sales workers; agriculture and fishery workers; and elementary occupations. These cover 25.47 per cent of men and 24.76 per cent of women. Legislators, administrators and managers; professionals; and technicians and associate professionals are occupations with high median incomes. These cover 36.15 per cent of men and 40.18 per cent of women. Contrary to the WAJP claim, these figures suggest that women are over-represented in occupations with high median incomes. This is more remarkable because women are more likely to work part time, which is likely to deflate the median income more in those occupations where they are concentrated.

Contrary to the WAJP claim, these figures suggest that women are over-represented in occupations with high median incomes

Measurement of unpaid work

It is said that women bear a double burden, doing the majority of the unpaid work in addition to paid work. A common source of information on unpaid work is time use surveys. These consistently show that, on average, men and women spend about the same amount of time in total on paid and unpaid work.

Two New Zealand studies have been undertaken so far: Fletcher, G J O (1978), "Division of Labour in the New Zealand Nuclear Family", (1978) 7 *NZ Psychologist* 33 and Department of Statistics *Testing Time: Report of the 1990 Pilot Time Use Survey*, (1991).

Fletcher's study has been used to show that women perform the greater part of unpaid work in the home, and that women who switch from "home-makers" to full-time paid workers experience a big increase in total hours worked while their partners' total work time hardly changes. While the study does support these findings, it has been incorrectly used to support claims that women are disadvantaged. Where the woman was a home-maker, working men's total work hours were 66.4, compared to 54.8 by their spouses. The men were working on average 11.6 hours more than their wives. Where both partners were in full-time paid work, the increase in the woman's hours worked was primarily a catch-up (with 66.3 hours worked by the man, and 68.1 by the woman).

Testing Time also does not show women doing a disproportionate share of the work. Figures on p 21 show that the sum of paid and unpaid work took up 34 per cent of an average 24-hour day for men and 28 per cent for women. Note that this considers primary activities only. It could overstate work time in that leisure activities could be undertaken at the same time, and it could understate work time as it would not include work done as a secondary activity.

Statistics New Zealand is currently undertaking a time use survey under contract to the Ministry of Women's Affairs. There are some worrying aspects to this study. It may not be following accepted practices for time diary studies and there may be undue emphasis on "caring" activities, with possibly inflated estimates of time spent on these activities. There are also likely to be distortions resulting in understatement of separated mothers' incomes and overstatement of separated fathers' incomes.

The effects of separation

The project's *Miscellaneous Paper 10* in para 45 and *Miscellaneous Paper 11* in para 52 state that women suffer a major fall in income following separation. They draw on the famous study by Leonore Weitzman. Weitzman has admitted that her figures are wrong (Weitzman L J "The Economic Consequences of Divorce are Still Unequal: Comment on Peterson" (1996) 61 *American Sociological Review* 537).

Gabrielle Maxwell was engaged as an expert witness in *B v B* [1997] NZFLR 217 to present evidence showing, on their income measure, that women fared worse than men after separation. She drew on Maxwell G M and

Robertson J P *Moving Apart: A Study of the Role of Family Court Counselling Services*, (1993) Department of Justice. The study was conducted in the late 1980s. Subsequent policy and other changes may mean that her information is no longer applicable. It would also be too soon for most of the changes in earnings and alienation and loss of contact between fathers and their children to have occurred.

In their paper, Maxwell and Robertson present other information besides incomes. As the issue is one of relative wellbeing of men and women post-separation, this information should be considered in addition to, or even in place of, the income figures used. This other information shows that women tended to make the decision to separate, 30 per cent of them perceived themselves to be better off in terms of income after separation, they fared better than men with housing, they were happier about their situation with the children, and they recovered from the separation better than men.

Domestic violence

Miscellaneous Paper 11 discusses violence against women on pp 17 and 18, making the claim that, "Violence against New Zealand women is also an effect of gender ...". (page 17.) This is a puzzling claim and the data presents only part of the story. Local and overseas studies indicate high levels of female violence.

Karen Holdom ("Femme fatal", *More*, April 1995, pp 80-82) quotes Liz Malcouronne, a coordinator at Waitakere Women's Self-Help Trust:

> Liz Malcouronne admits she feels uncomfortable about putting female aggression into the limelight. "It's very sensitive because when you start talking about women being violent it takes the emphasis away from men being violent. It's like transferring the responsibility. You don't want to take the heat off men". (p 82)

Pearson (1997) says:

> Women commit the majority of child homicides in the United States, a greater share of physical child abuse, an equal rate of sibling violence and assaults on the elderly, about a quarter of child sexual abuse, an overwhelming share of the killings of newborns, and a fair preponderance of spousal assaults. (p 7)

and:

> In Canada, young women now account for 24 per cent of all violent offences in their age group .... (p 32)

Figure 1 on p 6 of Moffitt T E, Caspi A and Silva P (1996, *Findings About Partner Violence from the Dunedin Multidisciplinary Health and Development Study*, Dunedin Multidisciplinary Health and Development Research Unit) has New Zealand results. For the cohort in the study, a higher proportion of women than men were perpetrators of violence.

The data on violence also require careful interpretation and may be misleading. There are alternative explanations of violence and the nature of violent and abusive relationships. The patriarchal power and control approach appears to dominate current thinking. There are flaws in this approach. It would be inappropriate to put too much emphasis on one explanation alone.

CONCLUSION

Why take a gendered approach? If differing characteristics are important, then those should be considered. We should be wary of basing policies and laws on the assumption that characteristics are purely gender-based, however. If, as is clear, they are not, then aggregation is misleading.

Gendered research as in the Women's Access to Justice project, focusing on only one group, makes other groups invisible. This can result in distorted perspectives, with conclusions which would not be supported if a wider perspective is taken.

This is a real danger. The existence of "gender analysis" indicates that we cannot assume gender impartiality by professionals. At the very least, the information is heavily weighted towards presenting women's perspectives and issues. More seriously, perhaps, when a society widely adopts a term such as "political correctness", it indicates that there are many people who feel that they cannot openly voice their true opinions.

Disadvantage requires both differences and relevant values assigned to those differences. Does gender analysis identify differences appropriately, or with bias? For example, why is it suggested that men should do half the unpaid work if they are doing more of the paid? Once differences are identified, are the correct values assigned? How can we know this if men are not also consulted to see what values they place on these issues?

In summary, we should be asking whether gender analysis as in this project is really of any value, or if it merely hides the real issues. Is it, as Mishan would suggest, the systematic propagation of an ideological doctrine, rather than open-minded inquiry and impartial scholarship? ❑

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continued from page 165

This includes anything for which they will need to take collective responsibility. Thus any legislation or regulation will need to go to Cabinet.

- On the other hand small things, affecting one Minister only, may depend entirely on the willingness of that Minister because other Ministers lack direct interest.
- Finally, MMP. I left it till last because I think it is not hugely relevant – except to journalists. MMP has affected Parliament more than it has affected the government. We have six parties in Parliament, five of whom are bigger than the "minor" parties were under FPP. The government is now a coalition (and likely will stay that way). But the major parties were always a cross-section of interests. And manifestos, which is what the Coalition Agreement is, in effect – were always tagged "E&OE".
- Most of the problems the government encountered last year reflected the inexperience of the junior coalition partner, which did not understand the importance of Cabinet solidarity – better known as "collective responsibility" (ie they forgot the maxim: "We must hang together or we shall all hang separately"). Also the importance of working out key priorities and concentrating on them rather than on headline-hunting.

SUMMARY

Leave the headlines to the politicians. Work out what you want. Seek the means of achieving it which involves the minimum impact (ie don't change the law unless you absolutely need to). Avoid big spending proposals and regulation if at all possible. But if you do need to approach the government and you want to avoid disappointment, then think carefully and take advice. ❑

RECENT LEGISLATION

CRIMINAL PRACTICE

edited by
Catherine Cull

EVIDENCE (WITNESS ANONYMITY) AMENDMENT ACT 1997

This legislation was passed at a time when there had been a great deal of publicity relating to the intimidation of witnesses in trials involving gang members. The Court of Appeal had just given its decision in *Hines* ruling that the trial Courts did not have the inherent jurisdiction to provide witness anonymity. Thus the community saw the Courts as suggesting that the unjust avoidance of conviction by some criminals through witness intimidation as being an acceptable price for ensuring that innocent people are not convicted. The opinion generated was that this approach would allow criminals to place themselves above the law. Accordingly Parliament rushed to pass legislation to remedy the situation.

One of the major questions has been whether there was a need for this legislation and whether it was a knee jerk reaction.

The Law Commission questioned whether there was a need for change in its Discussion Paper entitled Evidence Law Witness Anonymity. There was no statistical evidence to show that there was in fact a significant and growing problem of witness intimidation in New Zealand. The Law Commission drew on the clear evidence that there had been an increase in violent crime only and from anecdotal evidence from a variety of sources. For example reference was made to a letter written by Neville Trendle, Assistant Commissioner of Police, 25 July 1997;

> At least 14 specific instances of witness intimidation were reported in the news media in 1995-1997. Several newspaper articles have also been published detailing police measures against police intimidation at trials. In the same period there was one reported instance of a trial in Christchurch being abandoned after a witness failed to show up, allegedly as a result of intimidation, see *The Press*, 15 October 1996, 15. In New Plymouth on 6 October 1996 a potential witness, Christopher Crean, was killed before he could testify in a gang-related trial. The killing received widespread publicity at the time. The Police have a clear impression that the intimidation of witnesses has increased over the last few years. This cannot be confirmed by crime statistics, but there was, for example, an increase from 112 to 169 between 1993 and 1997 in the number of reported offences involving the obstruction of or attempts to pervert justice.

This type of information led the Law Commission to conclude that "intimidation arises particularly in cases that are gang related and those concerning family violence".

In the *Sunday Star* on October 26th 1997 in an article entitled "Is Secret Witness Law Thin End of the Wedge?" Jane Dunbar discusses the background to the new legislation and she states that:

> even the Law Commission, which is recommending the change, acknowledges its deliberations had to rely on a perception of an increase of witness intimidation rather than hard statistical data. In the commission's discussion paper, it admits "no statistical information is available" regarding the incidence of witness intimidation, but argues "there appears to be a significant and growing problem" and, combined with other factors, this makes a strong argument for change.

The Law Commission concluded (p 5):

> The Law Commission would prefer to have received statistical information about how often, and in what ways, witnesses are intimidated. In other circumstances we might have conducted our own survey. Without such statistics we cannot say definitely whether legislation is needed. Our provisional view is that the time has come; but we would be happy to be proved wrong;

These comments suggest that the need for this legislation was not as obvious and clear as perhaps the community thought and one needs to ask the question as to whether the legislation has in fact been passed because of mass hysteria rather than cold hard facts.

The law change had the aim of stamping out intimidation of Court witnesses, particularly by gangs and there was a lot of public debate about the pros and cons of such legislation.The question whether to grant witness anonymity involved the consideration of significant competing interests. The right of a defendant to a fair trial is of fundamental importance and yet the right of the public to the protection of the law should not quickly be compromised. It is a radical change to the time-honoured principle that the accused should see and hear who is doing the accusing.

An application for witness anonymity can raise the practical issues of;

- veracity of police information
- the form in which that information should be given to the Court
- the possibility of the right to cross-examine the witnesses seeking anonymity
- the right to appeal if pre depositions an order is declined or made
- the opportunity for the accused to answer the allegations of intimidation
- personal responsibility as opposed to treating the matter as concerning an overall gang and therefore imposing the same conditions on all members.

The ramifications of this legislation are far-reaching and after analysing the law itself I intend to look at some of those ramifications.

Section 13B

provides for a pre-trial anonymity order. An application can be made for such an order if a person is charged with an offence and is to be proceeded with by indictment.

Accordingly all offences do not carry with them the opportunity for the prosecution to apply for witness anonymity. A check

of the various schedules and legislation outlined below should be the starting point when one is analysing an application on behalf of the Police for witness anonymity.

1. Section 2 Crimes Act 1961 defines offence as any act or omission for which anyone can be punished under the Crimes Act or under any other enactment, whether on conviction on indictment or on summary conviction.
2. Section 2 Summary Proceedings Act 1957 defines an indictable offence as any offence for which the defendant may be proceeded against by indictment: Provided that an offence shall not be deemed to be an indictable offence solely because under s 66 of Summary Proceedings the defendant could elect trial by jury.
3. Section 2 also defines a summary offence as any offence for which the defendant may not, except pursuant to an election made under s 66, be proceeded against by indictment; and, where the enactment creating an offence expressly provides that it may be dealt with either summarily or on indictment, includes such an offence that is dealt with summarily.
4. Section 66(1) Summary Proceedings Act 1957 states that any person charged under this Part of this Act with an offence which is punishable by imprisonment for a term exceeding three months shall be entitled, before the charge is gone into but not afterwards, to elect trial by a jury.
5. Section 66(4) states that where a defendant who is charged under this Part of this Act with an indictable offence elects under this section to be tried by a jury, the proceedings shall continue as if he had been charged on an information setting out the charge was indictable. (Second Schedule Summary Proceedings Act)
6. Section 66(5) states that where a defendant who is charged with a summary offence elects under this section to be tried by a jury, the proceedings shall continue as if the offence were an indictable offence not punishable summarily.
7. Section 6(1) Summary Proceedings Act sets out that a Court presided over by a District Court Judge shall have summary jurisdiction in respect of the indictable offences described in the enactments specified in the First Schedule to this Act, and proceedings in respect of any such offence may accordingly be taken in a summary way in accordance with this Act.
8. Section 7 Summary Proceedings Act sets out the maximum penalties on summary conviction for an indictable offence ... five years imprisonment or maximum $10,000 fine.
9. Section 8(1) Summary Proceedings Act nothing in this part of this Act shall limit in any way – (a) the right to proceed against any person under Part V of this Act. ie the prosecuting authority is able to determine that a matter be proceeded with on indictment, irrespective of an accused's election.

Thus an application pursuant to s 13B can only be made for offences which are purely indictable. For those which an accused is charged with a purely summary matter or elects trial by Judge alone no orders can be applied for. Accordingly, the Police may increase the number of charges they elect to lay indictably in order to get the right to make such an application.

Once it has been determined whether or not there can be a pre-trial application made pursuant to s 13B it is suggested that the next step is to identify and clarify the exact grounds on which the prosecution are making their application. I understand that the normal procedure is that affidavits are filed together with the application and these set out why the witness has a fear of intimidation. These affidavits are not done in the witness's true name and in fact s 178A of the Summary Proceedings Act has been specifically amended to allow a deposition or other written statement given by a witness who is the subject of an application for an anonymity order made under s 13B or s 13C of the Evidence Act 1908, or is the subject of an anonymity order made under either of those sections, to be given and signed by the witness using the term "witness" followed by an initial or mark.

This provision does raise some concerns because there is no way that one can independently verify that the witness has actually read and marked the document nor can any investigations be done on the witness to test their veracity. Thus a Court is asked to rely on unchallenged evidence of unnamed and unidentified witnesses.

There does not appear to be any provision for there to be a challenge to the affidavit evidence of a proposed witness which again can give the Court a one-sided view. Like other proceedings there must be an opportunity to cross-examine the deponents but, looking at the legislation I am not sure how that could be done logistically.

Section 13B (4)

the Judge may make the order if she or he believes on reasonable grounds that:

- The safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed prior to trial; and
- Withholding the witness's identity until the trial would not be contrary to the interests of justice.

The Law Commission (p 22) set out some valuable insights into how a Court should look at this issue:

82. Anonymity is usually granted to protect witnesses from retaliation. There are a number of elements to consider in determining whether, and in what form, retaliation is likely; whether an actual threat must be proved; the kind of harm feared by the witness; whether the belief or state of mind of the witness is relevant; and the standard of proof to be met.
83. In the United States the cases appear to require an actual threat to the life of the witness to be shown before anonymity will be granted. However, the Law Commission's view is that to require an applicant to show that there has been an actual threat against the life of the witness is to set the standard too high. Lesser threats of violence against witnesses are equally effective at dissuading people from testifying. Further, it is the fear of harm which will often influence a witness's conduct.
84. In England the Courts require that there be "real grounds for fearing the consequences" if a witness testifies. The cases do not specify what the feared "consequences" of testifying must be before a witness anonymity order is granted. The Law Commission proposes that the fear of the witness should relate to the risk of serious personal harm (serious personal harm to a person). Although fear of financial harm may also be sufficient to persuade a potential witness not to testify, the Commission's view is that a witness anonymity order should only be granted in exceptional circumstances.

Section 13B(5)

without limiting subs (4), in considering the application, the Judge must have regard to –

- The general right of an accused to know the identity of witnesses; and
- The principle that witness anonymity orders are justified only in exceptional circumstances; and
- The gravity of the offence;
- The importance of the witness's evidence to the case of the party who wishes to call the witness; and

- Whether it is practical for the witness to be protected prior to the trial by any other means; and
- Whether there is other evidence which corroborates the witness's evidence.

The grounds set out above do appear to be fairly stringent in the sense that the section states that an order can only be made in exceptional circumstances. Although this phrase is hard to define it would be my argument that a mere fear of gang retaliation would not be enough to justify an order. Any witness runs the risk of having problems with accused persons whether they are in a gang or not, so there would need to be grounds which were far more specific and directed at the particular witness, from the accused. At p 19 the Law Commission states:

> 65. Law reformers must take a long view, standing back from the heat and controversy of a particular case. It can be powerfully argued that to allow anonymous evidence entails a cure that is worse than the disease, responding to the mischief of witness intimidation by depriving accused persons of the right to full cross-examination that has protected individual freedoms in England and New Zealand for hundreds of years. The only justification for change can be that proposed by Gault J – that an absolute rule of exclusion is an "invitation for intimidation of witnesses".
>
> 66. We agree that the power is needed, as a reserve power to meet such abuse. But it must be most carefully circumscribed, to avoid a distortion of our system of justice in a way that, being more insidious, is even more dangerous than witness intimidation.

The section also discusses the factor of gravity of the offence. I am not sure quite how that would come into the balance, the more serious the offence the more likely anonymity will be ordered to obtain evidence for a trial, yet surely the accused who faces a severe penalty has the right to know the identity of the accuser.

The other factor listed is whether there is other evidence that corroborates the witness's evidence. I am unsure whether this means that if there is corroboration then it is safer to have anonymity or is it the other way around?

If a pretrial anonymity order is made then the depositions must be heard by a Judge, see s 5 Summary Proceedings Act 1957 amended to include (2). No preliminary hearing of a charge may be conducted by justices if a pre-trial anonymity order under s 13B Evidence Act 1908 applies to the proceeding and the witness is to give oral evidence at the hearing.

Section 13C

provides for witness anonymity for the purpose of a High Court trial. This section applies if the accused is committed to the High Court for trial; or is committed to the District Court for trial but is the subject of an application under s 28J of the District Courts Act 1947 to transfer the proceedings to the High Court.

For completeness, s 28J District Courts Act 1947 states that where any person is committed under s 168A Summary Proceedings Act 1957 to a District Court for trial or where proceedings have been transferred to a District Court for trial by order made under s 168AA the accused or the prosecutor may, either before or after an indictment is presented, apply to a Judge of the High Court for an order directing that the person be tried in the High Court.

Unlike an application under s 13B an application under s 13C adds another factor to be considered by the Court hearing the application and that is the truthfulness and reliability of the witness seeking anonymity. Matters which should be taken into account are set out in the Law Commission's Discussion Paper:

- the relationship if any of the witness to any of the parties;
- whether the witness was previously known to the defendant;
- any interest the witness may have in the outcome of the case;
- any facts or circumstances which call into question the credibility and reliability of the witness; and
- whether there is any evidence which contradicts in a material way the evidence of the witness which, if believed by the jury, will call into question the witness's credibility or reliability.

One of the questions often asked is can there be an appeal from any decision pursuant to an order being made under ss 13B or 13C. Section 379A Crimes Act 1961 sets out the instances when there can be appeals before trial.

For example, in *R v G* (CA62/98, 23 April 98; Eichelbaum CJ, Henry and Smellie JJ) the Court of Appeal confirmed that s 379A Crimes Act 1961 did not specifically include s 23A Evidence Act 1908 and accordingly there could be no appeal pre-trial.

Although s 13A is included (anonymity of undercover police officers) and s 13C, s 13B is not included. This seems to suggest that if an order is not made for the depositions there is nothing the prosecution can do about it other than to try and bolster up the reasons for the order.

Section 13D

seems to confuse the matter of when an order can be made in relation to an application to have the matter sent up to the High Court pursuant to s 28J District Courts Act. It states that if there is an application to transfer the case to the High Court pursuant to s 28J District Courts Act 1947 and a witness anonymity order is made under s 13C before the application is dealt with under s 28J then the Judge considering the application must transfer the proceeding to the High Court.

It should also be noted that s 13(2) states that if a witness is the subject of an anonymity order under s 13C the trial must be held in the High Court.

Section 13E

states that independent counsel may be appointed by the Judge hearing an application pursuant to s 13C and directed to look at, amongst other things:

> the safety of the witness or of any other person is likely to be endangered, or there is likely to be serious damage to property, if the witness's identity is disclosed; and

Either,

> (i) there is no reason to believe that the witness has a motive or tendency to be untruthful having regard (where applicable) to the witness's previous convictions or the witness's relationship with the accused or any associates of the accused; or
>
> (ii) the witness's credibility can be tested properly without disclosure of the witness's identity.

The aim of s 13E according to the Law Commission is to "compensate as far as practicable for the disadvantage to the defence occasioned by the order". It must be noted that the appointment of counsel to fill this role is to be done carefully from members of the experienced criminal Bar. The Law Commission stated at p 20 "It will be desirable that such counsel enjoy the confidence of the Court, of the defence and of the Crown".

Such appointment should be mandatory and that counsel should have access to all police files, medical reports and any other relevant information and may speak with and question the witness. Taking this course means that the possible difficulties relating to cross-examining the witness seeking anonymity can be overcome.

Despite the Law Commission's proposals regarding appointment of independent counsel the legislation appears only to enable counsel to be appointed on s 13C applications but not those under s 13B. This seems an oversight given the fact that once

evidence is given at depositions it practically guarantees a subsequent trial even if the prosecution is left with using a signed deposition statement only. It seems inappropriate to have split ss 13B and 13C. Surely all applications should be dealt with in the High Court using the same procedures regardless of when the application is made, ie before or after committal.

BAIL

One of the ramifications that appears not to have been considered is how witness anonymity and its availability affects applications for bail and in particular those offenders that come within s 318 Crimes Act 1961.

Section 318(3) Crimes Act states that:

> ... no person to whom subs (2) of this section applies shall be granted bail or allowed to go at large unless the person satisfies the Judge on the balance of probabilities that bail should be granted, and, in particular (but without limiting any other matters in respect of which that person must satisfy the Judge under this subsection), that the person will not, while on bail or at large, commit any offence involving violence against, or danger to the safety of, any other person.
>
> (4) In deciding, in relation to any person to whom subs (2) of this section applies, whether or not to grant bail to that person or allow that person to go at large, the need to protect the public shall be the paramount consideration.

The concern is how does the new anonymity legislation slacken if at all the standard to be used to grant bail?

Often in bail applications a ground used for opposition is the likelihood of intimidation of witnesses, not so much that the offender may not answer bail or would reoffend on bail. Thus if there is provision to protect witnesses from intimidation other than the keeping of the offender in custody, can intimidation continue to be a ground on which bail can be opposed?

If a Judge has granted bail, does that mean that on the evidence presented at the bail hearing there is nothing to justify the anonymity order and vice versa? Is there in other words a predetermination of the anonymity issue because issues of safety to others is clearly a factor in a bail application?

The police form for opposing bail sets out a number of reasons for opposing bail and specifically includes threats to witnesses/victims and/their families; likelihood of interference with witnesses or victims. If the application is based on s 318 the form states that the paramount consideration is the need to protect the public.

CONCLUSION

It will be interesting to see how this legislation operates in practice and whether it will be as liberal as the community perhaps first thought. In my view any applications made under this Act must be very carefully considered and a decision to make an order should only be made in extreme circumstances.

CASE COMMENT

Lucas v Williams (HC Palmerston North, Ap 29/97, Gendall J)

At [1997] NZLJ 385 this column discussed the principles of case management and the impact of these principles on the rights of an accused. The article concentrated on criminal jury trials and discussed the need for the gathering of information relating in the main to the clear aim or policy behind case management and whether in fact those procedures can achieve those aims.

At [1998] NZLJ 2 the Chief Justice and the Chief District Court Judge wrote to the editor. They stated:

> There is worldwide recognition that Court time is an expensive public resource which, in the interests of litigants and the general public, needs to be effectively managed. Speedy trials consistent with adequate time to prepare are in the interests of the Crown, the defence and the public. Effective criminal case management techniques allow the early identification of issues for trial, ensure that once trials commence they are completed without delay and are considerate of ever reluctant jurors and their daily lives. They also ensure the information that needs to be exchanged between the parties is exchanged early, and that the administrative procedures associated with the trial are efficient and are not in themselves a cause for delay. The mischief to be met is the injustice of delayed trials for all – the remedy has been application of well tried and established case management techniques.

In February 1998 Justice Gendall heard a civil appeal, *Lucas v Williams*, which involved the failure of one party to comply with timetable orders. Although not directly on point for criminal cases the statements made by Justice Gendall I believe could equally be applied to criminal cases.

At p 3 His Honour states;

> It is beyond doubt that the High Court and the District Court need to regulate their procedures, particularly in civil work so as to achieve efficient expeditious cost effective resolution of cases, not only in the interests of parties but in the interests of resources available to the public to have their cases determined as quickly and cheaply as possible. It is for that reason that the Courts are zealous to ensure timetable directions and orders are made and enforced. However, it seems that the course of justice does require there to be flexibility and an adjustment to timetables or procedural requirements so as to ensure in the end that justice is done.

Gendall J then goes on to refer to the Court of Appeal in *McEvoy v Dallison* [1997] 3 NZLR 11, 21 "The dictates of fairness must prevail over the demands of efficiency".

In concluding he states at 4:

> It is not to be thought that this Court will be critical of essential timetable procedures, vitally necessary for the efficient administration of justice, but it is necessary that in appropriate cases concessions and flexibility exist so as to ensure that independent and individual judgments or decisions from time to time are made based upon overall circumstances that then exist, and not solely because of a need to rigidly adhere to timetable directions.

Although Gendall J has viewed the principles of the administration of justice from a civil law standpoint, it would appear that these comments should equally apply to the criminal forum. A balancing act must be performed by Judges involved in administering criminal trials. There is no doubt that injustices can be caused by delay and that the interests of the litigants and the public should be important factors in case management decisions. However, there must be some flexibility and careful consideration taken when making case management decisions to "ensure in the end that justice is done". The demands for cost effectiveness and efficiency do not sit easily with the criminal trial process and the strategies and tactics used in jury trials. Despite the move to try and stop the use of such tools in the jury trial forum, surely, it must be in the interests of justice that the accused be given the opportunity to benefit from them at any time and should not be prevented because a timetable order was not met. ❑

RECENT CASES

TRANSACTIONS

edited by
Brian Keene

MUTUALITY OF RELATED SECURITIES/ TRANSACTIONS

Morris v Rayners Enterprises House of Lords, 30 October 1997.

The complexities of banking securities and the importance of their interrelationships is strikingly emphasised in this decision. The case arose out of the collapse of the BCCI Group in the United Kingdom. The plaintiffs were the liquidators of BCCI. That company had lent Rayners US$3.5m on security. In a collateral arrangement one Mohammed Jessa, the substantial owner of Rayners, deposited £1.4m on deposit with BCCI. He signed a letter of lien/charge under which he warranted the deposit had been charged to no other party and confirmed that BCCI would not have to repay the deposit unless and until Rayners had repaid in full the advance BCCI had made to it. All was well while BCCI remained solvent. However, on its collapse BCCI's liquidators sued Rayners for the US$3.5m without offsetting the Jessa deposit for £1.4m. This would have led to a full recovery against Rayners and the return of a small dividend to Jessa as an unsecured creditor of BCCI. Rayners objected and argued that BCCI was required to offset the deposit and sue Rayners only for the net difference. Because of the close financial relationship between Jessa and Rayners the effect would be that Jessa would have his £1.4m estreated but have a like sum as a reduction in the final repayment which Rayners must make to BCCI. Thus effectively the Jessa/Rayners financial group would receive full value for the £1.4m deposit whereas otherwise it may have recovered little at all.

Following pressure from Rayners, the liquidators applied to the Court seeking directions on whether BCCI could claim repayment from Rayners without resorting to the Jessa security. At both first instance and in the English Court of Appeal it was decided that they could do so.

On appeal, Lord Hoffmann delivered the principal speech. His conclusions were heavily dictated by the nature of the contractual arrangement and the separate personalities involved.

Nature of lien/charge

His Lordship first held that on a proper construction letter of lien/charge between BCCI and Jessa, Jessa did not contract to be responsible for all or any part of Rayners' debt. The deposit was made and Mr Jessa granted a lien/charge covenanting not to call for repayment until the entire outstanding Rayners' liability was met. There was never any personal liability express or implied by Jessa for Rayners' debt. The deposit was in the nature of a "flawed asset" ie irrecoverable unless strict conditions were met.

Against that background the House declared that the general rule was that a creditor can decide how to make recovery and is not constrained to take its options in any particular order. It adopted Lord Templeman's statement in *China and South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536, 545.

> The creditor has three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All of these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all.

Insolvency set-off

Arguments that the Insolvency Set-Off Rules (BCCI being insolvent) provided a remedy were rejected. There was neither mutuality of personality – Rayners and Jessa being separate legal personalities – nor mutuality of contractual debt – the Jessa letter created no personal liability.

Rayners further argued that the letter of lien/charge had to be considered as a personal debt to avoid the doctrine of conceptual impossibility propounded by Millet J in *Re Charge Card Services Ltd* [1987] Ch 150 and affirmed on appeal by the Court of Appeal, and by the Court of Appeal and House of Lords in *Halesowen Presswork and Assemblies Ltd v National Westminster Ltd* [1971] 1 QB 1; [1972] AC 785. The principle was "a man cannot have proprietary interests in a debt or other obligation which he owes another". However the notice of lien was held to be effectively the legal assignment to BCCI of the Jessa's chose in action permitting the recovery of the deposit. There is no principle which prevented such an assignment. Accordingly the argument failed.

Surety subrogation

The next argument was that Jessa as surety was entitled to pay the debt off himself then claim indemnity from the personal debtor, the Court having already found that there was no debt to be set off between depositor and BCCI in respect of the Rayners loan as at bankruptcy date. All Jessa could do was to prove in the liquidation. He could not manufacture a set off by directing the deposit be applied to discharge someone else's debts as that would be to subvert the statutory scheme of a liquidation which ensured payment to general creditors by pari passu distribution of assets.

Marshalling

The final argument was marshalling. This was succinctly described as "a principle for doing equity between two or more creditors, each of whom are owed debts by the same debtor, but one of whom can enforce his claim against more than one security or fund and the

other can resort to only one. It gives the latter an equity to require that the first creditor satisfy himself (or be treated as having satisfied himself) so far as possible out of the security or fund to which the latter has no claim".

However in the present case because of the distinct legal personalities and the Court's findings as to the contractual nature of the letter of lien/charge there was only one debt owed to BCCI by the principal borrower. The marshalling document could have no application.

So in the end the judgments at first instance and in the Court of Appeal were upheld and Rayners was liable in full on the loan but Jessa was entitled only to a dividend as an unsecured creditor of BCCI.

The case illustrates the care needed to ensure that parties to complex transactions have a clear understanding of the nature of the obligations being undertaken, the legal effect of their interrelationships and the risk/benefit of the transactions being kept separate or being linked.

CAUSATION AND REMOTENESS

Bank of New Zealand v NZ Guardian Trust Co Ltd CP 431/94, Auckland, 22 April 1998, Fisher J.

Led by the international accounting community there has been considerable focus on the inequities of the "but for" reasoning on causation and remoteness said to be applied by the Courts in establishing whether a loss claimed by virtue of a breach of duty was caused by that breach. In New Zealand our Court of Appeal in *Sew Hoy* [1996] 1 NZLR 392 declined to strike out a claim against the company's auditors which included losses incurred by the company in the two years following the delivery of the audit report. The only apparent basis for that claim seemed to be that "but for" the error in overstating the assets and profits of the company it would have gone into liquidation earlier, thereby avoiding the further trading losses. Thus the apparent principled approach of the English Court of Appeal in *Galoo Ltd v Murray* [1994] 1 WLR 1360 was not applied, even although that decision was the principal basis of the strike out application. Thus there was potentially a clear divergence between English and New Zealand precedent.

Since then the decision of the House of Lords in the *South Australia Asset Management Corporation v York Montague Ltd* [1996] 3 All ER 365 provided an even more definitive English law view of remoteness. There a valuer had negligently overstated the valuation of the property. The amount of the overstatement was £0.7m but the lender bank claimed significant further damages on the grounds that, had the correct valuation been given, it would not have lent at all. The House of Lords in a well reasoned decision declined to extend the extent of damages beyond the error in the valuation itself. Thus, unlike *Sew Hoy* which was more equivocal, the "but for" approach was firmly rejected.

Fisher J's judgment in *BNZ v NZ Guardian Trust* appears to be the first opportunity for a New Zealand Court to consider the difference in approach between our Court of Appeal and the House of Lords. The result seems to signal an approach closer to the English law position, but remains in some aspects regrettably unclear.

The case concerned a suit by BNZ and other lenders against Guardian for $38m said to have been lost because of the negligence of Guardian in fulfilling its duties as a trustee under a debenture trust deed to which the BNZ was party. The BNZ, Westpac, NZI and NAB all had contributed to the funding of a public listed company Comsec. That company, by imprudent policies, had failed and Guardian ought to have recognised that over some period Comsec had been in breach of its obligations under the deed. Guardian should have taken action and did not do so. Losses accrued to the lenders arising from trading subsequent to the time that Guardian ought to have investigated trust deed breaches. The plaintiffs each claimed their losses.

By a process of detailed fact analysis Fisher J found as a fact that had Guardian drawn Comsec's breaches of the deed to their attention all the bankers (with the exception of NAB) they would have taken no action. NAB in contrast was looking for a way out of the security and would have used that as a lever to get paid out. He formed this conclusion having regard to Comsec's position over the time together with the actions of the respective banks. He concluded that NAB would probably have negotiated a buy-out of its interests by the other banks.

Whilst each case depends upon its facts there may be some leaps of logic involved in accepting that bankers, knowing of breaches, would cheerfully have clubbed together to pay out another banker which was demanding repayment in full. That said, it was on the facts an inference available to the learned Judge which he adopted. However, due to Guardian's breach NAB was denied that opportunity and therefore lost the ability to be repaid in full.

This fact situation led to some closely reasoned analysis by Fisher J on the topic of causation and remoteness. The learned Judge distinguished between two broad approaches to remoteness, one requiring a relatively close nexus between breach and loss and the other a more distant one.

> "Close nexus" requirements are exemplified in breach of contract and tortious negligence. The causal nexus between breach and loss must be substantial, the kind (although not the extent) of the loss reasonably foreseeable, and the loss reasonably proximate in other respects heavily influenced by policy. Such an approach may be contrasted with the "distant nexus" approach exemplified in trust loss cases (ie breaches of trust causing loss to the trust estate), breaches of fiduciary duty, and certain intentional torts such as deceit. Here, a relatively distant causal link between breach and loss suffices. Not required are reasonable foreseeability or causal directness. Without overlooking the further refinements required within each approach, this division seems fundamental to the whole subject of remoteness. It also has some correlation with distinctive treatments afforded to mitigation, contributory negligence or abatement, limitation. and remedy-types, but for present purposes it will be sufficient to use it solely for remoteness purposes.
>
> Examining the "close nexus" approach in more detail, it appears that in this category it will not be sufficient for the plaintiff to show that "but for" the breach the loss would not have been suffered. The breach must have been a material or substantial cause, not merely a part of the history which created the opportunity for loss .... The other irreducible requirement is that of reasonable foreseeability. Whether foreseeability forms part of the cause of action itself (as in tortious negligence) or merely a principle limiting damages (as in contract), it appears that at common law damages will normally be payable only for those heads of loss the kind (although not the extent)

> of which was reasonably foreseeable on the part of the defendant.
>
> ... Those two concepts – causation potency and foreseeability – have a particularly important role to play in the treatment of events which have causally intervened between breach and loss, especially those resulting from discretionary human behaviour.

Fisher J reflected that as a matter of policy the more that discretionary human behaviour is intervened between breach and loss the more difficult will it be to argue that the defendant should be held responsible for the loss. He further observed that in addition to causal potency and reasonable foreseeability there were "a diverse range of further considerations", some of which he proceed to list:

- any marked disparity between the risk which appeared moderate in probability and the loss which proved major, although he added that "it is difficult to believe that principles change according to the size of the claim per se";
- a "frankly moral assessment of the nature of the breach";
- the nature of the foreseeable injury (economic loss being more difficult than, for example, personal injury);
- closeness of the prior dealings between the parties;
- the extent to which reliance was foreseen and/or encouraged;
- the ease with which either party could have avoided or minimised the risk;
- whether the imposition of liability might beneficially encourage greater care or detrimentally result in withdrawal of services presently available to the community;
- whether and how losses should be more widely spread within the community.

Whilst appreciating the frankness of expression of these criteria for the commercial adviser they present a bewildering and breathtaking list. In advising clients on prudent risks which they should take in business, how may one deal with difficult topics like the "frankly moral assessment"? or whether and how losses should be more widely spread within the community? This broad-reaching analysis stands in stark contrast to the *South Australian Asset* case which asked the careful question of what risk the defendant undertook to protect the plaintiff from. If the losses fall squarely within the risk, the defendant is responsible.

On the interesting question of whether the *Sew Hoy* consequential losses would still be claimable following the *South Australian Asset* case, Fisher J observed that the *Sew Hoy* decision may still stand.

However, when these principles fell to be applied in the particular case, Fisher J was not prepared to allow even the NAB's claim:

> ... it has been demonstrated that NAB's loss would not have occurred but for Guardian's breach. It does not follow that the breach was a substantial cause of the loss. The most immediate cause was Comsec's business failure. Comsec did not fail because of non-charging advances. At a less immediate level, the causes included the decision by NAB's predecessor to provide a financial facility to a highly geared property investor, expansive Comsec policies which relied upon continued property rises, the banks' prolonged readiness to accept property revaluation as a sufficient indicator of profit, the lack of cash income with which to service rising debt, NAB's decision to purchase a business which included a major loan commitment of this kind, the sharemarket crash, and the decline in the property market.

The decision in result establishes that the New Zealand Courts are moving to a much stricter and principled basis for assessing damages. The wide range of considerations mentioned by Fisher J may appear frightening but the result is much more consistent with the English approach than earlier decisions upon which the commentators have levied the complaint of a "but for" mentality in causation in fixing damages. With respect the principled approach shown by the result of the case is correct. It is hopefully the beginning of a trend establishing a more precise and commercial approach to the computation of damages.

COMPLEXITIES IN ARBITRATION APPEALS

T H Barnes & Co Ltd v IRD (CA 207/97, 28 April 1998)

The Arbitration Act 1996 came into force with considerable fanfare. The Act was the first major review of the law in this important area. It adopted the UNCITRAL code. One of its objectives is reasonable simplicity. The latest judgment of the Court of Appeal throws up the first signs of unlooked for complexity in the new Act's transitional provisions.

Briefly, the IRD applied to the High Court for an order setting aside an arbitration award relating to a lease. After the proceedings were filed but before the hearing, the Arbitration Act 1996 came into force. The question was whether the 1996 Act applied to the appeal, even though the award and the appeal pre-dated the commencement of the Act.

At first blush the transitional provisions of s 19(2) seem to provide an easy answer to the question:

> Where the arbitral proceedings were commenced before the commencement of this Act, the law governing the arbitration agreement and the arbitration shall be the law which would have applied if this Act had not been passed.

However, the Court of Appeal drew a distinction between "arbitration proceedings" to which s 19(2) applies and proceedings based upon a delivered award. It applied s 19(5) to the latter:

> This Act applies to every arbitral award, whether made before or after the commencement of this Act.

The Court therefore held that proceedings on an award were governed by the 1996 Act. As the High Court application was made in this case before the new Act came into effect, the High Court decision was invalid.The result was to allow the appeal so that the arbitration award was restored.

Although the Court of Appeal acknowledged the desirability that legislation should be interpreted prospectively, nonetheless s 19(5) was held to give retrospective effect.

The result must be reckoned to be curious. It applies one legal regime to arbitrations in process and a different regime to any appeal or attack upon the award on a question of law. Futhermore the practitioner advising on an appeal against an arbitral award is confronted with a potentially insolvable dilemma. On the one hand, if he/she files proceedings under the old Act he/she will, by virtue of the Court of Appeal's judgment, be found to have erred unless all of the appeal process is completed before the new Act came into force. On the other hand, he/she was unable to appeal under the new Act until it did come into force.

This is clearly an outstanding example of the *Catch 22* principle. The law lays down quite strict time guide-

lines for the filing of appeals but thereafter they progress through the Courts at a more leisurely pace. In the instant case the dispute arose out of a rent review of 30 August 1991. The arbitral award was dated November 1995, the judgment in the High Court July 1997 and in the Court of Appeal April 1998. This question of statutory interpretation was not raised in the lower Court. It first emerged two and a half years after the arbitral award.

It is understood that an appeal may be considered. While, in the end, the question is one of statutory interpretation it seems a very curious outcome indeed that the transitional provisions should be so interpreted so that at the time of first appeal against the award the legislation then in force cannot bring the appeal procedure to finality. That, however, is the result unless the Court's decision is reversed in a higher Court.

EXPRESS AND IMPLIED TRUSTS IN COMMERCIAL DEALINGS

Fortex Group Ltd v MacIntosh, Cox and Forde CA 208/97, 30 March 1998

Ever since the Privy Council decision in *Goldcorp* the New Zealand Courts have shown considerable diffidence about engrafting onto commercial transactions equitable principles of trust. The Privy Council judgment acknowledged that trusts could co-exist in commerce with securities and contract principles. However, the reality of business is that trust type concepts in arms length dealings do not reflect the ways of the commercial community when negotiating and allocating risks on business transactions.

Against this background the respondents on the present appeal, who were employees of the Fortex Group, made claims based upon trusts relating to payments made by them and due to be made by Fortex into a superannuation scheme for the employees' benefit. Although source deductions were made from employees' wages and contractual commitments undertaken by Fortex for the company to make its contributions, there was a shortfall in payment of $251,042 on the date of liquidation of the company. The employees argued that their funds and the employer's contributions to be made should not go to the debenture-holder but be held in trust for them.

In the High Court Gallen J upheld a claim based on a remedial constructive trust – that is one imposed by the Court as a remedy in circumstances where, before the order of the Court, no trust of any kind existed.

The concepts of express trust and institutional constructive trusts were rejected by Gallen J and the Court of Appeal because there was never any "fund" which could be the subject matter of such a trust. The employee deductions and the employer contributions were never anything more than part of an overall overdraft balance in the various accounts of the Fortex Group. There being no certainty of subject matter neither trust could be upheld. That left for consideration the alleged remedial constructive trust.

A remedial constructive trust does not require a fund in the same sense as the other categories. All it requires is the existence of assets in the "trustee's" hands which the Court considers is appropriate to impress with a trust in favour of the plaintiff. However, the Court reminded itself:

> But before the Court can contemplate declaring that assets owned in law by A should, by way of remedy, be held by A in Trust for B, there must be some principled basis for doing so, both vis-à-vis A and vis-à-vis any other person who has a proper interest in the subject-matter which would be affected by the imposition of the trust.

In the instant case the Court of Appeal enunciated the "principled basis" as:

> How then is it said that the plaintiffs by means of the equitable remedy of remedial constructive trust can prevail, pro tanto, over the legal rights of the secured creditors? Equity intervenes to prevent those with rights at law from enforcing those rights when in the eyes of equity it would be unconscionable for them to do so. Equity acts in this respect as a Court of conscience. In order to defeat, pro tanto, the secured creditors' rights at law under their security by the imposition of a remedial constructive trust, the plaintiffs must be able to point to something which can be said to make it unconscionable – contrary to good conscience – for the secured creditors to rely on their rights at law. If such can be shown, equity may restrain the exercise of those rights to the extent necessary to afford the plaintiffs appropriate relief.

The Court then properly held the person whose conscience had to be affected before equity could intervene in the particular case was that of the secured creditors, rather than the Fortex Group itself. This contrasted with the view of Gallen J at first instance, whose inquiry into the equities focused on the relationship between Fortex and its employees rather than the employees and the secured creditors of Fortex.

Thus the Court reached the conclusion that the appeal should be allowed and no trust of any sort at law should be declared. The debenture-holders were entitled to retain the full amount of moneys collected and the employees recovered nothing.

Individual and separate judgments were delivered by Henry and Blanchard JJ which reached the same conclusions on similar but differently expressed grounds.

The principled approach adopted by the Court of Appeal in this case must be right. By virtue of the defaults of Fortex through its senior management and directorate the proper expectations of its employees were not met. That is not the fault nor responsibility of the secured creditors who continued to support the trading of Fortex innocently and in good conscience. In such circumstances equity should not imply a trust. If the policy of law in commercial dealings is to allow parties by their contracts and securities to achieve certainty that certainty may only be displaced if, to the knowledge of the person propounding the right, there will be an injustice which he/she cannot fairly benefit from.

UP TO THE MINUTE: *SADIQ v LUNN* REVISITED

In the last *Transactions* Section a case note reported that Master Faire declared cancellation of the agreement for sale and purchase invalid as notice cancelling the contract had been given before the expiry of the time for compliance, it having been given during and not after the third working day.

By subsequent submission to the Court the respondents were successful in having the interim judgment recalled by the Court because the copy of the letter of cancellation was transmitted at 5.09 pm, nine minutes after the expiration of the working day as defined by the contract.

The original case note focused on the importance of allowing the expiration of the clear number of working days required by the agreement before taking cancellation action. The recall of the judgment is an application of that principle given that the definition of "working day" under the agreement provided that it ended at 5.00 pm. ❑

"NAY, THIS BE ESTOPPEL"

Ray Mulholland, Massey University

offers a rejoinder to Duncan Webb

This article is written in rejoinder to: Webb, D "Is this a contract I see before me?" [1996] NZLJ 384.

Clearly Webb is searching for a new conceptual framework within which to set contemporary contract law. It is submitted that this new conceptual framework may be found in estoppel but that any new conceptual framework is not, as yet, set in concrete.

It is well to recall that contract law is presently in a state of flux. The rigid formula devised in the 19th century, known by some as "classical contract theory" is in the process of disintegrating but nothing decisive or clearly defined has yet emerged in its place.

The following propositions are put forward:

- Apart from a relatively short period in the 19th century, it is doubtful if anything that could be termed a coherent set of rules relating to the law of "contract" ever existed;
- The development of contract, which was essentially a common law phenomenon, cannot be regarded in the absence of the influence of equity;
- A more accurate generic description of this area of law would now be "self-imposed obligations";
- Any consideration of contract cannot now be considered without reference to estoppel;
- Offer and acceptance never have been, and are not now, a basis of contract. It would be reasonably accurate to say that agreement is the basis of contract. But it is also true to say that in many instances obligations derive from a specific situation rather than an objectively or subjectively determined agreement. The phenomenon of offer and acceptance was merely a formula to test the existence of agreement between the parties.

Contemporary judicial policy is highly remedy orientated and legal concepts have been moulded and adapted, and old concepts such as indebitatus assumpsit as in *Pavey & Mathew Pty Ltd v Paul* (1987) 162 CLR 221 (HCA) are being revived to enable Courts to arrive at desired results.

To say "whilst there are contracts which fall neatly into the orthodox framework of offer and acceptance ..." is quite unrealistic. The Courts have been called upon for centuries to cope with interactional situations when it was clear the parties had no intention at all of ever being legally bound. Also Courts have been called upon to structure situations where an intention to be bound was initially present but the relationship between the parties later collapsed.

There is an increasing tendency for Courts to adopt a holistic approach to situations rather than to fit facts into a preconceived formula. Estoppel is a weapon admirably suited to this purpose.

THE HISTORICAL PERSPECTIVE

A full understanding of the present status and structure of contract law requires some knowledge of its history.

"Contracts" or "deals" or "transactions", as those conversant with Holy Scripture will well know, go back to the dawn of history. Until the later years of the 18th century, the juridical basis of contract law tended to be set upon the rectification of reliance loss. That is a Court would assess the loss which a party had suffered as a result of relying upon a representation which the other party had made. Thus usually something had to be done in execution of a contract before it was binding. Indeed equity would not decree its remedy of specific performance unless the contract had been partially performed. *Marquis of Normanby v Duke of Devonshire* (1697) 2 Freem 216, 22 ER 116.

Estoppel operated both in equity and at common law as an alternate method to contract of enforcing obligations. Equitable estoppel, in particular, was an extremely flexible instrument with which to overcome the rigidity of the common law and was freely applied in instances, where in the view of the Court, the conduct of a party was tainted with unconscionability.

CLASSICAL CONTRACT THEORY – THE PROMISSORY INTEREST

A rigid doctrine of precedent "stare decisis" which could have provided a coherent set of rules, evolved only as late as the 19th century.

Equity was largely forced out of contract law, estoppel went underground, and common law contract assumed the form of a set of rigid rules based upon agreement and containing the fiction of consideration. This particular form of contract is sometimes referred to as "classical contract theory". It has been brilliantly expounded by Atiyah P S *The Rise and Fall of Freedom of Contract.*

The basic purpose of this singular form of contract was to carry into effect the protection of the promissory interest. The protection of the reliance interest was down played. The enforcement of completely executory contracts had, at last, become fully accepted but this classical contract theory was, in fact, a mere upstart in the historical development of a law of contract. It was introduced at the behest of the commercial community and was designed to extrapolate expectations into the future. It assumed the status of a cult.

Classical contract theory became deeply entrenched by the works of classical writers such as Anson, Treitel, Cheshire, Fifoot and Pollock and, on the margin of contract, George Spencer Bower. How realistic their exposition of law

was is open to debate. This systematisation of the law was to some extent intended to assist the teaching of law which was taking off upon a large scale at that time.

Classical theory reached a culmination in the momentous decision of the House of Lords in *Maddison v Alderson* (1883) 8 App Cas 467. This was a case where a highly deserving applicant who would clearly have succeeded in equity on the grounds of estoppel, was denied relief because she could not prove the existence of a contract.

A few years later counsel in *Re Fickus* [1900] 1 Ch 331, 334 was heard to say "The letter either amounts to an offer resulting in a contract, or it is nothing". This submission appears to have been accepted by the Court.

Classical contract theory was in substance a form of estoppel developed by the common law for the purpose of ensuring that the reasonable expectations of reasonable men were not frustrated. It provided a system whereby parties could write their own piece of mini-legislation which would be completely binding.

If one is searching for a coherent concept of contract in the English legal system then 19th century classical contract theory is probably the only one which conforms to such a rubric. It is this form of contract which has been bequeathed to the present generation.

THE RESURGENCE OF ESTOPPEL

The much vaunted decision in *High Trees House Ltd v Central London Property Trust Ltd* [1947] KB 130 heralded the resurgence of estoppel. Since that time estoppel has developed into a thriving cause of action in its own right.

The advent of estoppel in contemporary law had the effect of extending contract law back into a law of self-imposed obligations as it had been prior to the advent of classical contract theory in the late 18th century.

The vista of circumstances in which parties may conscionously or unconscionously impose obligations upon themselves is now greatly extended.

Classical contract is now subsumed within this vista, and indeed, is still very much alive. Where parties have concluded a clear agreement that undertaking will bind with the same degree of force as under classical contract theory. A reading of the *Lloyd's Law Reports* will clearly reveal the relevance of contract interpretation in present day law.

The extension of the scope of obligations was largely dictated by the great upsurge in domestic and other transactions which clearly did not fit the strict rubric of classical theory.

Many of these situations were extremely compelling from a factual viewpoint and clearly called for redress. They frequently involved reliance loss. The revival of estoppel was clearly the most effective way to provide redress in these situations.

In many domestic interactions the parties would specifically eschew legal advice had it been suggested to them. They rush into "transactions" or "deals" with no thought of what is likely to ensue should the relationship collapse. Classical examples are provided by real property disputes between de facto couples; *Gillies v Keogh* [1989] 2 NZLR 327 or in family arrangements where a party who has induced reliance by the other party, resiles; *Richies v Hogben* [1986] 1 Qd R 315, or where parties have simply transacted without thought of the consequences; *Fleming v Beavers* [1994] 1 NZLR 394.

In such instances loss suffered by one party can be considerable and can be clearly attributable to the conduct of the other party. But such cases do not fit the rubric of formal contract.

PUTATIVE OR COLLAPSED CONTRACTS

Even should a clearly intended contract be concluded obligations could extend beyond the boundaries of the contract and redress may be provided in instances where for example, the negotiations have collapsed or where a party seeks to resile from a contract by unconscionably relying upon a legal right.

Recent years have seen a revival and broadening of legal concepts in order to secure obligations in such circumstances. The application of such concepts is not dependant upon the existence of any agreement much less offer and acceptance.

The action in quantum meruit is well suited to securing obligations beyond the scope of contract. It is not limited to a situation in which a contract has been concluded. It is essentially a conceptual vehicle to provide redress against reliance loss: *Dickson Elliott Lonergan Ltd v Plumbing World Ltd* [1988] 2 NZLR 608. It is contended that quantum meruit conforms to the fundamental requirements of estoppel in that it will require the raising of an expectation and reliance upon that expectation to the extent that detriment will result should the party who raised the expectation seek to resile from it.

The arcane action in indebitatus assumpsit was revived in the Australian case of *Pavey & Mathews Pty Ltd v Paul* (1987) 61 ALJR 151, where the defendant sought to unconscionably rely upon the Builders' Licensing Act 1971 (NSW), which rendered building contracts not in writing unenforceable, to escape liability under a building contract which had been fully executed by the plaintiff. The High Court of Australia was not prepared to determine the issue in quantum meruit as it considered that such would be tantamount to enforcing the unenforceable contract by the back door. Hence it framed its determination in indebitatus which is completely divorced from contract. This rested upon the assumption that a benefit had been conferred upon the defendant by the plaintiff and that the defendant had not rendered the promised exchange value. This was a case where "the law itself imposed or imputed an obligation or promise to make compensation for a benefit accepted" per Deane J p 165.

This action is far removed from contract and any semblance of offer and acceptance. Should the practice of pleading indebitatus assumpsit gain currency, which seems unlikely in view of the peculiar circumstances of *Pavey* there could be a dramatic extension of obligations beyond contract. For example many cases of what are now regarded as gifts could attract an obligation on the part of the donor to pay.

But, as with quantum meruit, indebitatus can be seen as a form of estoppel in that an expectation had been raised by the acceptance of a benefit and detriment in the refusal to pay for the benefit.

On the other hand in *Maher v Waltons Stores (Interstate) Ltd* (1988) 62 ALJR 116, estoppel was applied directly.

This was a case where obligations in contract collapsed as a clear contract between the parties had been intended but Waltons then sought to escape liability by unconscion-

ably relying upon a provision in the written "contract" to the effect that a contract would not come into existence until the signatures of both parties were on the written agreement.

As the contract had not, in fact, been signed by both parties there was no way that a contract could be seen to exist so the High Court of Australia applied estoppel based upon the unconscionable conduct of Waltons in resiling from the agreement.

The New South Wales Court of Appeal had attempted to determine the issue in contract and strained the facts to find the existence of a contract. On appeal to the High Court, by Waltons, this approach was cast aside in favour of the direct application of estoppel. This decision is a graphic illustration of how a Court may cast a clear contractual agreement aside to arrive at a decision which rectified unconscionable conduct and strike at the substance of the true relationship between the parties.

Thus estoppel stepped into secure obligations where contract was unable to do so. The obligations arose not from an offer and acceptance but from the unconscionable conduct of one of the parties in attempting to take advantage of a clause in the "contract". It was a case of the Court denying a party the unconscionable insistence upon a contractual provision.

UNILATERAL CONTRACTS

A classical illustration of an example where it is difficult to see the traditional rules of offer and acceptance working themselves out is provided by unilateral contracts; *Australian Woollen Mills Pty Ltd v The Commonwealth* (1953-54) 92 CLR 424.

These do not readily fit the traditional contractual concepts but are widely accepted as possessed of binding effect.

Unilateral contracts usually take the form of an offer being made and the acceptance taking the form of the actual doing of the act prescribed in the offer. The statement made, and which is relied upon as consideration for the act done, must in fact, be offered with the intention that it amounts to consideration for the act done.

Unilateral contracts have long sat uncomfortably within the ambit of classical contract theory. No clear and consistent formula for assessing the obligations of the parties, and, in particular, the point at which the offer becomes binding on the offeror, because of acceptance by the offeree, appears to have been devised.

According to Denning L J in *Errington v Errington* [1952] 1 KB 290, 295 the offer could not be revoked once performance of the required acts had commenced. But if performance was left incomplete the offer would no longer be binding on the offeror.

THE DEMISE OF INTENTION TO CONTRACT

Under contemporary conditions it is very difficult to see the existence of a specific requirement of an "intention to contract". The classic decision in *Balfour v Balfour* [1919] 2 KB 571, would most certainly be decided differently should those facts come before a Court today. The development of estoppel would now result in a decision in favour of the wife.

It is probably more realistic now to set this requirement in a wider framework that is "the raising of an expectation". The clearest intentions of parties can be set aside by a Court should an obvious expectation be raised and should the dictates of conscionability as shown by the facts of the particular case so move the Court. This is very evident in the decision in *Waltons Stores (Interstate) Ltd v Maher*, where the most decisive indications of intentions to contract in a clearly specified manner were set aside by the Court.

The issue of whether or not an expectation has been raised will be assessed from an objective point of view and there is an increasing tendency to infuse an element of strict liability into this assessment; *Pascoe v Turner* [1979] 1 WLR 431.

UNCONSCIONABILITY – EQUITY RE-ENTERS CONTRACT

The 19th century rigid system of classical contract theory based upon a manifested agreement, consensus ad idem, and the presence of consideration, has been shattered. It will not stand against the onslaught of a perceived need to ensure fair dealing in all commercial transaction.

It must be remembered that the phenomenon of offer and acceptance as a manifestation of agreement, was essentially an aspect of contract theory designed to give effect to the purely promissory contract. Courts are now just as interested in what has taken place subsequent to the agreement. That is in taking an "ex post facto" approach.

But the Courts have gone further. Facts are no longer assiduously fitted into the strict rubric of a predetermined contractual form. Rather the Courts will look at the substance of a transaction. They will consider what the parties have actually done and, if the dictates of "conscionability" so demand, provide a remedy which conforms to the expectations of the parties. Thus the Courts now require a device which will enable them to roam at large over the facts of a particular case. Estoppel provides such a device.

This process seems to have reached a high water mark in the application of the revived doctrine of "estoppel by convention". This has now been clearly accepted by New Zealand Courts; *National Westminster Finance NZ Ltd v National Bank of New Zealand Ltd* [1996] 1 NZLR 548, where Tipping J in the Court of Appeal set out the requirements of this breed of estoppel. Among these are:

- the parties have proceeded on the basis of an underlying assumption of fact law or both of sufficient certainty to be enforceable, (the assumption);
- each party has, to the knowledge of the other, expressly or by implication accepted the assumption as being true for the purposes of the transaction;
- such acceptance was intended to affect their legal relations in the sense that it was intended to govern the legal position between them.

It is contended that this strikes at the very heartland of contractual consensus. Indeed it can be seen as subsuming contractual consensus.

Thus it can be seen that offer and acceptance is now merely one, quite limited, device whereby obligations may be secured. The Courts will not now allow the determination of an issue to rest upon simply whether or not offer and acceptance has taken place. The substance of the modern law of self-imposed obligations would seem to be "have the parties interacted to such an extent that it would be unconscionable to allow one of the parties to resile from the expectation which that party had previously raised". ❑

TELECOMMUNICATIONS DISPUTES IN THE COPYRIGHT TRIBUNAL

Abraham van Melle, Victoria University of Wellington

finds that the Copyright Tribunal has no licence to interfere in "private" copyright licensing disputes

INTRODUCTION

Litigation has again formed the concluding chapter to protracted contractual negotiations in the telecommunications industry – this time as competitors jockey for position in the emerging pay-TV and information services markets. Saturn Communications Ltd, a cable TV operator, had sought a re-transmission licence from Sky Network Television Ltd for Sky's pay-TV broadcasts. When a contract could not be concluded on mutually acceptable terms Saturn applied, unsuccessfully, to the Copyright Tribunal for the granting of a compulsory licence. Saturn alleged that Sky was a licensing body that had refused to grant it a licence in accordance with the licensing scheme it was operating.

The Tribunal (Judge A Gaskill Chair, Professor D Gunby, and Mr B W N Robertson) has wide powers to intervene in the operation of those copyright licences administered by licensing bodies, such as the various collection societies. Although licensing bodies are potentially subject to the Commerce Act 1986 (eg *APRA Ltd v Ceridale Pty Ltd* [1991] ATPR 41-074), the Tribunal is a more direct means of tempering "abuses" of market power than recourse to the complex mechanisms of competition law. It is debatable however whether the provisions of Part VIII of the Copyright Act 1994 were ever intended to apply to "private" licensing operations such as those of Sky.

Since the Tribunal last sat the Copyright Act 1994 had commenced. The Act contains substantially revised provisions relating to the Copyright Tribunal based on those in the Copyright, Designs and Patent Act 1988 (UK). The main thrust of these revisions was to extend the Tribunal's jurisdiction to a greater variety of licensing schemes run by collection societies. As part of the re-drafting the UK Act had introduced the concept of the "licensing body", but in the New Zealand Act this pivotal definition which delimits most of the Tribunal's jurisdiction had been altered without explanation. It was the meaning of these words, and also of "licensing scheme", which was at issue in *Saturn Communications Ltd v Sky Network Television Ltd* (Decision No 1/97). In declining Saturn's application the Tribunal's careful decision provides a clear exposition of how it will approach the requirements of Part VIII of the Act.

THE FACTS

The facts of the case covered some two years of negotiations between several parties. Sky's network channels were CNN, Discovery, Sky Sport, Movies, and Orange. Virtually all the material broadcast on these channels (with the exception of some sports-casts on Sky Sport) had been licensed from third parties. Because of technical constraints Sky broadcasts were unavailable in some parts of New Zealand and therefore Sky sought to enter into re-transmission agreements with cable service operators. Sky had initially entered into a re-transmission agreement with Telecom, but this agreement became the subject of an injunction granted to Clear Communications under the Commerce Act 1986 and was abandoned in December 1996. In the meantime (July 1996), after an expression of interest by Saturn, Sky had sent a draft re-transmission agreement to Saturn and four other cable TV operators. Sky's licence agreement with CNN and Discovery mandated sub-licensing to cable operators, and an agreement in respect of these channels had already been concluded with Saturn in June 1996. But Saturn wished also to add Sky Sport, Movies, and Orange (the "SMO channels") to its service. Sky's draft contract had proposed a licensing period of six years, but the proposal was in other respects unsatisfactory to the cable operators. By August 1996 Sky had withdrawn the "blanket" offer in the draft agreement, but it expressed a willingness to negotiate with individual companies for a one year licence period only. In December 1996 two cable service operators entered into re-transmission agreements for one year at a royalty rate of 80 per cent, and in February 1997 another cable operator entered into a re-transmission agreement on similar terms.

In March 1997 Sky had renewed its licence agreement with ESPN Inc which supplied the greater part of Sky's sports content (for one of the SMO channels). This agreement provided that Sky could not sub-license this material without ESPN's consent, but that this consent would not be unreasonably withheld. In the meantime Saturn and Sky had continued to negotiate and by April 1997 Saturn had made an offer of a 75 per cent royalty rate and a three year period. Sky rejected this offer on 1st May 1997 refusing to change from a 80 per cent royalty rate and one year term. On 6th May Saturn's representative informed Sky that, subject to

gaining approval, he would be prepared to accept the 80 per cent rate and one year term and requested execution copies of this agreement. Sky responded the following day that it was no longer prepared to enter into any further re-transmission agreements. This may have been prompted by the arrival of Sky's satellite broadcast technology in April 1997, capable of broadcasting to anywhere in New Zealand.

None of the cable TV operators had accepted Sky's blanket offer before it was withdrawn, but three operators subsequently entered into individual agreements all on similar terms. Saturn initially declined to enter into a like individual arrangement and Sky later refused to grant any further licences when Saturn had changed its stance. It was in this context that Saturn applied to the Copyright Tribunal for a compulsory licence; but the Tribunal was not sympathetic to the claim (at 17):

> Saturn effectively wants the Tribunal to grant it a licence on terms which it had the opportunity to accept and did not, during the course of ten months' negotiation. Furthermore, Saturn, by its application, is asking the Tribunal to compel Sky to re-enter an area of business in which it no longer wishes to operate. Unless there was clear statutory authority for the Tribunal to make such an order then it would be an unwarranted interference in the commercial dealings of the parties.

The Tribunal – [did] not accept that the legislature envisaged the Tribunal's having an unlimited power to fix terms in the event that standard terms cannot be identified

THE COPYRIGHT TRIBUNAL

The regulation of copyright licensing by the Copyright Tribunal is covered in Part VIII of the Act, the operative provisions of which fall into two categories: ss 148-155 apply to various prescribed types of "licensing scheme", some of which must be operated by "licensing bodies". Sections 155-160 apply to prescribed types of licences granted by a "licensing body" but not pursuant to any licensing scheme. In the latter situation only the expiry of licences already granted, or the terms of licences proposed by the licensing body, may be contested. In the former situation, under s 153(1), the refusal to grant a licence in accordance with the terms of the scheme is actionable. Under s 153(2) a refusal to grant a licence in a case "excluded" from the licensing scheme (providing one exists) is also actionable although the applicant must then prove that the refusal was "unreasonable in the circumstances". Cases "excluded from the scheme" is defined in subs (3) as only those cases either falling within an exception to the scheme or cases "so similar" to those included in the scheme that it would be unreasonable not to treat them in the same way. Under s 153(4) the Tribunal has the power to declare that a party is entitled to a licence on terms in "accordance with the scheme" or, as the case may be, on terms which are "reasonable in the circumstances". Therefore, as Saturn's situation would have been a case falling within the licensing scheme had one existed, it had to prove that Sky was operating a prescribed type of licensing scheme and that Sky had refused to grant a licence to Saturn in accordance with the scheme. Saturn also argued in the alternative that if its case was excluded from the licensing scheme then the refusal to grant a licence was unreasonable, but nothing turned on this in the decision.

LICENSING SCHEME

The Tribunal first addressed the issue of whether there was any licensing scheme. "Licensing scheme" is defined in s 2 as:

> ... a scheme setting out –
> (a) The classes of cases in which the operator of the scheme, or the person on whose behalf the operator acts, is willing to grant copyright licences; and
> (b) The terms on which copyright licences would be granted in those classes of cases ...

This definition required Saturn to prove three elements: First, that Sky had "set out" the classes of cases and terms upon which it would grant licences; secondly, that Sky had a general willingness to grant licences; and thirdly, that Sky's re-transmission agreement was in fact a copyright licence.

SETTING OUT CLASSES OF CASES AND TERMS

The Tribunal held that the phrase "setting out" did not require "any particular degree of formality", but that the scheme must be set out with sufficient particularity to identify the cases and terms upon which licences would be granted. Sky submitted that "classes of cases" could only satisfied by more than one class, and in this case there was, if any, only one class – re-transmission licences to cable television operators in New Zealand. The Tribunal applied the principle in s 4 of the Acts Interpretation Act 1924 that, in the absence of a contrary intent expressed in the Act or by its context, the plural includes the singular and therefore "classes of case" was satisfied.

The Tribunal was unable to find any "setting out" of the terms however. Sky's first offer in the form of draft re-transmission agreements was irrelevant as it had been withdrawn before being agreed to by any of the cable television companies. The Tribunal held therefore that the subsequent dealings, while necessarily similar because of the common subject matter, did not disclose the requisite standard of certainty or consistency to amount to "setting out". Likewise the word "terms" requires "the existence of some discernible or standard terms on which the licences would be granted". There was no tariff set out indicating the price, and the Tribunal observed that in the absence of clearly identifiable terms the Tribunal would have to fix the price. Under s 153(4) this would go further than determining the applicable terms "in accordance with the scheme". The Tribunal (at 14) –

> [did] not accept that the legislature envisaged the Tribunal's having an unlimited power to fix terms in the event that standard terms cannot be identified. It would seem an unwarranted intrusion into the business affairs of the parties and is quite beyond the jurisdiction and expertise of the Tribunal to enter into such an arena.

WILLINGNESS

The Tribunal noted that the licensing body must, in general, be willing to license third parties in accordance with the scheme, but it is obviously unnecessary to prove that the licensing body was willing to grant a licence to the party in question for, as Gaskill J noted (at 16), s 153 of the Act "contemplates a refusal". The Tribunal considered the

potential dates on which Sky may have been willing to grant licences, but the actual findings on this point are unclear from the decision. Certainly there was willingness to grant licences before the revocation of the draft agreement, but other things being equal there was probably also a general willingness to grant licences as the negotiations continued. The Tribunal did not remark on the significance, if any, of Saturn asking for execution copies of the revised proposal the day before Sky communicated its intention of discontinuing all negotiations on 7th May.

COPYRIGHT LICENCE

Sky had argued (at 18) that the re-transmission agreements were not copyright licences for the purposes of "licensing schemes" because the agreements included non-copyright subject matter over which the Tribunal had no jurisdiction. The copyright licence contained in the agreement was inextricably linked to this material and therefore could not be severed and treated in isolation. The "non-copyright" obligations included: mutual marketing obligations, a licence to use Sky's trade mark, and clauses designed to prevent the licensee from competing with Sky by acquiring New Zealand pay-TV rights for programmes which Sky may wish to include on its own channels. Saturn responded by pointing to the clauses in the first draft agreement that permitted the re-transmission of the copyright material and indemnified the licensee against any breach of copyright by Sky.

"Copyright licence" is defined in s 2 as "a licence to do, or authorise the doing of, any restricted act". The Tribunal observed that it is the owner of the copyright that has the right to authorise the doing of restricted acts and, that while Sky owned certain copyrights in its broadcasts such as the compilation copyright and sports-casts, it did not own the copyrights in most of the other material. Therefore a compulsory licence would interfere with the rights of third party copyright owners, as the re-negotiated agreement with ESPN evidenced. Furthermore the Tribunal accepted Sky's argument that the "copyright licence in the present arrangements is inextricably linked with the balance of the retransmission agreement and cannot properly be severed". The Tribunal did not attach any significance to the indemnity clause as this was simply a means of allocating risk once a licence was actually granted by Sky. Therefore the Tribunal concluded (at 21) that:

> ... while the retransmission agreement does include a copyright licence, the arrangements involved go well beyond that and it cannot properly be said that the retransmission agreement is a copyright licence.

LICENSING BODY

The Tribunal's finding that there was no licensing scheme at the time Saturn was refused a licence was sufficient to dispose of the case, but the Tribunal also considered whether Sky would satisfy the important definition of "licensing body" included within para (a) of the prescribed licensing schemes in s 148. This is defined in s 2 as:

> ... a body of persons (whether corporate or unincorporate) that, as copyright owner or prospective copyright owner or as agent for a copyright owner, –
>
> (a) negotiates copyright licences; and
>
> (b) Grants copyright licences, including licences that cover the works of more than one author.

The test in this definition is whether the organisation actually functions in a licensing capacity whereas the definition in the UK Act, while otherwise similar, looks to the objects of the organisation: "Licensing body" is defined in that Act as "a society or other organisation which has as its main object, or one of its main objects, the negotiation or granting [of licences etc]". Cornish notes that "it would be contrary to the Berne Convention to place under public control the licences and licensing schemes offered by individual right-owners ..." and that (with the exception of the schemes defined in ss 148(b)-(c) of the NZ Act and UK equivalents) the "licensing body" definition ensures that this does not occur (Cornish Intellectual Property, 3rd ed, Sweet & Maxwell, 1996, p 424). Potentially therefore the New Zealand definition evinces a different legislative object and extends the jurisdiction of the Tribunal beyond the traditional scope of collection societies to the dealings of "private" organisations provided that the organisation, first, negotiates (and grants) licences at least some of which cover the work of more than one author, and secondly, does so as a copyright owner, prospective copyright owner, or agent for a copyright owner (at p 23). Was Sky such a licensing body? Paragraph (b) was significant because –

> if [Sky] does not in fact negotiate [licences covering the works of more than one author] then it is not a licensing body, but that does not mean that all the licences negotiated and granted by a licensing body have to be such licences.

The test in this definition is whether the organisation actually functions in a licensing capacity whereas the definition in the UK Act, while otherwise similar, looks to the objects of the organisation

As Sky owned the copyright to some of the material that it broadcast it therefore negotiated and granted licences on its own behalf at least, but the definition of "works of more than one author" for purposes of Part VIII of the Act (as defined in s 147) excludes collective works of which the authors are the same and works made by the employees of single firms or groups of companies (etc). Hence the copyrights that Sky actually owned did not satisfy the requirement of "more than one author", although the programmes made by third parties and broadcast on the SMO channels would. However the Tribunal held that Sky had no right to license the materials of the third parties without express permission as it was not their "agent", and therefore could not be a licensing body.

PRESCRIBED LICENSING SCHEMES

The finding that Sky lacked authority to license the works of more than one author also meant (assuming there was a scheme) that Sky was not operating the type of licensing scheme to which the provisions in ss 149-155 apply. The prescribed licensing schemes are outlined in s 148, at least one of which must match Sky's "scheme". Paragraph (c) and sub-paras (d)(i)-(iii) relate to various licences none of which were relevant to Sky. Paragraphs (b) and (d)(iv) deal with schemes relating to broadcasts and schemes authorising the immediate re-transmission of a broadcast in a cable transmission respectively. Both potentially applied to Sky, but the Tribunal held that these paragraphs did not assist Saturn because they were intended to apply to broadcasts only and

not other classes of copyright work included within the broadcasts. Although Sky's "scheme" would have licensed the broadcast copyright, the scheme would have been much wider than this by including the underlying copyright works in addition to the broadcast copyright. Saturn attempted to draw a distinction between the use of the word "broadcast" in the two paragraphs arguing that para (d) did contemplate the underlying works because of its relationship to other sections in the Act, such as s 48, which apply to broadcasts and the works "included" in them. The Tribunal would not entertain two different meanings of the word, irrespective of different legislative histories, and rejected this argument holding that its interpretation was consistent with the other classes of works referred to in para (a) all of which applied to the "finished product as opposed to the original expression of the author" (at 27).

This left only para (a) which required Saturn to prove that it licensed the works of more than one author and that it was a "licensing body". Saturn was unable to satisfy the requirement for the reasons discussed above and therefore the Tribunal had no jurisdiction over the matter for the purposes of ss 149-155. (Interestingly the "works of more than one author" requirement in para (a) creates a certain degree of redundancy as this is the very essence of a licensing body. It does ensure however that when a licensing body operates more than one scheme that it is the scheme in question which is the one that covers the works of more than one author. Perhaps the licensing body requirement could have been omitted instead from para (a).) Whatever the findings in respect of s 148 the Tribunal reiterated its stance that the Tribunal could not grant a licence for works for which Sky was neither the owner or agent for this would "expropriate the rights of persons not before the Tribunal" (at 27).

In summary the Tribunal decided that Sky was not a licensing body, it was not operating a licensing scheme, and, even if it was, it was not a licensing scheme to which the remedies provision in s 153(1) applied. These findings would also have defeated Saturn's alternative claim under s 153(2), but as Saturn would not have been excluded from the cases covered by the licensing scheme, had one existed, it was unnecessary to consider the additional requirements of s 153(2) that the licence had been "unreasonably" withheld.

COMMENT

The decision shows that it is possible, subject to s 148, for a private body to be subject to the Tribunal's jurisdiction in respect of refusals to license if that body has set out the general terms upon which it would be willing to grant licences. In Saturn's favour was the continuity in all the negotiations and that Saturn had asked for execution copies of Sky's final proposal before Sky withdrew from negotiations completely (a point that did not seem to weigh heavily with the Tribunal in making its remarks at p 17 quoted above). The main obstacle to liability was the absence of a clear "setting out" of the terms by Sky at this stage in the negotiations. The Tribunal would not let the certainty or willingness arguably present in the draft agreement colour the later negotiations. Even if Saturn had purported to accept Sky's terms prior to the revocation of the draft agreement (which would not have been contractually binding on Sky), the lack of agency powers necessary in this case to satisfy the definition of "licensing body" and failure of the scheme to qualify as one of the types of scheme to which s 149-155 relate would still have prevented Saturn's claim from succeeding.

For all the complexity and apparent precision of Part VIII of the Act one is left with impression that the provisions are rather cumbersome, inflexible, and to a certain extent redundant. Part VIII establishes several "bright-line" tests for jurisdiction all of which were considered in the judgment (and none of which were satisfied), but the lack of any value-based element to the provisions, such as the "primarily" element of the UK licensing body definition, does not enable a holistic view to be taken. The Tribunal then has little discretion in determining whether it has jurisdiction other than its residual discretion over whether to grant a remedy. A counter-argument would be that an objects based approach merely leads to characterisation disputes, although in this context it is difficult to see how the line could be easily blurred between genuine collection societies and other operations. The atomisation of a test into many small elements can have the effect that some findings will inevitably seem strained which does not usually make good law. Three of the Tribunal's particular interpretations of the Act are interesting in this respect.

the inclusion of any ancillary restraints or obligations in a licensing agreement will remove it from the sphere of both "licensing schemes" and licences granted "otherwise than under a licensing scheme"

First, the Tribunal's reasoning on "copyright licence" is unsatisfactory as the Tribunal appears to be declining jurisdiction in respect of terms that do not specifically relate to copyright infringement when those terms affect the "balance" of the agreement. The effect of this rather pedantic approach seems to be that the inclusion of any ancillary restraints or obligations in a licensing agreement will remove it from the sphere of both "licensing schemes" and licences granted "otherwise than under a licensing scheme", and hence the Tribunal's jurisdiction. This seems especially ironic given the anti-competitive nature of the non-competition clause in Sky's contracts – the very sort of term one would have expected a copyright tribunal to deal with.

Secondly, the use of the word "agent" in the Act is potentially problematic. The Tribunal's decision did not attempt to address how third party rights had been dealt with in the other re-transmission agreements: even though Sky had the ability to negotiate and secure sub-licences (and presumably had the blessing of the other copyright owners to initiate such negotiations), it seems that the lack of any right to do so is a barrier to the Tribunal compelling Sky, and its third party licensors, to grant a further similar licences. The Tribunal did not entertain a compulsory licence order conditional upon Sky obtaining consent from its licensees even though such contingencies are arguably anticipated by the Act when it refers to "prospective copyright owners" as qualifying as licensing bodies. The Tribunal felt unable to overcome the "agent" requirement, subscribing to the view that "agent" took its narrow agency law meaning (ie one who is authorised to license on the copyright owner's behalf). The definition of "licensing body" does require the body to both negotiate and grant licences as an agent, which tends to support the Tribunals' view, but such a definition

could exclude collection societies that are not formal agents even though they are de facto copyright owners in their capacity as the conduit through which licensees must, in practice, travel. Would such a society not be a licensing body setting out schemes for the granting of copyright licences?

The third point relates to the finding that Sky's scheme was not in respect of "broadcasts" as prescribed in s 148(b) and (d)(iv). In the case of the schemes prescribed in s 148 other than in para (a) neither "licensing body" nor the licensing of the works of more than one author is a requirement. (Therefore any licensors falling within paras (b)-(d) should be careful in making blanket invitations to treat on specified terms.) By analogy the Tribunal's finding would appear to mean that a scheme could only fall within s 148(c) in respect of the rental of computer programs if the scheme would not involve any other classes of copyright work. If the scheme's operator licensed only its own works for rental and the computer programs included artistic works which were all created by the scheme's operator then the scheme would not fall within para (a) but could not fall within para (c) either! Although even if the Tribunal had included Sky's scheme as relating to broadcasts the "on behalf" requirement in the definition of "licensing scheme" may have posed problems similar to the agency requirement implicit in para (a) through its inclusion of "licensing body".

Perhaps the most significant feature of the decision is demonstration of the Tribunal's marked reluctance, in principle at least, to intrude into the subjective elements of contractual negotiations by setting terms for the parties. This is in contrast to the Tribunal's approach under the 1962 Act which did not materially differ in the discretion conferred on the Tribunal (see *Federation of Independent Commercial Broadcasters (NZ) Ltd v Phonographic Performances (NZ) Ltd* Decision 23 May 1977 and discussed in Spiller "The Copyright Tribunal 1963-1988: An Assessment" [1989] 4 Canterbury Law Review 52). While the Tribunal may be correct that it should not be overly intrusive, it should not be too squeamish either lest this frustrate the Tribunal's role. Certainly the benefits of establishing a Tribunal are that it is not bound by the normal rules of evidence (s 215(1)) or procedure (s 214(5)), but these seem of comparatively little moment in the sort of civil commercial dispute where facts are not usually contested. Rather these features confirm the Tribunal's raison d'être of exercising specialist expertise, and making value-judgments if need be, to regulate the use of market power that can sometimes arise from copyright ownership. The general tenor of Part VIII for either assessing conduct or giving remedies is one of reasonableness in the circumstances. Section 149 even empowers the Tribunal to vary an entire licensing scheme proposed by a licensing body on this basis. In respect of licences granted otherwise than under a licensing scheme the Tribunal likewise has the power under s 157(3) to confirm or vary the terms of proposed licences "as it may determine to be reasonable in the circumstances". Such provisions are intended to afford the Tribunal considerable latitude in setting terms and can require intervention in private commercial arrangements that a Court of general jurisdiction would not normally contemplate.

For the instant case s 153 likewise provides that the Tribunal "shall make an order declaring that, in respect of the matters specified in the order, the applicant is entitled to a licence on such terms as the Tribunal may determine to be applicable in accordance with the scheme or, as the case may be, to be reasonable in the circumstances". Section 153 contains something of a contradiction in this respect. For refusals to license the Tribunal only has jurisdiction over licensing schemes which must, by definition, set out the terms. This apparent contradiction can be explained in part by the Tribunal's power to order licences in cases "excluded" from the scheme. Since the scheme would not provide for terms in such a situation the Tribunal would have to set them, with other terms as a guide. But it is unclear whether Parliament intended the reddendo singula singulis rule of interpretation to apply to this power so that "reasonable" terms could not be set for cases falling within the scheme when the Tribunal has been unable to determine the scheme's complete details. It seems strange that a drafting economy should have been made on this critical point whereas the remainder of Part VIII hardly stints on words.

In reality it was not the certainty of terms which posed the problem in this case. The essential terms (ie period and royalty rate) would have been clear enough from the three other individual contracts if the Tribunal had been disposed to a favourable view of Saturn's claim and was prepared to exercise the modest value-judgment the Act seems to require. The actual obstacles for Saturn were that Sky was not the sort of body that the Tribunal anticipated would be subject to its jurisdiction and that after the revocation of the draft agreement Sky did not "set out" any terms in a general sense to all comers. Therefore the negotiations could not fairly be characterised as a scheme at all. Rather than dismiss Saturn's application on all grounds it might have been better to simply dispose of the case on this last ground. Even so, firms should refrain from issuing invitations to treat for copyright licences on specified terms until the ramifications of Part VIII of the Act have been considered, especially for schemes falling within paras (b)-(d) of s 148 which have a lower threshold than para (a). If Sky did have the power to sub-license its broadcasts and their content and the offer had been accepted earlier the outcome could have been different.

CONCLUSIONS

It was not mentioned in the decision why Saturn was so keen to secure a re-transmission licence from Sky: CNN and Discovery had already been sub-licensed to Saturn and presumably content substitutable for most of the SMO channels (with the possibly exception of some sports content) could have been licensed directly from other sources. Foreclosure of these markets by Sky to a degree actionable under the Commerce Act seems unlikely. Whatever the precise facts and Saturn's motivation for litigating, the move to resolve this dispute in the Copyright Tribunal perhaps reflects a disenchantment with the ability of the Commerce Act to moderate business conduct in this (and other) intensely contested markets – especially where anything in the nature of "interconnection" pricing and negotiation is involved. The outcome of the case was probably correct, but the Tribunal's findings on several of the points discussed above send discouraging signals to licensees applying to the Tribunal for this sort of relief in future. The decision shows that, notwithstanding the broad wording of the relief provisions in Part VIII of the Act, the Tribunal will not readily entertain complaints from competitors (as opposed to non-competing licensees) about perceived anti-competitive behaviour. This is especially the case where the licensor is not primarily constituted as a licensing body and has merely made a rational business decision about with whom it will deal with and on what terms: The Tribunal is not the appropriate forum for such disputes. Once more unto the Commerce Act? ❑

"WAITAKERE UNREASONABLENESS"

Hamish Hancock, Crown Counsel

examines Thomas J's judgment in Waitakere *and tries to align rights with reason for the 1998 AIC Administrative Law Conference*

When do individuals and minorities whose rights are neglected have an administrative law remedy against a democratically elected council? Just how unreasonable does a decision of elected representatives have to be before it is reviewable by the Courts?

This paper considers these issues in an economic rights context by examining the different judicial approaches in *Waitakere City Council v Lovelock* [1997] 2 NZLR 385 (CA), in particular Thomas J's extensive critique of *Wednesbury* unreasonableness.

PRELIMINARY WARNING

Those who might have expected individual property rights to be well protected in New Zealand law should be warned that there are both gaps and obstacles in this area. Although the Courts were once most protective of such rights this protection has diminished in various areas. Planning legislation is an example where limiting individual property rights is said to be justified in the wider interests of the community.

In a similar vein the economic interests which were at the centre of the *Wellington City Council v Woolworths New Zealand Ltd (No 2)* [1996] 2 NZLR 537 (CA) and *Waitakere* cases did not attract any particular weighting by the Judges, except by Thomas J in *Waitakere*. Richardson P said of that judgment at p 397:

> It discusses numerous interesting questions much debated by scholars over the years. However, I do not find it necessary for the purpose of this judgment to discuss those matters.

The New Zealand Bill of Rights Act 1990, and the preceding White Paper make no reference to any intention to enact protection for general economic freedoms. Nor does the International Covenant on Civil and Political Rights 1966 provide a general guarantee against deprivation of property. However the right to own property and not to be arbitrarily deprived of it is contained in Art 17 of the Universal Declaration of Human Rights.

A member's Bill entitled New Zealand Bill of Rights (Property Rights) Amendment Bill was defeated on 25 February 1998 by 110 to nine votes. The Explanatory Note says:

> Private property rights have been subject over the years to particularly serious and continuing erosion, and many statutes now intrude on that right. Reliance on s 28 of the Act ... existing rights and freedoms ... not to be ... restricted by reason only that they are not included in the Act, has been shown to be inadequate.

The Bill provided that everyone has the right to undisturbed possession and enjoyment of private property and that "no one is to be deprived of that right in any way for any public purpose without full and fair compensation".

The defeat of the Bill raises interesting questions as to the relationship between traditional economic rights and freedoms on the one hand and the attitude of the legislature towards the Court's supervisory role over the state's extensive power over the individual's economic rights.

The writer suspects the problem is not that the legislature opposes property rights or fair compensation as values in themselves. Rather the problem is one of defining and limiting the circumstances in which such rights might apply. Perhaps this is a task which is so complex and detailed that only the Courts, armed with some basic principles, can evolve a jurisprudence which, whilst upholding the interests of the majority in the community, does so in a way which is not oppressive or discriminatory to a minority which lacks the power or influence to protect its position through the political process. Alternatively, some recent remedial local authority legislation may be an example that when necessary the legislature will act.

LOCAL GOVERNMENT AMENDMENT ACT 1996

From 1 July 1998 councils will be subject to a detailed statutory regime in respect of their expenditure, funding and accountability – a Fiscal Responsibility Act for local government. Some nine local authorities have been voluntarily complying with the new legislation since 1 July 1997. Ratepayers such as the *Woolworths* and *Waitakere* plaintiffs will have the protection of a series of factors which the council must take into account in setting rates and expenditure programmes (ss 122F to 122H). These are directed to procedural requirements. If ratepayers do not raise their challenges during the special consultative procedure they may well find their judicial review rights restricted (s 122W).

Aspects of the *Woolworths* decision are contained in s 122I which confirms that the ultimate decision on funding is still a political one. The local authority, having regard to any relevant submissions, shall make judgments on fairness and equity and the extent to which the procedural requirements are relevant in any particular case. These judgments:

> may reflect the complexity and inherent subjectivity of any benefit allocation for specified outputs and the complexity of the economic, social, and political assess-

ments required in the exercise of political judgment concerning rating.

THE RIGHTS IN ISSUE

In this paper the term economic rights is used in the sense of the right or freedom of citizens against excessive, oppressive or discriminatory interference by the state in their property or commercial interests. In other words rights used as a shield rather than a sword. This paper does not deal with economic rights as affirmative rights enforceable against the state, as for example some commentators advocate for the rights contained in the International Covenant on Economic, Social and Cultural Rights. This is a topic on its own and is already much discussed in the "rights" literature: refer Hunt, "Reclaiming Economic, Social and Cultural Rights: The Bangalore Declaration and Plan of Action" [1996] NZLJ 67.

In this paper the term economic rights is used in the sense of the right or freedom of citizens against excessive, oppressive or discriminatory interference by the state in their property or commercial interests. In other words rights used as a shield rather than a sword

How serious to the ratepayers concerned were the interests in contention in *Waitakere*, *Woolworths* and *McKenzie District Council v Electricity Corporation of New Zealand* [1992] 3 NZLR 41 (CA) not to mention the many other rating challenges between 1990 and 1996?

In *McKenzie*, ECNZ owned property of $627 million capital value out of a capital value of saleable properties in the district of $858 million, there being 2600 ratepayers. Through ECNZ becoming a ratepayer the council's rates income was expected to rise by 78 per cent. Of that the council planned to budget for an unallocated surplus of $1.9m. The local authority maintained the total of general rates levied against other ratepayers as for the previous year, a year in which it had not received any rates from ECNZ. The Court of Appeal held the council had failed to follow the statutory process; had approved an unallocated surplus of a magnitude beyond a prudent contingency; had failed to address its attention to its statutory power to rate on a differential basis; and had failed to appreciate its fiduciary duty to ECNZ to consider the latter's interests as a ratepayer.

In *Woolworths* new government valuations of the capital value of land in the Wellington region upon the application of the council's differential rating system, resulted in rates increases of up to 100 per cent for a number of commercial ratepayers in suburban areas. The Court of Appeal reversing Ellis J at first instance held that this was not one of those extreme cases meeting the stringent test for impugning the rating determination by elected representatives.

The *Waitakere* case has a curious aspect in that on appeal only the council appeared and was represented. The ratepayers, whilst opposing the appeal, had earlier reached a settlement with the council, leaving the latter unilaterally to argue the appeal. Thomas J found the comprehensive written submissions and oral argument from the appellants' counsel, in the absence of opposition, "overwhelming" (p 397).

In *Waitakere* the seven plaintiffs, members of a residential ratepayers group, alleged inequalities in the level of rates levied by council against high-value inner city residential properties. They said the council breached its statutory responsibilities in not introducing a stepped differential for the inner residential area.

Describing their grievance in constitutional terms Thomas J said at p 417:

> In a rating case, for example, the power being exercised over the citizen is extensive. In effect, it amounts to a far-reaching power of taxation .... Taxation, after all, is a subject dear to the hearts of citizens since Magna Carta in 1215, the Petition of Right in 1628 and the Bill of Rights in 1688. Thus, there can be no justification for effectively placing or seeking to place the rating decisions of councils beyond the scope of the Court's traditional supervisory function.

His Honour emphasised the need for effective accountability having regard to the nature of the power being exercised, saying at p 417-418:

> the reality of majoritarian government can be taken into account by the Courts. Individuals and minority groups may not fare well. Indeed, the potential for a democracy to brook the tyranny of the majority is a concept well articulated in democratic theory. It underlies much of the rights-based jurisprudence which is current today.

His Honour saw the remedy in an independent body such as the Court exercising its review function, because:

> Public bodies zealously concerned with the implementation of a general policy may tend to be indifferent or neglectful of the legitimate interests of an individual or a minority (p 418).

On the facts of *Waitakere* Thomas J, whilst agreeing with the majority that the council's decision could not be said to be beyond the bounds of reasonableness, confessed that he was "not entirely comfortable with this outcome" (p 397). He noted Kerr J at first instance had concluded this was one of those "clear and extreme" cases where the Court should intervene (p 399):

> As he saw it, the council had evaded its responsibility to correct an inequitable anomaly in its rating system. The Judge seems to have suspected the failure by the council ... was politically motivated. He referred to the "elected representatives" being anxious to maintain a "popular profile" with the "majority" of the electorate and in doing so putting and keeping a "significant minority" in a less favourable and unfair situation. The Judge's opinion that the council's conclusion ... was so unreasonable that no reasonable council could ever have come to it was obviously based on the perception that the decision – or lack of a decision – was oppressive and discriminatory to a significant group of ratepayers.

His Honour did not doubt a Court would be persuaded to intervene if it were established that a rating system was clearly inequitable to a significant minority of ratepayers, and that the local authority's decision to maintain the status quo was:

> motivated by purely "political" considerations and the consequent desire to avoid making a hard decision which would be unpopular with the majority of the electors.

> But although intimated, it cannot be said that the Judge's conclusion in this case is spelt out in these transparent terms. Clearly, it is important where the ground on which the applicant succeeds is based on *Wednesbury* unreasonableness that the reasons why the Judge considers the decision unreasonable be carefully and fully spelt out (p 399).

Thomas J thus indicated the point at which he would have intervened in that case. The trigger is a decision which is "clearly inequitable to a significant minority" and "motivated purely by political considerations".

In the following discussion the test for unreasonableness accepted by the Court of Appeal in *Woolworths* and by the majority of Richardson P and Blanchard J in *Waitakere*, will be considered in the light of Thomas J's criticism of *Wednesbury* unreasonableness.

"Public bodies zealously concerned with the implementation of a general policy may tend to be indifferent or neglectful of the legitimate interests of an individual or a minority"

WEDNESBURY UNREASONABLENESS AND ITS CRITICS

Wednesbury test

Unreasonableness as such was not an issue in *McKenzie* which was decided on the basis of the council misconstruing its statutory power. However the *Wednesbury* test for unreasonableness was involved in both *Woolworths* and *Waitakere* cases. The effect of a series of cases from *Wednesbury* on was summarised by Richardson P in *Waitakere* as:

> ... a Court can intervene only if the decision of the council is irrational or such that no reasonable body of persons could have arrived at that decision. It is not an appeal on the merits. In review proceedings the Court cannot substitute its own opinion for that of the elected council. Proper respect must be given to the role and responsibilities of the democratically elected council: *Waitakere*, p 397, per Richardson P.

The strict approach to unreasonableness by the New Zealand Court of Appeal accords with that of the English Judges. Thus the Privy Council in *Mercury Energy Ltd v ECNZ* [1994] 2 NZLR 385 confirmed the *Wednesbury* test for unreasonableness, quoted extensively from Lord Greene's judgment and described it as "definitive". In doing so The Board also endorsed the strict or "super-*Wednesbury*" test, as referred to in subparas (b) and (c) above.

Critics of the test can fairly point to a degree of exaggeration – a type of judicial poetic licence. I believe this exaggeration was intended to serve as a signal to the Court to intervene only in decisions on grounds of unreasonableness in extreme cases lest the Court "be itself guilty of usurping power". If that clear and extreme demarcation put review remedies beyond the reach of some plaintiffs on some occasions that was better than encouraging review on the merits with its attendant risk of merely substituting the Court's opinion for that of the authorised decision-maker.

What's wrong with Wednesbury?

Whilst supporting the majority decision in *Waitakere* Thomas J rejected their use of the *Wednesbury* test and proposed instead what he described as his own more principled straightforward test at p 419:

> [the *Wednesbury*] test which is semantic and tautologous, unduly inflexible having regard to the different kinds of decisions and the varying gravity of such decisions, lays claim to a spurious measure of objectivity, accepts that a public authority, although under a duty to act reasonably, may act unreasonably so long as its unreasonableness is not so unreasonable as to be outrageous, absurd, perverse, or the like, and leads to a disparity between the terms of the test and what the Courts actually do.

Instead, the Judge would have had to hand a more straightforward test; would a reasonable council in the position of the Waitakere Council acting with fidelity to its statutory function have reached the decision which that council reached?

Thomas J acknowledges that this approach requires the exercise of a value judgment on the part of the Judge, preceded by the following steps (p 419):

- close examination and analysis of the facts
- review of the statutory power
- consideration of the nature of the authority
- regard to the options open to the council
- recognition of impact or seriousness of decision
- appreciation of interests required to be balanced.

Rather than applying an objective test, the Judge would focus attention on the latitude which the council possessed in reaching its decision.

> Conscious of the need for judicial restraint the Judge would then bring to bear a realistic and balanced perception of the factors outlined above in determining that latitude and whether the council's decision went beyond the bounds of reasonableness. Should it emerge the council's decision was unreasonable the Judge would spell out the grounds or reasons why this was so or articulate the principles or values which led to that conclusion.

In *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* CA 176/97, 17 December 1997 a five Judge bench considered Pharmac's appeal from Gallen J's decision that its determination that payments made by Regional Health Authorities for Rulide, an antibiotic produced by Roussel, be reduced was unlawful, invalid, and be set aside. Gallen J said he was satisfied that the "lack of even-handedness" and discrimination which led to the reduction of subsidy on one of two competing products was neither adequately nor acceptably explained.

On appeal the Court considered the case was about process rather than substance (p 9) but that on this occasion the distinction made no difference to the result. However, if the matter was considered as a challenge to the substance of Pharmac's decision, four of the Judges – Richardson J, Henry J, Blanchard and Tipping JJ – indicated they relied on the well-known standard test in *Woolworths*; per Blanchard J delivering the majority judgment (p 12):

> In some cases, such as those involving human rights, a less restricted approach, even perhaps, to use the expression commonly adopted in the United States, a "hard look", may be needed. The concept of substantive fairness, discussed in *Thames Valley Electric Power Board v NZFP Pulp & Paper Ltd* [1994] 2 NZLR 641, also requires further consideration. The law in this country

> applicable to situations of that kind will no doubt be developed on a case by case basis. But this is not such a case. It is entirely about money, subsidisation of the sale of pharmaceuticals. There is no call for any departure, on these facts, from the position so recently taken in *Woolworths*. Is the deferral of a new classification for Klacid so discriminatory against Rulide that the decision is unreasonable in a *Wednesbury* sense? Inconsistency can be regarded as simply an element which may give rise or contribute to irrationality in the result of the process.

The majority disagreed with the determination of the Judge at first instance that Rulide and Klacid should not have been treated differently. Instead they held that adequate justification existed for Pharmac's determination, based on expert advice, that pending further evaluation of Klacid, Rulide should be treated differently. They noted that Gallen J himself referred to the existence of "understandable reasons".

In his dissenting judgment Thomas J noted that in the subsidy system the government had adopted for providing a benefit to the consumer of pharmaceutical product competitors are effectively exposed to the whim or caprice of the governing agency:

> At its core, Roussel's complaint is that it did not receive equal treatment. The formal equality which "requires officials to apply or enforce the law consistently and even-handedly" [Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, (5th ed) at pp 576-582] was absent (p 22).

Thomas J noted that counsel for Pharmac was quick to seize on the strict test of *Wednesbury* unreasonableness so that Pharmac's decision must be shown to be "perverse" before it could constitute a reviewable error (p 55). His Honour's response was that because the majority of the Court and himself had concluded that the case was about the decision-making process or procedure rather than substance, the *Wednesbury* test could have no application. To do so would be to fail to distinguish the decision-making process from the decision (p 56).

> Ultimately, the reference pricing system was the pharmaceutical companies' protection against unfair or irrational treatment at the hands of Pharmac in an environment where their economic well-being was heavily dependent on that company's management of the benefit system. Roussel was deprived of that protection and is now entitled to have the Court intervene. .... pp 56-58

His Honour's concerns about *Wednesbury* are shared by other commentators. For example Craig in *Administrative Law*, (3rd ed, 1994), states at p 444:

> Intellectual honesty may well require a better explanation as to why an act is unreasonable than that which has been provided by the Courts using traditional techniques of review.

Jowell and Lester in "Beyond *Wednesbury*: Substantive Principles of Administrative Law" [1987] PL 369 do not regard the test as a satisfactory principle on its own to explain why the Courts review certain categories of conduct (p 371-372):

> The incantation of the word "unreasonable" simply does not provide sufficient justification for judicial intervention. Intellectual honesty requires a further and better explanation as to *why* the Act is unreasonable. The reluctance to articulate a principled justification naturally encourages suspicion that prejudice or policy considerations may be hiding beneath *Wednesbury*'s ample cloak.

CRITIQUING THE CRITIQUE

Semantic, tautologous, inflexible

Using some colourful adjectives Thomas J describes as unhelpful the addition of various epithets such as absurd, outrageous and perverse (pp 400-403) to the *Wednesbury* test. He criticised them as designed to "impart a spurious veil of objectivity" (p 403).

I believe it is necessary to consider not only the adjectives used but also their context and the message or philosophy which the appellate Judges wished them to convey. Why was their language so emphatic? The answer is clear. As Thomas J correctly notes, the Judges wanted to: "Impress upon the Courts the need to exercise judicial restraint" (p 403).

That they succeeded was reconfirmed as recently as 1994 by the Privy Council in *Mercury*. The philosophy behind the test was bluntly stated by Lord Templeman at 339 quoting Lord Brightman in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at p 1173:

> Judicial review is concerned, not with the decision but with the decision-making process. Unless that restriction on the power of the Court is observed, the Court will ... under the guise of preventing the abuse of power, be itself guilty of usurping power.

True, the *Wednesbury* formulation and its subsequent refinements may well contain some semantic or tautological faults, but these should not be allowed to obscure the main point. At a practical level there is little evidence that the semantics or even hyperbole of the *Wednesbury* or "super-*Wednesbury*" tests have in themselves impeded the Courts in judicial review or led to unjust results. Where the Courts have found the stringent test onerous they have simply applied it less intensively. Even in *Waitakere* Thomas J applying his own different test to that used by the majority did not conclude – despite his unease – that the council's decision was unreasonable.

Spurious objectivity

Thomas J reasons that because ultimately the Court must exercise a judgment in assessing the reasonableness or unreasonableness of the authority's action, what is required is assistance in the way that judgment is to be exercised, not epithets designed to impart a "spurious veil of objectivity" into the exercise (p 403). However that criticism may be too severe. The *Wednesbury* formula "so unreasonable that no reasonable authority could ever have come to it ..." because it is strict can be seen to enforce judicial objectivity, or at least restraint.

The test requires the reviewing Judge to be restrained and tolerant towards a range of decisions which he personally may consider unreasonable but which he acknowledges that another person – with different social or economic values – might reasonably hold. Even if that is not objectivity it is probably the next best thing.

If *Wednesbury* is read in this way then it does not allow an area of "permissible unreasonableness" extending all the way to just short of outrageousness, perversity or absurdity, as Thomas J argues based on a literal interpretation of Greene MR's formulation (p 412). Rather it allows – in a

tolerant, democratic vein – that a view you regard as unreasonable another may reasonably hold. It is equivalent to Voltaire's saying that he disagreed with his opponent's point of view but would defend to the death his right to hold it.

Disparity between the test and what the Courts do

Thomas J said the test of unreasonableness lacked coherence and consistence because it varies according to the subject-matter, such as fundamental human rights (p 403):

> It is incongruent that the Court should ask of an authority's decision affecting, say, the life of an individual, whether or not the decision is so unreasonable that no reasonable authority could have arrived at it. Such a vital decision surely need not be outrageous, absurd or perverse before the Courts should be prepared to intervene.

A recent example of a less intensive application of unreasonableness is in *Electoral Commission v Cameron* [1997] 2 NZLR 211 (CA). The Electoral Commission sought judicial review of a decision of the Advertising Standards Complaints Board that certain of the Commission's advertisements were in breach of the Advertising Codes of Practice 1995. The Commission was a Crown entity under the Electoral Act and the Board was an incorporated body constituted by the Advertising Standards Authority Incorporated Society which represented organisations of the major industry interest groups. The Court held that the advertising of the Commission concerning the new MMP electoral system fell outside the jurisdiction of the Board and the code because the Commission's advertising did not promote the "interest of any person, product or service".

Gault J delivering the judgment of the five Judge Bench said that the appropriate remedy was one of declaration under the Declaratory Judgments Act 1908 and was available without resort to judicial review (p 430).

Dealing with the hypothetical situation where the Board did have jurisdiction to consider such a complaint the Court observed that in carrying out its public regulatory role as a private organisation it was exercising public power and was therefore reviewable on public law principles. A material consideration was that the Board (by the Society) had set its own jurisdiction boundaries:

> In those circumstances the legitimacy of the exercise of the powers should be scrutinised not narrowly by reference to that jurisdiction but rather more broadly. ... For instance, it would seem entirely appropriate in such circumstances to have regard to any encroachment upon statutory functions and powers conferred on public authorities and to apply a somewhat lower standard of reasonableness than "irrationality" in the strict sense (p 433).

Thomas J is of course correct that at a literal level there is a disparity between the test and what the Courts do. When one considers the ad hoc and incremental way in which the common law has developed over time some disparity is impossible to avoid. However, at a practical level I believe that generally the Courts have made it clear when the unreasonable test will be applied strictly and when it will be relaxed.

Bylaw cases

As a further example of inconsistency of standards Thomas J referred to the bylaw cases, which predate the *Wednesbury* decision. He noted it is easier to establish that a bylaw is unreasonable than it is to establish *Wednesbury* unreasonableness and that:

> it is anomalous that a local body decision which is to be implemented by way of a bylaw should in effect attract a different approach from a decision which is not incorporated in a bylaw (p 404).

Part of the problem perceived by Thomas J is that the concept of unreasonableness does not rest comfortably with ultra vires, the traditional doctrine that has governed the development of administrative law. It is far easier for the Courts to judge whether an authority has kept to the terms and purposes of a statutory power, adopted a fair procedure, had regard only to relevant considerations and ignored irrelevant factors, and even acted fairly, than it is to judge the reasonableness or unreasonableness of the authority's substantive decision (p 406).

Proportionality

Thomas J then considered the developing ground of review, that of proportionality, and its close affinity to the concept of unreasonableness (p 407):

> Proportionality recognises that an administrative discretionary power should not be exercised in a manner which causes injury to individuals out of proportion to the perceived advantage to the public. ... In *Ex parte Brind* [[1990] 1 AC 696] the concept was seen as having a significant substantive element and, while rejected in that case, its future application arguably was not ruled out.

Thomas J concluded that the existence of the *Wednesbury* test at present inhibited treating proportionality or disproportionality as an aspect of unreasonableness. I share His Honour's view that disproportionality – at a certain extreme point – itself becomes an instance of unreasonableness.

Fiduciary duty

His Honour then discussed the fiduciary or quasi-fiduciary duty owed by local authorities to their ratepayers. Reviewing the leading English authorities on the subject he found at p 409 that:

> the underlying notion that the local authority's discretion is confined by an obligation arising from the fact it is entrusted to collect and administer funds provided by ratepayers clearly emerges.

And at p 411:

> It is ... difficult to reconcile a fiduciary obligation ... with super-*Wednesbury* notions of outrageousness, absurdity or perverseness .... But why should *Wednesbury* unreasonableness prevail? ... the implicit notion of two differing standards is incongruous. ... This is not to elevate the fiduciary duty above *Wednesbury* unreasonableness but simply to incorporate it within that principle. ... The values which it [fiduciary duty] incorporates become the values which the Courts will advert to when determining the issue of [*Wednesbury*] unreasonableness.

In my view there is considerable force in this argument. It would seem that breach of a fiduciary duty could well be regarded as a special category of unreasonableness, much the same as breaches of human rights.

The "appearance of unreasonableness", "latitude" and judicial restraint

Thomas J says at p 412 that a public authority is in breach of its basic obligation whenever it acts unfairly or unreasonably but that (p 412):

this does not mean the Courts must or should intervene every time a decision might appear to be unreasonable. The latitude required for a public authority in carrying out its statutory function ... remains critical ... there is no sharp dividing line between reasonableness and unreasonableness .... A decision remains a reasonable decision until such time as the authority goes beyond the bounds of this permitted latitude.

At pp 413-418 under the heading "Unreasonableness and judicial restraint" Thomas J describes the "latitude" the Court should allow when reviewing a public authority. At pp 413 to 415 he lists six factors favouring or not favouring judicial restraint:

1. Task vested in it by the legislature
2. Democratically elected body
3. Extent of administrative/statutory controls
4. Genuine scope for differing views
5. Detriment to efficient administration
6. Policy versus improper political considerations.

If one contrasts Thomas J's criteria for judicial restraint with the judicially restrained *Wednesbury* approach of the majority in *Waitakere* and *Woolworths*, is the difference appreciable? Blanchard J in *Waitakere* did not seem to think so, saying at p 419:

> The task which Thomas J in the conclusion to his judgment assigns to the reviewing Judge is, I believe, precisely that which the members of this Court undertook in *Wellington City Council v Woolworths*.

This aspect of Thomas J's judgment may give rise to some of the very problems it seeks to address. It criticises *Wednesbury* for the unwiseness of allowing an area of "permissible unreasonableness" saying at p 412: "A public authority is permitted a latitude to be reasonable, not unreasonable". Yet at the same time Thomas J's judgment recognises the Courts must not intervene every time a decision might appear to be unreasonable; acknowledges there is no sharp dividing line; and that the authority should be allowed some "latitude".

The issue comes down to who controls the area beyond the latitude allowed to an authority to "appear to be unreasonable" to the point just short of *Wednesbury* unreasonableness? Greene MR said the Courts have no business in this area. Thomas J says they do.

His Honour proposes the judiciary should police this tautology and semantics-strewn minefield occupying the fuzzy boundary between reasonableness and unreasonableness. He acknowledges this supervisory role will require a judicial value judgment but seeks to regulate this through judicial restraint (as he defines it); by allowing some latitude to the local authority; and also by requiring the Judge to articulate the principles or values which led to his conclusion (p 419):

> In the assertion that "a decision is unreasonable because ..." it is what comes after the "because" which is important.

Thomas J says that the list of grounds, principles or values to which the Court might have recourse in determining that a decision is unreasonable is probably limitless; incrementally they will become recognised as "the principles of unreasonableness". He lists the following examples (p 413):

- disproportionate to objective sought
- disregarded/too little weight on a fundamental human right or value
- logical flaw in reasoning
- failure to comply with fiduciary/quasi-fiduciary duty
- failure to balance properly the interests of disparate groups

I consider that diminishing the strength of the *Wednesbury* test or bypassing it as proposed by Thomas J will only shift, rather than resolve, the perennial question of when a Judge can intervene for substantive unreasonableness. However, I believe that His Honour's "principled" approach to ascertaining unreasonableness could assist in this area. It contains the prospect for developing a well-defined set of rights, giving as much certainty, objectivity and assurance that the law will be applied equally to all as can be expected. The more important the principles involved the more readily an infringement will satisfy the *Wednesbury* test. As to the examples of principles listed above I consider an extreme breach of any of them should satisfy the *Wednesbury* test, except for "logical flaw in reasoning" which comes too close to substantive review on merits or a general appeal right.

The issue comes down to who controls the area beyond the latitude allowed to an authority to "appear to be unreasonable" to the point just short of Wednesbury unreasonableness?

The bottom line: judicial restraint or activism

The *Wednesbury* test applied in *Woolworths* and *Waitakere* is clearly intended to keep the Court well out of the area of funding decisions by elected representatives. For this the Court of Appeal has postulated a stringent test; a test criticised by Thomas J for being too rigorous.

Despite the safeguards he proposes of a qualified form of self-imposed judicial restraint and permitting a public authority some latitude, I predict His Honour's alternative test for unreasonableness would significantly increase the Court's power to review the substance of decisions on their merits. The majority in *Waitakere* clearly believed it was necessary to have a stringent test, a clearly marked "no go" area for the Courts.

The majority would also have been mindful of the Courts' ability to provide remedies in deserving cases using the considerable powers available to it under other heads of judicial review such as illegality or procedural unfairness. I consider Thomas J gives insufficient importance to the power which these conventional grounds of judicial review confer on Judges. They are extremely powerful, as noted by Craig in *Administrative Law*:

> The language [of a statute] is often elliptical, ambiguous and inherently open-textured. What the legitimate ambit of a certain power actually is will necessarily be a value judgment. It is relatively easy for a Court using the formal language of keeping a body within the four corners of its powers to impose its own view as to what the authorities should have done (p 433).
>
> ... the assumptions ... that by concentrating, in so far as the Court can, upon "process" rather than the "merits" judicial review will be less controversial. It has however been convincingly demonstrated that complex substantive value judgments underlie the determination of many ostensibly process-related issues. (p 440) ❑