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THE WINEBOX

The role of the Court in the common law system is to decide matters properly brought to it by parties in dispute. Since the parties are paying for the privilege, it would be exploitative simply to treat a case as an opportunity to settle some interesting point or develop the law in a way of interest to the Court rather than to the parties.

The role of a statement of claim and then of the case on appeal has always been to enable the defendant or respondent to know what case has to be met. Trial by ambush is supposed to be over and indeed this is regarded as not merely more efficient but as pursuing proper standards of fairness. Litigants are supposed to play with their cards on the table.

Now, Courts have always been at pains to assist litigants in person, and this may be fair enough. But when an apparently well informed and well funded litigant engages experienced counsel then there is no ground for not sticking strictly to the pleadings drawn up by that party and on the basis of which the other parties have prepared to fight the case.

This is not what seems to have happened in *Peters v Davison* (The Winebox case) in the Court of Appeal, CA 72/98, 17 November 1998, Richardson P, Henry, Thomas, Keith, Tipping JJ.

Non-lawyer journalists present in Court report that it was apparent that the Court did not find Mr Henry's pleadings or arguments of much assistance. There are also sufficient indications in the judgments that this was the case. The majority (Richardson P, Henry and Keith JJ), for example, state at p 6:

> The amended statement of claim traverses the report at some length. It does not identify the source of the jurisdiction invoked to challenge aspects of the report, and does not in so many words identify particular paragraphs allegedly containing errors of law. In essence, however ...

So perhaps counsel who on other occasions have left the Court to divine the "essence" of their pleadings and who have had their arguments knocked back in Court can take comfort from the Court's willingness to construct a case and a series of arguments and then to go on to make observations on matters which had not been argued at all.

The central issue in the Winebox case was whether the report of a Royal Commission could be subjected to judicial review on the ground that the report itself contained an error of law. The alleged error of law was the Commissioner's interpretation of s 301 of the Income Tax Act 1976. There was also a "less explicitly identified" contention that the Commissioner misconstrued s 293 of the same Act.

The reasoning followed by the Court might be called the *Finnigan* reasoning. The argument goes that since we can review this body when it does some things, we should be able to review it when it does anything. What was forgotten in *Finnigan* was that the jurisdiction to review decisions by sporting bodies to discipline and expel members comes from equity and not from administrative law.

Similarly, in the Winebox case, the Court reasoned that since it could review some actions by a Royal Commission, it could review the contents of its report as well. Throughout there is a lack of focus on the point that the matters admittedly reviewable were decisions to take some action, and not merely the expressions of opinion of the Commission.

A similar issue arose in *Phipps v Royal Australasian College of Surgeons*, CA 70/98, 30 November 1998, Henry, Keith, McGechan JJ. In that case the Otago Crown Health Enterprise commissioned a report by the RACS into one of its surgeons. The jurisdiction to review this report was found in ss 3 and 4 of the Judicature Amendment Act 1972 and the fact that the RACS was a corporate body. The obvious advice to give a health authority from now on is that it should have such inquiries carried out by individuals who have direct contracts with the authority.

But the more general point is that such a report is merely an expression of opinion. Someone may or may not make a decision on the basis of the report. It is well settled that before doing so the decision maker must reveal the contents of the report and give an opportunity for the subject to make representations. Once a decision has been made it can be challenged in administrative law or employment proceedings if appropriate. That is the complete answer to the Winebox Court's hypotheticals about a report which had been damning of the Commissioner for Inland Revenue or the Director of the Serious Fraud Office. The authorities quoted by the Court of Appeal are all, with the exception of one Canadian case, examples of Commissions taking decisions, such as to hold the inquiry in public, to summon a witness and so forth.

The Court of Appeal having upheld the appeal against the application to strike out the action, one can now ponder the nature of the High Court action which must ensue. It is very hard to see who has a real interest in fighting this case, apart from Mr Peters. In the event of a declaration in his favour he will presumably represent this as a victory,

although, as the Court of Appeal noted, this particular matter was only one of several about which he and Mr Henry represented that they had evidence which in the end they were unable to produce. (It is therefore hard to see that the reputation of either is seriously in issue in this proceeding.)

None of the other parties have any real interest in fighting the case and indeed, in the case of the Crown, its interests are complex and potentially conflicting.

The outcome is going to be a declaration by a High Court Judge. At that stage we will then have two expressions of opinion, one formally authoritative. If Mr Peters is the losing party he will presumably prosecute an appeal. If Sir Ronald were the losing party, then the question would be whether he were sufficiently exercised to appeal. And if none of the other parties would be prepared to mount an appeal, then it is questionable whether they will wish to spend time and money fighting the case in the High Court.

It is almost certain that any other tax payer who is faced with a massive tax bill as a result, will not accept the result of the High Court action as determining liability and will relitigate the issue, at which point it will be being fought by a party with a genuine interest.

The Court of Appeal, especially Thomas J, went on to express some oblique opinions on the central issue, the interpretation of the relevant sections of the Income Tax Act and the "form over substance" doctrine. In particular the case of *McGuckian* in the House of Lords was mentioned, without the vigorous criticism to which the speeches of Lords Cooke and Steyn have been subjected being mentioned. It is strange to see that many lawyers active in the maintenance of Bill of Rights standards when criminals are being dealt with by police adopt quite a different posture when the subject is tax gathering.

In addition Thomas J commented on the nature of a Commission of Inquiry. It is, as His Honour noted, an inquisitorial body, not a lis inter partes. The comments imply criticism of the Commissioner for effectively placing a burden of proof on Mr Peters. But this implies contentment with the stance that Mr Peters actually took. This was to mount a public campaign in which people were accused of offences from behind the shelter of parliamentary privilege, then to campaign for the setting up of an inquiry, then repeatedly to say that he had evidence of fraud and corruption on the part of senior officials, and then to say that he would not produce the evidence as it was the Commission's job to find it. This is hardly satisfactory.

It must be remembered that allegations of fraud and corruption were what were in issue. The Commission was to inquire into whether the IRD and the SFO had done their jobs "in a lawful, proper and competent manner". This too reflects on the striking out application. If senior lawyers can advise the authorities, as they did, that the transactions were within the law, and if a retired Chief Justice can come to that conclusion himself, then whatever the Courts finally decide on the interpretation of the Income Tax Act, it seems difficult to say that the IRD or the SFO acted unlawfully, improperly or incompetently in doing what they did.

Finally, the position of Mr Henry himself is worthy of remark. Mr Henry appeared as counsel for Mr Peters at the Winebox Inquiry itself, at the taxpayer's considerable expense. Mr Henry made personal representations to the Commission on which he was in due course unable to deliver. He was subjected to trenchant criticism by the Commissioner in the report. Yet he appears as counsel in the Winebox case representing Mr Peters. Even more remarkably, he appeared as counsel in the judicial review application which hinged round secret interviews the Royal Commission had conducted with, amongst others, Mr Henry.

Opposing counsel in the Winebox case also raised the question of Mr Henry's close relationship with Mr Peters and whether that endangered the independence expected of counsel. However, as we now appear to accept as counsel lawyers appearing for their employers, their close relatives and groups of trustees of which they are themselves members, perhaps this is a concept whose time has past. ❑

WORLD TRADE BULLETIN

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***writes about important recent developments in world trade in a column commissioned by Butterworths (UK)* Tax Journal**

BANANA FRITTERS

The long-running dispute between the European Union and the United States over the importation of bananas into the member states of the EU suddenly became headline news in the general press. The Office of the United States Trade Representative announced that if the EU did not by the 1st of January next year make alterations to its regime for the import of bananas, Washington would impose 100 per cent duties on a wide range of goods from European countries consigned as exports to the USA. The list of products which have been threatened strikes at many of the most lucrative goods which move across the Atlantic from Europe. High on the list comes wine, although surprisingly whisky is not included. So this will be a considerable blow to France, but not so hard for the UK and Ireland. However, the list goes much further. Textiles are on it, and so are electrical products, toys, garments, cheese and paper products.

The United States has consistently claimed that the EU has failed to comply with the ruling of the appellate body of the WTO which was handed down in July 1997 in respect of the banana dispute. But Brussels is adamant that it has made sufficient alterations to satisfy the ruling which the appellate body then made. It says that the quotas which will apply are in line, and that the United States has no reason to complain. The problem is that this is the first occasion on which the new dispute resolution scheme has been subject to this kind of challenge; its procedure does not really cater for a situation in which one party claims that there has been a failure to comply with the final ruling of the appellate body, while the other side says that it has. There is only a single level for an appeal beyond the initial panel stage, and to have a third level in addition would seem to over-egg the pudding.

For the USA to impose 100 per cent duties in retaliation for an alleged failure to comply would almost certainly itself constitute a serious breach of WTO rules. But more importantly, for the two major players in the world economy to take the matter to the brink in this way is a grave threat to the future regulation of world trade. It does not only jeopardise the dispute regulation procedure of the WTO which only came into being in 1995; a trade war of such dimensions between the EU and the USA would threaten the future of the World Trade Organisation itself. The crises which have rocked the world economy over the last eighteen months are far from resolved; other unpleasant surprises may remain to be uncovered in the months ahead. If the two major world economies cannot provide clear and coherent leadership in this situation, there will be a real risk of the new century starting with a very unpleasant slump. The solution to the banana dispute is for the two sides to ask the WTO appellate body to reconvene, and to give a further unambiguous ruling on whether the EU has in practice complied with its earlier decision.

OVERHAULING THE WTO DISPUTE PROCEDURE

Ironically, just before the USA announced its intention to impose these duties, the Commission of the EU had set out its proposals for reform of the dispute resolution procedure. The banana spat has put the spotlight on the absence of an effective process for deciding the extent of any compliance, but there are other fundamental shortcomings which can be identified. In particular the Commission criticises the first stage of WTO litigation, which is adjudication by a panel. The current scheme is based on an extensive list of candidates, who are essentially part-timers. As the EU and the USA between them have by far the largest involvement in WTO cases under this new jurisdiction, both are well placed to draw attention to perceived defects. The Commission points out that the panellists have to sit on any dispute to which they may be allocated, in addition to their normal professional duties. In addition, they may only be called upon to sit in a small number of disputes, perhaps only one. They may find it hard to devote enough time to the case in hand, and also may find it difficult to keep abreast of the rapidly developing WTO jurisprudence. The EU also complains about what it says is an unduly large number of panel decisions which have been overturned on appeal to the appellate body. What the Commission would prefer to see replace the panel is a smaller group of between 15 and 24 experts in international trade law. They would take all the panel disputes at first instance, sitting in panels of three experts.

There is no doubt that far from being underemployed, the dispute procedure has generated far more cases than had been expected. At the time of writing, at least 20 different disputes are passing through the pipeline at various stages of the procedure. All the signs are that, far from a universal lowering of trade barriers as had been predicted until quite recently, we may be entering a new era of protectionism. In these circumstances, it may well be that the Commission's suggestion makes sense. The problem for the WTO is to represent all the geographical areas of the world, and to achieve a proper balance in doing so. Underlying any proposal is the need to reflect both the interests of the developed and the developing economies. But there is an increasing realisation that the kinds of issues which are now coming before the WTO are of the greatest importance; they affect

not just a limited number of companies or shareholders, but the populations and workforces of entire countries.

THE MULTILATERAL AGREEMENT FOR INVESTMENT (MIA)

One of the more significant features of the new dispute procedures in the WTO is the fact that the parties are obliged to be states which have signed up to the WTO/GATT agreements. Thus the litigation is conducted at inter-governmental level. It puts proceedings into a plane at which diplomatic and lobbying skills become at least as important as forensic abilities. But inevitably references are driven by commercial interests within the national spheres of the governments involved. The impetus for the US stance on bananas is said to come from the Chiquita company. The system does reflect increasing globalisation; frequently the reality is a clash of multinational companies. It is probably true to say that the WTO forum is the most active international Court in the world. But if the rug had not been pulled from under the draft Multilateral Agreement for Investment in October, the ultimate tool for Court action against national governments would have fallen into the hands of corporations all over the world.

In the final analysis it was the French delegation which walked out of the last round of discussions. Prime Minister Jospin produced an analysis which has not been lost on his fellow heads of government confronted with the onward march of globalisation. He referred to the effect of the recent upheavals in world markets and "the hasty and often thoughtless movement of capital". In these circumstances, he observed "it would appear wiser not to allow excessive private interests to bite into the sphere of state sovereignty. States must remain the principal players in international life". The point on which the Quai d'Orsay had taken a stand was the attempt to remove protection for national cultural media. Subsidies for film and TV programming making would no longer be allowed. Attempts at linguistic protection by governments would have to be abandoned under the MIA. This would have ended the situation in some Scandinavian countries under which no foreign language programme or film can be exhibited without a subtext in the national language affixed to the screen.

The preservation of ethnic culture is a highly sensitive issue. The anglophone nations will ignore it at their peril; it is likely to be one of the most thorny issues in the early decades of the next century. Gwynfor Evans of Plaid Cymru achieved the introduction of S4C (Sianel Pedwar Cymru) in Wales by threatening to starve to death if the establishment of a Welsh language station was denied. The French objected to their viewers and cinema goers being exposed to a diet of American and British productions, and so the negotiations came to an end. The proposal for the MIA was made under the auspices of the Organisation for Economic Cooperation and Development (OECD). This only boasts twenty-nine members states. Very few of these can be regarded as anything other than fully developed, so the third world in any case was poised to talk down any final agreement as neo-colonialism. But if the agreement had been signed, it would have allowed multinationals to sue in a new international any national government which attempted to protect its own environment by domestic legislation. The UK would not have been able to forbid the testing of genetically engineered crops for example, let alone impose a requirement for a quota for national/EU workers on any non EU company operating in this country.

THIRD WORLD DEBT

Following the recent catastrophe in Central America, much criticism was voiced about the weak response of the richer countries before the United States and the EU were eventually spurred into positive action. Eventually Chancellor Gordon Brown took the initiative in proposing a moratorium on the enormous debts which confront the governments of Honduras, Nicaragua and Guatemala. The world was astonished to learn that where aid of many millions was eventually promised, this was merely the equivalent of a few weeks' interest payments on the debts which these countries owed to the international financial organisations. Has the time come to consider the extension of the principle of limited liability to national economies? The Secretary for Trade and Industry Peter Mandelson recently eulogised the American approach to corporate failure. There, he told us, "some of the most successful entrepreneurs are those who have failed once or twice. Banks and society as a whole don't write people off as failures. They see them as people who have learned".

But there is little doubt that the principle of limited liability is one of the main factors in the great success of the capitalist system during the nineteenth and twentieth centuries. That success has engendered economic growth and rising prosperity in those countries where it has taken root. If debt burdened third world countries are given the chance to wipe the slate clean and start again, might this not give them the chance to create better internal living standards which would create consumer societies anxious to buy more of the goods and services which the already developed world is producing? ❑

WHY NOT SUBROGATION?

Simon Judd, Morrison Kent, Auckland

questions the need for the further extension of negligence in Riddell v Porteous

Riddell v Porteous [1999] NZLR 1 (CA) was a claim for the cost of repairing a deck which had rotted due to water leakage. The original action in the District Court was by the owners of the house and deck, the Bagleys, against the Riddells, from whom they had bought the property. They sued pursuant to cl 6.1(10) of the REI/NZLS agreement form which contained a vendor warranty that:

> where the vendor has done or caused or permitted to be done on the property any works for which a building permit is required by law, a permit was obtained for those works and they were carried out in compliance with that permit.

It was common ground that the damage to the deck was caused by work which the Riddells had allowed to be done which required a permit and which had not been done in compliance with the permit. Therefore, the Riddells were liable to the Bagleys, but issued third party proceedings against the builder who carried out the work in question and the council which had been responsible for checking that the work did comply with the permit. The Riddells claimed against the builder in contract and against both the builder and the council in the tort of negligence.

There were a number of matters in issue on the appeal, but the one which I shall deal with is the liability of the builder and the council to the Riddells. The Riddells were not the owners of the property when the damage was discovered. Therefore, they did not suffer any loss as a direct result of the negligence of the builder and the council. They had sold the property to the Bagleys for a price agreed without knowledge of the damage, and it was the Bagleys who paid to have the deck repaired. The Riddells were only out of pocket because of the contractual warranty contained in the agreement for sale and purchase.

A cause of action in tort arises when the plaintiff suffers damage caused by the tortious act of the defendant. Without proof of damage, there is no cause of action. It is difficult to see how the Riddells could have a cause of action in tort against the builder and the council when it was the Bagleys who suffered the damage.

The Court of Appeal considered that the Riddells did have a tortious cause of action against the builder and the council. They approached the matter as if the important issue was whether the builder owed a duty of care to the Riddells. They applied the two stage test set out in *Anns v Merton Borough Council* [1978] AC 728 and concluded that a duty of care was owed. Having found a duty of care, they held the builder and the council liable to the Riddells for the amount paid to the Bagleys pursuant to the warranty.

With respect, the existence or otherwise of a duty of care was a red herring. Of course the builder and the council owed a duty of care to the Riddells when the deck was being built. The real issue was that the breach of that duty did not cause any damage to the Riddells. The only people who suffered damage as a result of the negligence of the builder and the council were the Bagleys. They are the ones who had a cause of action against the council and the builder.

There is a similar problem with the Riddell's claim against the builder in contract, which was upheld by the Court of Appeal without discussion. While the builder plainly owed a contractual obligation to the Riddells to build in compliance with the permit, the Riddells did not suffer any damage as a result of the breach of that obligation. The Bagleys suffered the damage caused by the breach of contract. The Riddells were out of pocket because of their separate obligations under the sale and purchase agreement.

One can see why the Court of Appeal would have felt that the Riddells should be able to recover from the builder and the council as it was their negligence which caused the damage. But it was not necessary to find a cause of action in negligence or extend the scope of damages for breach of contract to achieve this. The remedy for the Riddells is found in the equitable doctrine of subrogation.

Pursuant to cl 6.1(10) of the REI/NZLS sale and purchase agreement, the Riddells were obliged to indemnify the Bagleys for damage caused to them as a result of the negligence of the builder and the council. The Riddells were in the same position as an insurance company contractually obliged to indemnify the assured for damage caused by a negligent third party. Just as an insurance company has the right to step into the shoes of its assured and pursue the rights of the assured against the third party, so the Riddells were entitled to step into the shoes of the Bagleys and sue the builder and the council in their name.

While insurance policies usually contain specific clauses providing that the insurer has the right of subrogation, the doctrine is not dependent on contract, but is a creature of equity. The doctrine was described by Ashburner: *Principles of Equity* (2nd ed) p 243, as follows:

> A payment by A to B may have the effect of swelling the assets or diminishing the liabilities of C, but it may not give A in law any direct remedy against C. In such a case a Court of equity allows A to stand in the shoes of B to enforce against C in equity corresponding rights to those which B would have against him at law or in equity. A is treated as the assignee of B's claim against C, and can enforce it, subject to all equities and rights of set-off which C may have against B.

Unfortunately, instead of using the doctrine of subrogation, the Court of Appeal has attempted to do justice by extending the tort of negligence and the availability of damages for breach of contract to a situation where the defendant has not caused damage to the plaintiff. In the view of the writer, it is not good law to attempt to do justice by ignoring or avoiding the requirements of established causes of action when the law already provides a recognised and principled route via which justice can be achieved. ❑

UNAUTHORISED ACCESS TO COMPUTER SYSTEMS

Mark Perry, Faculty of Law, The University of Auckland

argues that much of what people are told about cyberspace is wrong, and much of what they're told that's wrong is also frightening (Godwin: Cyber Rights)

A LACUNA IN THE LAW?

One might be amused (or troubled) by the phenomenon that the most mundane events draw headline attention in the media. Particularly attractive in recent years are antisocial activities that involve computers and cyberspace. If a perceived failure by our legal system adequately to deal with a situation, can also be brought into the story it seems to become irresistible to any editor. The recent news coverage of the incident in late November, where over 4000 files were deleted from the IHUG server and some of XTRA's passwords were revealed as having been breached, have all of these elements.

Headlines such as "Web site vandalism shows law in need of shake-up" (*Herald* November 24) or "Lawless web good only for hackers" (*Evening Post* November 25) do not give much credence to the effectiveness of current legislation, and such reports tend to promote misconceptions of the Internet as some wild frontier that is home to hoards of vandals and perverts. To be fair, some newspapers do carry the occasional column with more reasoned comments, such as on the viability of anti-hacking laws. You may even see the sentiment expressed that computers, and the networks that connect them, provide a useful tools for commerce, education, and personal interaction.

Undoubtedly there has been a lack of considered discussion in New Zealand concerning the application of the law to the Internet. Perhaps there has been a tendency to dismiss cyberspace as simply another area of commerce in which current laws work just fine, and although it is true that "passing-off is passing-off", there are questions of applicability of current law in new contexts. It is advisable to consider the implications of twisting current laws to fit new environments, and to avoid proceedings such as those in *R v Gold* [1987] 3 All ER 618 (upheld in the House of Lords). Lord Lane, at 623, described prosecution efforts to bring the activities of two hackers under the terms of the Forgery and Counterfeiting Act 1981: "The Procrustean attempt to force the facts into the language of an Act not designed to fit them produced grave difficulties for both the Judge and jury which we would not wish to see repeated".

The recent publication of the Law Commission's *Electronic Commerce* has done something to fill the void in New Zealand legal publications in this area. (A publisher rejected an offer of a reference work on the law of information technology in New Zealand two years ago on the grounds of the limited market.) However, the report does not inspire confidence in treatment of the law related to information technologies when the first page of the main text seems to exclude the telephone from electronic communications technology. This broad report does mention trespass to property, confidential information, negligence and the two United Kingdom criminal damage cases discussed below (*Electronic Commerce* 147-185), but it does not treat computer misuse in any depth.

OVERSEAS EXPERIENCE

There have been a large number of overseas reports and commissions directed specifically at criminality and computer security issues (such as The Australian Review of Commonwealth Criminal Law Committee Discussion Paper on Computer Crime, the OECD Computer Related Crime Analysis, and the United Kingdom Law Commission approach adopted in the Computer Misuse Act 1990). Such reports generally divide computer misuse into categories of fraud, damaging data, unauthorised use, unauthorised access, and omission to record or store data when there is a duty to do so. In many cases they have led to the introduction of sui generis legislation to deal with the perceived problem. Such legislation has had mixed success. In New Zealand there is no legislation that is directed specifically at unauthorised computer access, although a number of provisions are available for the prosecution of those who invade others systems. However, for the sake of simplicity and brevity let us look solely at the possible criminality of actions of persons who gain access to computer systems and delete files.

Unauthorised access to computer systems is a threat to security, often causes the victim economic loss and threatens confidence (one would not trust a bank that did little to prevent unauthorised access to account details on the Internet, for example). There are also issues of privacy and trade secrets. The Crimes Act 1961 was enacted at a time when very few had access to computers and even fewer to computer networks. The computer issue did arise in the reports that culminated with the Crimes Bill 1989. New crimes relating to computers were drafted in cls 199-201, including a broader definition of "property", and definitions of such terms as access, computer, computer network, computer programme, computer software, and computer system. The Bill never became law, and there have been no amendments to the Crimes Act for specific computer crimes. However, s 298 Crimes Act provides for criminal damage, and in subs (4):

> Every one is liable to imprisonment for a term not exceeding five years who wilfully destroys or damages any property in any case not provided for elsewhere in this Act.

This is a very broadly drafted section where property includes real and personal property, and any estate or interest in any debt and anything in action and any other right or interest. This is much broader than the definition for property capable of being stolen. It is not specified in the Crimes Act whether this can include data on computer systems, and it may prove an obstacle to prosecution for criminal damage that the data on the disks is intangible. However, the corresponding provision in the United Kingdom can be found in the Criminal Damage Act 1971, and was considered in *Cox v Riley* [1986] Crim LR 460 and *R v Whiteley* [1993] FSR 168. Section 1 of the UK Act makes it an offence for a person to destroy or damage "any property belonging to another intending to destroy or damage such property ...": property is defined as real or tangible.

In New Zealand there is no legislation that is directed specifically at unauthorised computer access, although a number of provisions are available for the prosecution of those who invade others systems

COX v RILEY

In *Cox*, the defendant worked on a computerised saw that relied for its operation on a printed circuit card. The defendant erased the computerised saw of all its 16 programs, thereby rendering the saw useless apart from limited manual operation. Cox was charged under the Criminal Damage Act. His counsel argued was that the deletion of the program was not property within the terms of the Act. The Divisional Court rejected this argument. Cox's deletion of the programs was seen similar to those of someone spiking a gun: the gun itself is not damaged, but is nonetheless rendered useless. His actions "made it necessary for time and labour and money to be expended in order to replace the relevant programs on the printed circuit card". This case, though expedient in its outcome, did little to facilitate further understanding of the limits of damage within the terms of the Act. Section 3(6) of the Computer Misuse Act, which was enacted after the decision in *Cox*, provides that a modification of the contents of a computer is not to be regarded as damaging any computer or computer storage medium, unless its effects on that computer or storage medium impaired its physical condition, although such modifications would fall within the offences under that Act.

WHITELEY

Whiteley offers more in the way of applicability to the current New Zealand context. Whiteley was a computer hacker. Using his Commodore 1000 from his home he gained unauthorised access to the United Kingdom Joint Academic Network and entered a number of computers on the system. He deleted and added files, put on messages, made sets of his own users, and operated them for his own purposes, changed the passwords of authorised users, enabling himself to use the system as if he were those users. He deleted journal files to ensure that there was no trace of his activities. He was astute and skilled enough to detect a special tracing programme that had been inserted by the legitimate operator to trap him, and deleted it. He successfully attained the status of system manager on some computers, enabling him to act at will without identification. The computers failed. Legitimate users were denied access to their files at times, and some computers had to be shut down for periods. He altered data contained on those computers' disks; deleted and replaced files.

Whiteley was charged with damaging property (as defined by s 10(1)) contrary to s 1(1) Criminal Damage Act 1971. The prosecution argued that he caused criminal damage to the disks by altering the state of the magnetic particles when files were deleted or altered. The disks and magnetic particles on them containing the information were one entity, and were thus capable of being damaged. Whiteley was convicted and sentenced to 12 months' imprisonment. He appealed against conviction on the ground that a distinction had to be made between the disk itself and the intangible information held on it which was not capable of damage as defined by law. The appeal was dismissed on the ground that s 1 Criminal Damage Act required that "tangible property had been damaged, not necessarily that the damage itself should be tangible". Furthermore, there could be no doubt that the magnetic particles on the metal disks were a part of the disks, and if the appellant was proved to have intentionally and without lawful excuse altered the particles in such a way as to impair the value or usefulness of the disk, then that would be damage within the meaning of the Act. The fact that the damage could only be perceived by operating the computer did not make the damage any less within the ambit of the Act.

CONCLUSION

By adopting the approach of the Court of Appeal in *Whiteley*, a New Zealand Court could apply s 298(4) Crimes Act to any instance where someone has gained unauthorised access to a computer system and changed data in the system. Although this comment has focused on the wilful damage provisions of the Crimes Act, there are a number of other sections that may prove useful to successfully prosecute those who engage in unauthorised access to computer systems. Some may argue that it is timely for clarification of the law, either by new legislation or perhaps amendment of the current Act. Such measures however should be approached with caution. The wide liability introduced by the Computer Misuse Act 1990 in the United Kingdom has not been without problems. We need to consider whether it is necessary to create new offences, refine current laws, or rely on other forms of regulation – for example by placing a greater burden on system operators to protect users' files, or extended civil liability for those who engage in unauthorised access. It should be noted that simply having laws creating offences is not enough to ensure computer security. There must be willingness for computer operators to have some protective systems in place. There must be mechanisms to detect perpetrators. There must be willingness for prosecutions to be pursued. ❑

The author welcomes your thoughts, comments and suggestions: please e-mail them to m.perry@auckland.ac.nz

THE PENALTY FOR MURDER

Sean McAnally, Judges' Clerk, Wellington

Comments on the Bill currently before Parliament

INTRODUCTION

The Degrees of Murder Bill 1996 is being considered by the Justice and Law Reform Select Committee, in light of which the Minister of Justice has expressed a preference for sentencing discretion for murder.

On 2 September 1998 the Justice and law Reform Select Committee heard oral submissions on the Bill. From listening to the submissions made, and to the questions being asked by the members it became clear to me that the Bill, which is unworkable in its current form, is simply a manifestation of public dissatisfaction due to public perceptions on three important matters:

- that "life" only means ten years' imprisonment;
- all murderers are put into the same category; and
- those, such as Janine Albury-Thomson, who should, according to some, be convicted of murder, but of a lesser degree of culpability, are instead being convicted of manslaughter. Under a degrees of murder regime this could have been third degree murder.

The purpose of this article is to address those concerns and put a case which can clearly show that degrees of murder are not necessary, and that sentencing discretion alone would not entirely address these concerns either.

LIFE SHOULD MEAN LIFE

By s 172 Crimes Act 1961 the penalty for murder is life imprisonment. Those who are dissatisfied with the current regime take exception to the fact that an indeterminate sentence, such as life, is subject to the provisions of s 89(1) Criminal Justice Act 1985, which gives the life prisoner eligibility to consideration for parole after having served ten years of their sentence. The proponents of the Degrees of Murder Bill argue that there is a certain class of murderer who should never be eligible for parole. Life should mean just that. Such an approach is completely punitive and disregards any other aim of sentencing. One must question whether incarcerating a youthful killer, say of 18 or thereabouts, for somewhere in the range of 60 years really benefits anyone. That offender will reach a point where he can no longer be any real threat to the public, given the effects of age. He may also "rehabilitate" in prison, although this latter aspect could justifiably get less weight. After that 18-year-old has served, for arguments sake, ten years and cannot credibly be regarded as a further threat to society, does anyone benefit from his continued incarceration? Society is entitled to protection from dangerous offenders, and I accept that the families of victims are entitled to a significant amount of retribution, as is society generally, but once the threat to society has long since passed, there must be a limit to how much longer a family can expect the state to accede to their retributive whims. Once a killer can be regarded as reformed, or no longer a threat, which will often be the case immediately, as murders are so often a result of unique circumstances, there must be a reasonable limit to incarceration.

There are some cases where the circumstances are such that the offender truly does deserve incarceration for life. It is hard to imagine what criteria would be required to satisfy this hypothetical situation, but repeat killing, and the killing of children in circumstances where insanity cannot assist the accused may be such. Degrees of murder, it is said, will enable such villains to be incarcerated for life. However, to attempt to create a fixed sentence not for an offence, but instead for the *circumstances* of an offence is obviously problematic. This is one of the reasons the Degrees of Murder Bill as it stands is technically unsound, and even dangerous. Clause 3 says that murder in the first degree would be a murder committed in "a particularly sadistic, heinous, malicious, or inhuman manner". These terms cannot be defined. One jury may find a particular killing heinous, others may not. It could lead to terrible inconsistencies. This particular Bill, meant to rectify supposed inconsistencies in the justice system, could only perpetuate more such inconsistencies.

The solution is not degrees of murder. If some killers deserve to be incarcerated for life and others do not, the answer is simple. Start with the Minister's suggestion, and look to make the penalty for murder a maximum of life, rather than mandatory life. This means reverting to orthodox sentencing principles. That maximum would be reserved for the "worst cases". The grey area would consist of determining what falls into that category, but in sentencing for other offences the Courts are guided by this principle and seem to manage. Obviously the maximum is rarely imposed, but the Courts do allow themselves to consider a case in that most grave category if the facts demand it. In *R v Wickliffe* [1987] 1 NZLR 55 the Court of Appeal upheld life imprisonment imposed for manslaughter. There seems no reason why the same cannot occur for murder. In New South Wales the maximum penalty is life imprisonment. Sentencing discretion in that jurisdiction is approached, according to Hunt CJ in *R v Kalaczich* (1997) 94 A Crim R 41 at 50-51, in this manner:

> The maximum penalty ... [is] reserved for cases falling within the worst category of cases, but it is not reserved only for those cases where the prisoner is likely to remain a continuing danger to society for the rest of his life or for those cases where there is no chance of rehabilitation; the maximum penalty may be appropriate where the level of culpability is so extreme that the community interest in retribution and punishment can only be met by such a punishment. It must nevertheless be possible in the individual case to point to its particular features which are of very great heinousness, and there must be an absence of any facts mitigating the objective seriousness of the crime.

It is submitted that this adequately ensures that some murderers will be sentenced to life imprisonment. It is preferable that a sentencing Judge conversant with all the facts related

to the offender and the offence decide whether the case is in the "worst" category. A jury, for obvious reasons, cannot be fully aware of the background of the offender, and Parliament by attempting to legislate for that worst case scenario can only confuse the issue.

The concern will always remain that sentences imposed will be too lenient. However, it is submitted that when the public cannot have access to the information a sentencing Judge has, this dissatisfaction will always be present. In a 1996 survey in the United Kingdom, by the Home Office, 51 per cent of those interviewed were of the opinion that sentences were "much too lenient". A further 28 per cent thought they were a "little" too lenient. However, when given the facts of a case, and asked what form of sentence they would themselves have imposed, the sentences suggested by the public were in fact, generally, more lenient than that considered appropriate by the Court of Appeal. From this it can be contended that for as long as the public is misinformed by the media, and by those with particular political agendas, public dissatisfaction with sentencing levels will remain an inherent part of judicial work.

Sentencing discretion alone will not dispel the myth, perpetuated at the Select Committee hearing by one of the Members, either out of ignorance, or otherwise, that the sentence for murder is in fact only ten years, and therefore less than a finite sentence of, for example, 12 years imposed for rape. However to say that the latter sentence is more than that imposed for murder is blatantly wrong, and disturbingly misleading. Again, the sentence for murder is not ten years, it is life imprisonment. The rapist sentenced to 12 years' imprisonment will in most cases be released unconditionally, under s 90(1)(d) of the Criminal Justice Act, after having served eight years of that sentence. On the other hand, the life prisoner is only eligible for parole after ten years, and even if granted, that offender is subject to recall for life, so to this extent life does mean life. If the sentence for murder is perceived as being one of ten years' imprisonment, it is not the sentence that is at fault, it is the parole provisions. Even if sentencing discretion is granted, a sentence of, giving a ridiculous figure, 50 years' imprisonment still carries with it parole eligibility after ten years. The reason for this is that s 89(4) of the Criminal Justice Act provides this for any determinate sentence of 15 years or more.

To give true effect to any attempt at "hardening" the line to murder requires not only discretion at sentencing, but also amendment to the parole provisions. Doing the former without the latter, I suggest, is largely pointless.

CATEGORIES OF MURDERERS?

There is a view that degrees of murder would allow murderers to be categorised. That is to say, some murderers could be said to be worse than others. This can be taken as recognising that in some murders there will be mitigating factors, and in others there will be aggravating factors which distinguish a particular case from others. This already happens for other offences. The sentencing Court takes these individual factors into account and tailors a penalty which fits the circumstances of the crime. This is currently, of course, not possible with the penalty regime for murder. Degrees of Murder will supposedly redress this. I submit it is not necessary to go to this extreme. If the Courts were to have the discretion to impose a lesser penalty for murder it would also mean that degrees of culpability could be recognised at sentencing. There really is no need for a jury to further trouble itself by attempting to slot an offence into a particular square, that is, which degree of murder.

It may be that the public are not as interested in the sentence as in the name of the offence. Arguably, the categorisation spoken of must occur at the stage of conviction. Some may contend that the word "murderer" is not severe enough to mark the gravity of an offence. "First degree murderer" may be more appropriate. Is this really so? I have great difficulty in accepting that that sort of distinction serves any purpose at all. The word "murderer" has very strong connotations. We must remember the crime of murder has been around for a lot longer than the relatively modern "fad" of degrees of murder. Given the problems in defining degrees of murder, I suggest there is no logical reason to think that degrees of murder is a better position.

MURDER OR MANSLAUGHTER?

The *Albury-Thomson* case has highlighted this issue. I believe that the verdict was legally, but not morally, wrong. However, had the correct legal verdict been returned, the sentencing Judge would have had no option but to impose the mandatory sentence. For this reason, I believe, the defence of provocation *had* to be raised, *had* to be allowed by the Judge to go to the jury, and *had* to be accepted by the jury. Anything else may well have resulted in an injustice, as has arguably happened in other cases, particularly in the popularly known "battered woman's syndrome" context.

The supporters of degrees of murder submit that their Bill will solve this. A jury can return a verdict of third degree murder, and the sentencing Judge can impose an appropriate sentence. All this is saying is that in some cases a Judge should have sentencing discretion. Degrees of murder, as already said, is not necessary to achieve this. Sentencing discretion is all that is required. Albury-Thomson could then have been convicted of the offence she in fact committed, and sentenced accordingly.

It is expected that the argument against this obvious solution is that Judges should not have discretion in all cases. That can be dismissed as a ridiculous contention, simply because there is no justification for it, other than public complaint regarding sentencing levels. I need do no more than refer again to the UK report already discussed. This indicates that public dissatisfaction alone is not sufficient to say that in some circumstances we can trust our Judges, but in others we cannot. Put simply, if we are prepared to trust our Judges to impose sentence in some cases of murder, as even the advocates of the Degrees of Murder Bill do, then we can trust them to do so in all cases. Not to do so requires the legislative creation of artificial distinctions.

CONCLUSION

There is indeed an undercurrent of public concern at the current law regarding murder. The fact is that it is not the level of sentences imposed that is the cause of the concern, how could it be? There is only one sentence possible. Any non-parole periods imposed under s 80 of the Criminal Justice Act are simply an element of that one possible sentence. In fact non-parole periods are directed at what public concern is really about – the point at which a murderer becomes eligible for release on parole. Degrees of murder are not necessary, neither to increase the time convicted murderers actually serve, or to better categorise their culpability. These results are more easily obtained, in part, by giving the Courts discretion in sentencing for murder However, such discretion only addresses part of the concerns expressed. If the penalty for murder is not considered in conjunction with the parole provisions of the Criminal Justice Act, then only a partial solution can be achieved. ❑

MEDICAL MANSLAUGHTER

Kevin Dawkins, The University of Otago

files a surrejoinder to criticisms from the Medical Law Reform Group

The letter at [1998] NZLJ 342 by Merry, Blair and Corkill of the New Zealand Medical Law Reform Group (MLRG) took me to task for some of the views I expressed a year ago in "Medical Manslaughter" [1997] NZLJ 398. In that article I argued against the proposal in the Crimes Amendment Bill (No 5) 1996 (now the Crimes Amendment Act 1997) to raise the threshold of liability for negligent manslaughter arising from breach of the duties in ss 155 and 156 of the Crimes Act 1961 from ordinary negligence to a "major departure" from the standard of care expected of a reasonable person.

The writers think it regrettable that I entered into "a rather personal attack on the process" that led to the amendment. In their view, my article included "quite unpleasant" explicit or implicit criticism of some of the individuals and groups involved in that process. Whether they regard all my criticisms as miscreant is hard to tell. According to the letter, "most" of my "allegations" "seem" to be "unfounded and unsubstantiated". In fact, by far the greater weight of my criticism is met by silence, apparently because the writers see little point in "endless rehearsals of the same arguments on each side".

BEHIND CLOSED DOORS

The first complaint is that I "quite misconstrued" the facts in stating that "in effect" Sir Duncan McMullin's report on ss 155 and 156 of the Crimes Act was "commissioned" by the MLRG. All the same, the writers have no difficulty in describing themselves and others as being involved in "obtaining" the passage of the amendment.

To my mind, the relationship of cause and effect between the MLRG's campaign and the commissioning of the report is direct and obvious. No other group outside the medical profession had clamoured for change to an "unjust" law and crusaded so zealously to achieve it. The MLRG knew exactly what it wanted – a tailored amendment to the law of manslaughter. Let me refer to one of the signatories to the letter on the question of changing the law by introducing a lesser offence of negligently causing death: "We are aware of this proposal, but it is not the change we are seeking" (Merry and Wilson (1995) 43 *NZ Socy of Anaesthetists' Newsletter* 13). And of course the MLRG "obtained" exactly what it sought.

Its campaign led directly to the appointment of Sir Duncan McMullin to review ss 155 and 156. As the Minister of Justice explained when congratulating Sir Duncan on his report during debate on the amendment, "They [the doctors] came to me, and I asked Sir Duncan McMullin to prepare a report, which he did very quickly indeed" (NZPD, 6 November 1997, p 5207).

The letter reveals that the proposal to appoint an independent and authoritative person to evaluate the issues "arose" at a meeting attended by the MLRG, the Minister of Justice and officials of his Ministry. The Minister apparently decided on that course as the best way to resolve the conflict of opinion between his official advisers and the MLRG. The proposal "was accepted by all present as a fair and reasonable approach" and Sir Duncan McMullin "was accepted by all involved as a neutral person with no previously stated view on the subject".

But that account conceals as much as it reveals. Since the proposal cannot have presented itself, from what quarter did it "arise"? Was there any discussion of other options or proposals? Was any consideration given to establishing a review panel that might have included, for example, representatives of patients' rights or consumer advocacy health groups, or anybody else for that matter? And how and by whom were the very narrow terms of reference settled?

The writers also protest that "[f]or others to imply after the event that we 'commissioned' Sir Duncan's report may be likened to impugning the integrity of one team and of the referee after the match is over and the result known". Here I am at a complete loss as to the identity of the other team. Secondly, whomever may have been appointed as the referee, my objection was directed at the circumstances of the appointment – specifically, the involvement of just "one team". And thirdly, as I understand the rules, the match was not over and the result known until the recommendations in the report had been enacted as law. Surely the MLRG is not suggesting that the final whistle blew when the report was released. Even when I wrote there was still time left on the clock.

My statement that various officials and bodies "changed their tune after 'discussions' with Sir Duncan" is also regarded by the writers as carrying "an implication which we do not think is justified". As they claim, it was perfectly in order for Sir Duncan, in the course of consultation, to ascertain "the present opinion concerning the very specific proposal contained in his report of people known to have previously opposed the idea of change in general". (I presume that by "the very specific proposal contained in his report" the writers mean "the two questions in the terms of reference on which he was yet to report".) But as I pointed out in my article, the Ministry of Justice, the Crown Law Office, the Police and the New Zealand Law Society were already known not to support specific proposals from the medical profession to change ss 155 and 156. What is more, I based my statement on Sir Duncan's report. For example, "[a]s a result of my discussions with [several members of the Criminal Law Committee of the New Zealand Law Society] I believe they would support an amendment to ss 155 and 156" (p 45, para 11.5); and further, "I have since had discussions with the Deputy Solicitor-General and the Crown Counsel. Again I believe that the adoption of a definition broadly in terms of 'major departure' ... would be acceptable to the Crown Law Office" (p 45, para 11.4).

My critics acknowledge that there may have been "many reasons" for this turning of the tide of official opinion "including the considerable effort made by members of the MLRG to advance the case for reform". Quite so. It is a matter of interpretation and opinion. Let the reader be the judge.

OPENING DOORS

The writers take further umbrage at my references to "political patronage" which are dismissed as "without foundation". This is simply disingenuous. After all, the MLRG mounted a political campaign to change the law and the whole purpose of all its lobbying and "repeated representations" was to enlist support in high places for its cause. In my dictionary a "patron" includes someone who lends support to a cause.

The MLRG beat a path to the door of the Minister of Justice. Eventually it opened and, once inside, the campaigners found someone agreeable to a proposal acceptable to them. Two of the signatories to the letter are far better placed than me to assess the Minister's role. Writing as co-chairmen of the MLRG they ranked him "foremost" among the numerous individuals and groups which had contributed to the campaign (Merry and Blair, *NZ Medical Association Newsletter*, 28 November 1997, p 3). Faced with conflicting advice, the Minister could have simply declined to do anything. But no, "he appointed Sir Duncan McMullin to examine the issue in detail and, having done so, accepted his report, introduced the Bill and kept it moving through the House" (id).

And, cometh the hour, the Minister was only too happy to help. In debate on the Bill he declared that he was "very pleased" about the support for the amendment "and certainly so are the doctors" (NZPD, 6 November 1997, p 5207). What seemed to gladden him most was that once the amendment was passed, he could see "a great deal of content to a lot of people" (id).

NOT LETTING ON

Another criticism – made in passing – is that I was wrong to claim that the MLRG convinced the Minister of Health to replace the Anaesthetic Mortality Assessment Committee with a non-statutory body to be created under the auspices of the Australian and New Zealand College of Anaesthetists. Here is what Sir Duncan McMullin said in his report (p 35, para 8.21):

> I have been told by counsel representing the MLRG that the Minister of Health has now agreed that the Committee should be disestablished. The Australian and New Zealand College of Anaesthetists will establish an alternative system which will not be incorporated in statute. But the existing provisions which make reporting mandatory are to be repealed.

The writers say that my statement was factually inaccurate, that I am unaware of the history of the Committee, the details of its proposed replacement and "the motivations and issues at stake". Yet they fail to identify the inaccuracies and details, declining to take up space by labouring the point. What I do know is that in 1981 the Hospitals Act was amended to provide for mandatory reporting to the Committee of all anaesthesia-related deaths. But as is clear from the MLRG's 1995 submissions on the Medical Practitioners Bill, the Committee was disabled at a stroke when the Police subpoenaed a document from it. The Committee received virtually no reports after 1992 and was rendered effectively defunct. The report of the Justice and Law Reform Committee on the "major departure" amendment also reveals that the reluctance of medical professionals to provide incident and mortality data has impeded the operation of the Anaesthetic Mortality Assessment Committee's successor, the Perioperative Deaths Survey Working Party.

However, I do have a positive suggestion. The *McMullin Report* (para 8.20) attributes the failure to report information on anaesthetic deaths to "fear of prosecution". Now that the threshold of criminal liability for manslaughter has been raised from ordinary to gross negligence, that concern must be greatly alleviated. I urge the MLRG to lend its full support to the institution of a new and comprehensive mandatory reporting system, preferably under statute.

A QUIBBLE

A "less overtly misleading statement, but a misleading statement nevertheless" was my comment that the Justice and Law Reform Committee "heard submissions [on the amendment] from apologists for the MLRG". If I understand the point of censure correctly, it is that the MLRG presented written, as opposed to oral, submissions to the Committee. (The end note to the letter indicates that copies of the MLRG's submission to the Committee are available from one of the signatories.)

Still, I wonder whether my statement was really misleading. During debate, two members of the Justice and Law Reform Committee mentioned that Professor Alexander McCall Smith came from Scotland "just to make a submission to our committee" (R Waitai, NZPD, 6 November 1997, p 5171) and that in some quarters there was criticism that "certain groups were able to fly expert opinion to New Zealand to talk to the committee" (M Robson, NZPD, 6 November 1997, p 5175). While I cannot claim to be privy to the inner workings of the MLRG, Professor McCall Smith assisted the MLRG in presenting its submissions in 1995 on the Medical Practitioners Bill (Merry and Wilson (1995) 43 *NZSA Newsletter* 13, 15); he has been acknowledged as a contributor to the "medical manslaughter" campaign (Merry and Blair, *NZMA Newsletter*, 28 November 1997, p 3); and he was brought to New Zealand (twice) by the Medical Protection Society, an organisation that also made a major contribution to the campaign.

Now it may be that the professor came all the way from Edinburgh and uttered not a word to the Committee. But if – and I put it no higher than that – the professor did present an oral submission to the Committee "to advance the case for reform", then perhaps my statement was not so misleading after all.

A SORE POINT

My final sin is to have suggested that "members of the MLRG would condone 'egregious incompetence'". I can agree with them that this is "nonsense" – but of their own making not mine. In the article I referred to the published views of two of the signatories that the mistakes made in several of the medical manslaughter cases (McDonald, Yogasakaran, and Morrison) were "simple" or "common" errors. If I may just quote a little further from Merry and a co-author: "Dr Yogasakaran's crime has the feel of a simple mistake to us, as practising anaesthetists, and that is what matters, really" (Merry and Wilson (1995) 43 *NZSA Newsletter* 13, 14). And again: "In saying that justice has been done one is saying that Drs McDonald, Morrison and Yogasakaran and Nurse Brown are indeed criminals. What nonsense! These people's crime was to set about their normal

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PUTTING CHILDREN FIRST

Christopher Sharp, Barrister, Bristol, England

reviews family law with no "custody" or "access" disputes

The Children Act (UK), which was largely brought into force in October 1991 after a massive campaign to bring its radical new provisions to the attention of all those professionals who might be affected by it, was the most comprehensive piece of legislation which Parliament had ever enacted about children. As one of the government's introductory booklets pointed out, the law about caring for, bringing up and protecting children was inconsistent and fragmented across the face of the statute book (*Introduction to the Children Act* 1989 (HMSO 1989) para 1.1). The Children Act (and the substantial body of subsidiary legislation putting its provisions into practical effect) brought about radical changes and improvements in the law and provided a single and consistent statement of it. It is therefore not possible in a short article to do more than touch on some basic concepts, principally in the private law (as opposed to "public law" cases involving local authorities).

THE CHILD'S PERSPECTIVE AND THE ROLE OF THE FAMILY

The philosophy upon which the Act was built was that children are best looked after within a family and with both parents playing a full part without any unnecessary intervention from the Court. (*Introduction* para 1.3). This policy is to be seen both in the provisions regulating private law and also those governing public law issues, and is reflected in the general principle that no order should be made unless it will be better for the child than making no order at all. A greater importance has been given to the child as a person, rather than, as had tended to be the case in the past, as a form of matrimonial property to be fought over or used to inflict grief or pain on the other party.

To this end the Act has given statutory weight to the wishes and feelings of the child in the checklist of considerations to which the Court must have regard and, in particular, in public law cases the child is also given a voice in the proceedings through the appointment of a guardian ad litem (s 41), or (if the child and guardian ad litem do not agree) through separate representation.

THE s 1 CHECKLIST

Under s (3) wherever the Court is deciding an opposed application to make, vary or discharge an order under s 8, or wherever the Court is deciding whether to make, vary or discharge an order under Part IV of the Act, (that is to say care and supervision orders), the Court is required to have regard to a check list of factors of which the first (s 1(3)(a)) is "the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding)". *In Re H (A Minor)(Care Proceedings: Children's Wishes)* [1993] 1 FLR 440 Thorpe J appears to have accepted counsel's contention that the right of the child to be heard, and in that case to be heard independently of the contentions advanced on behalf of the guardian ad litem, was "one of the corner-stones of the Act". This did not mean that the child's voice (or wishes) should prevail.

However, the Courts have long been alive to the need to avoid casting upon a child the burden of having to decide its own future. Cases since the Act came into force have continued to stress that the child must be assured that the responsibility for the final decision lies with the Court (eg *B v B (Minors)* [1994] 2 FLR 489) and that it is inappropriate to ask young children to swear affidavits in family proceedings or to be required to choose between parents.

Nevertheless, the Act, while seeking to balance the need to allow the child's view to be taken into account, with the objective of avoiding casting upon it the burden of resolving the problems caused by his parents, also allows a child of sufficient understanding to ask the Court for leave to make applications, or to be joined as a party to the proceedings.

The s 1(3) checklist goes on to set out the other matters that a Court must consider, namely:

(b) the physical, emotional and educational needs of the child;
(c) the likely effect on it of any change in its circumstances;
(d) its age, sex, background and any particular relevant characteristics;
(e) any harm that it has suffered or is at risk of suffering;
(f) how capable each of its parents (or any other relevant person) is of meeting his needs; and
(g) the range of powers available to the Court under the Act in the proceedings in question.

The judicial task may then amount, at least in part, to setting established principles and findings of fact into the framework of the checklist and balancing one factor against another. Thus (in a contact dispute) the Judge may ask if the fundamental emotional need of every child to have an enduring relationship with both its parents (s 1(3)(b)) is outweighed by the depth of harm which, in the light, inter alia, of its wishes and feeling (s 1(3)(a)), this child would be at risk of suffering (s 1(3)(e)) by virtue of a contact order (*Re M (Contact: Welfare Test)* [1995] 1 FLR 274 at 278).

GUIDING PRINCIPLES

Three guiding principles appear in s 1 of the Act.

The welfare principle

When the Court determines any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, the child's welfare shall be the Court's paramount consideration (s 1(1)). This "welfare principle" had been an underlying principle in previous statutes since at least 1925. It

is stressed in this Act and runs, as a fundamental concept throughout the case law. (There is an exception to this principle where the Court is considering an application under Schedule 1 to the Act for financial provision for a child to be made by a parent and where under para 4 a separate check list of considerations is set out. This mirrors the position in financial relief after divorce (under the Matrimonial Causes Act 1973) where the Court must have regard to all the circumstances of the case "first consideration" being given to the welfare of any minor children, but where that is not a "paramount" consideration).

Delay

In any proceedings in which any question with respect to the upbringing of a child arises, the Court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child (s 1(2)). Such delay is seen as prejudicial not only in respect of the uncertainty it generates for the child but also in the harm it does to the relationship between the parents in their capacity to cooperate with one another. To this end the Court will draw up a timetable to ensure that the issue is determined without delay and will issue directions to ensure the timetable is kept to. An example of how delay (and cost) can be kept to a minimum is by the joint instruction of a single medical expert who then appears as the Court's expert rather than as an expert called by a party. In this respect the procedure under the Act foreshadowed the more Judge driven, Court controlled approach to litigation generally which is becoming a feature of practice in England and Wales. In family proceedings it is obviously better that the pace of proceedings should be controlled by the Court than by the parties.

The presumption against making an order

Where a Court is considering whether or not to make an order under the Act with respect to a child, it shall not make the order unless it considers that doing so would be better for the child than making no order at all. The object was to avoid the making of unnecessary "standard" orders, to limit the Court to "positive intervention" and to try and promote parental cooperation and agreement. Accordingly it is now unusual to have a residence order made as part of a "package" of orders on a divorce since in most cases there is no dispute over where the child will live, and no one needs to be seen as having "lost custody". The Court is required (s 41 Matrimonial Proceedings Act 1973 as amended) to consider whether there are any children of the family to whom the section applies and if so to decide whether it needs to exercise any of its powers under the Children Act 1989 in respect of them having regard to the arrangements made or to be made for their upbringing and welfare. Moreover, in public law cases this same principle applies, so that simply because the "threshold criteria" or conditions which have to be established before a care order can be made, have been made out, this is not a sufficient ground for making the order. The Court might conclude that it would be better for the particular child for the order not to be made.

SECTION 8 ORDERS

The Act does away with the proprietorial nature of concepts such as "custody" and "access" by replacing them with the more practical, pragmatic and child-centred concepts of "residence". This is defined in s 8 as "an order settling the arrangements to be made as to the person with whom a child is to live". An order may encompass more than one such person (s 11(4)) eg where a shared residence order will more appropriately reflect the amount of time the child is to spend with each. In practice such a shared order will not often be made by the Court since such a situation is likely to arise in circumstances in which the parents are able to agree and cooperate, and thus no order is necessary. Where the parties are in dispute it has been said that such an order will rarely be made and would depend upon exceptional circumstances: *Re H (A Minor) (Shared Residence)* [1994] 1 FLR 717. In the later case of *A v A (Minors) (Shared Residence Order)* [1994] 1 FLR 669 the Court of Appeal held that while there was no such general test of "exceptional circumstances", nevertheless such an order would be unusual and would have, by reference to the welfare checklist, to be of positive benefit to the child concerned. It has also been said that a shared order should not be made solely to give a person parental responsibility (*N v B (Children: Order as to Residence*) [1993] 1 FCR 231). "Access" is replaced by "contact" an order requiring the person with whom a child lives to allow the child to visit or stay with the person named in the order, or for that person and the child otherwise to have contact with each other.

The other "s 8 orders" introduced are the "specific issue order" whereby the Court gives directions to determine a specific question which arises in connection with any aspect of parental responsibility for a child, and the "prohibited steps order" whereby the Court may order that no step (specified in the order) which could be taken by a parent in meeting his parental responsibility for a child may be taken by any person without the consent of the Court.

PARENTAL RESPONSIBILITY

The concept of parental responsibility perhaps represents most clearly the philosophy behind the Act. Parental Responsibility is defined in s 3(1) to mean "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to a child and his property". In introducing this concept the Act seeks to stress the duty that a parent has to care for the child and to raise him to moral, physical and emotional health, as "the fundamental task of parenthood and the only justification for the authority it confers" (*Introduction* para 1.4). Parental Responsibility and Residence are entirely separate concepts under the Act, the intention being that both parents should feel that they have a continuing role to play in relation to their children.

Parental responsibility is automatically acquired by the mother and father where they were married at the time of the child's birth. Where they were not married to each other, the mother has parental responsibility but the father may acquire it either by applying for a parental responsibility order (s (1)(a), or by entering into a "parental responsibility agreement" with the mother (s (1)(b)) which has to be made and recorded in a prescribed form. The Court is required to make a parental responsibility order in favour of a father who has a residence order made in his favour, if he does not already have parental responsibility. Similarly, anyone else in whose favour a residence order is made who is not a parent or guardian will have parental responsibility (subject to certain limitations set out in s 12(3)) while the residence order is in force.

Once the father has thus acquired parental responsibility, it may only be terminated by order of the Court on the application of any person who has parental responsibility,

or (subject to the leave of the Court) by the child itself, save that while a residence order remains in force in favour of the father, a parental responsibility order made under s 4 cannot be brought to an end (s 12(4)).

The fact that a person has or does not have parental responsibility for a child does not affect any obligation which he may have in relation to the child, for instance under a statutory duty to maintain the child. Thus a step-father for whom the child is a "child of the family" but who does not have parental responsibility for the child, may be liable to maintain the child (as will the natural father under the provisions of the Child Support Act 1991 even where he does not have parental responsibility), while a guardian appointed under s 5 of the Act has parental responsibility (s 5(6)), but there is no statutory provision whereby a guardian may be made to provide financially for the child (see *Halsbury's Laws* vol 5(2) para 744).

CONCLUSION

In private law cases the Children Act 1989 has succeeded in reducing the number of unnecessary disputes. It has focused attention on the child, its wishes, feelings and welfare, and away from the competing wishes of the parents who are usually the authors of the problems the child now faces. It has given to the Court control of the litigation, ensuring that no longer can one party dictate the agenda, delay matters for their own purposes or call unnecessary evidence. It has promoted a non-adversarial approach in children's litigation and it has promoted a degree of specialisation amongst legal practitioners and a degree of inter-disciplinary intercourse that have both been of great benefit to the professionals involved and, in due course, to the lay clients and the children who are caught up in such litigation. In this article it has not been possible to address the issues which arise in public law cases where many of the same benefits have been experienced but where there has been an increase in cost to the public purse, albeit one that is not unjustifiable.

Finally, it should also be observed that when the provisions of the Family Law Act 1996 relating to the new law on divorce in England and Wales are implemented, there will be yet further changes in the law which will affect children, although they will not alter the provisions of the Children Act itself. The new regime will require that the parties to a marriage must have made arrangements for the future before they can be divorced. In particular there will be a requirement that satisfactory arrangements for the welfare of their children must have been made (or a Court order must have been made) before a "divorce order" can be made (subject to some exemptions). Section 11 of the 1996 Act provides that the Court must consider whether there are any relevant children and if so whether the Court should exercise its powers under the Children Act 1989 in respect of them. It reflects some aspects of the welfare checklist from the 1989 Act (notably the wishes and feelings of the child) in identifying the factors which must be considered in making that decision. The Court may direct that the divorce order or separation order shall not be made until the Court directs otherwise (ie until suitable arrangements have been made or the interests of the children dictate it).

Where there are children under 16 the period provided under the 1996 Act for "reflection and consideration" (a basic nine months from the date when the statement of marital breakdown is filed with the Court and 12 months from the initiation of the statutory process envisaged by the new law) may be extended by a further six months. In addition, there is a power under s 13 to require the parties to attend a meeting with a mediator to explore the facilities available for mediation to resolve any disputes. This power is specifically exercisable in the course of proceedings connected with the breakdown of the marriage. Such proceedings expressly include proceedings under Parts I-V of the Children Act 1989. The intention, evidently, is, by the positive intervention of the Court, further to extend the opportunity to minimise adversarial litigation over such issues, as well as ensuring that the parties to a marriage, especially where there are children, are given ample opportunity to try and save their marriage. Whether this will work, and in particular whether it will operate in the interests of the children caught up in the process, is a question which only time will answer. ❑

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continued from p 423

days work soberly and with good intentions, and then make a mistake" (id).

The only conclusion I could draw from those and similar statements was that certain individuals within the MLRG considered that the results in those cases were unjust (indeed in the letter the writers say "we do personally think that at least some of the results were unjust"). Even though these cases involved what many would regard as serious failures to take elementary precautions (not checking vital theatre equipment and drugs), the implicit assumption would also seem to be that such mistakes would not meet the new "major departure" test. From that I put a straight question: "One might then ask what kinds of egregious incompetence would do so?"

It is not a question of "condoning" incompetence of whatever order. Throughout its campaign the MLRG was at pains to assure one and all that medical professionals are and should remain accountable under the complaint and disciplinary procedures of the Medical Practitioners Act 1995 and the Health and Disability Commissioner Act 1994. Fair enough. Even so, despite the repeated assertions by the MLRG that the issue of criminal liability for negligent manslaughter is one of "threshold", the question is whether the MLRG now regards the new "major departure" test as a shield from criminal responsibility. At the end of my article I referred to a dissident medical view: that "The problem is not a major flaw in the law, the problem is a major flaw in us, in our assumption of immunity from accountability" (Chamley (1994) 42 *NZSA Newsletter* 11, 12). Whether my critics like it or not, many ordinary New Zealanders agree.

A NEW PROJECT

At last we have some common ground. The writers acknowledge – "[a]s we have said repeatedly" – that the limited civil remedies for obtaining damages for personal injury justify addressing inadequacies in the civil law and the Accident Compensation Scheme. In its report on the "major departure" amendment the Justice and Law Reform Committee recommended that the government undertake an "immediate review" of the civil law in this area. I commend this project to the MLRG and can only hope that it will contribute to the process of civil law reform as vigorously as it sought change to the law of manslaughter. Judging by its record to date, the MLRG won't take no for an answer. ❑

LITIGATION

edited by
Andrew Beck

SUMMARY JUDGMENT REFORM

Several highly significant changes to summary judgment procedure have been introduced by the High Court Amendment Rules 1998, which came into force on 9 November 1998. For the most part the amendments signify considerable improvements to the procedure. What is particularly commendable is that they exhibit a principled basis as opposed to some of the ad hoc measures which have been introduced in the past. As yet the amendments have only been made to the High Court Rules, which means that the position in the District Courts has not altered.

JURISDICTION

One of the persistent problems devilling summary judgment procedure has been the jurisdictional limits on its use. Since the introduction of the procedure in 1986 there has been a gradual whittling away of these limitations, and that process now appears to be complete. I would like to claim that my railings of a decade ago had at last been heeded ("Jurisdictional limitations on summary judgment: is there a better way?" [1989] NZLJ 298), but will be content simply to applaud the development.

Prior to the introduction of the amendment rules, summary judgment was not available in claims for defamation, false imprisonment, malicious prosecution, and those under Part IV (with certain exceptions) and Part VII of the rules. All of these restrictions have now been removed.

An application for summary judgment may now be made in any claim, other than those in probate, company liquidations, appeals, admiralty and for habeas corpus (R 135). In general these new exclusions are not surprising, because such matters have their own specified procedures and a summary judgment procedure is not required. There are, however, some matters which deserve comment.

Admiralty

The most obvious is the exclusion of admiralty matters. After a comprehensive discussion of the question, Potter J decided in *International Factors Marine (Singapore) Pte Ltd v The Ship "Komtek II"* (1998) 11 PRNZ 466 that there was no reason in principle to exclude admiralty claims from the summary judgment procedure. This was accepted without question by Giles J in *Ports of Auckland v The Ship "Raumanga"* (1998) 12 PRNZ 84. Summary judgment was granted in both of those cases, but would now not be possible. This appears to be a step backwards, and to leave something of a gap in the rules, which is particularly unfortunate now that the Admiralty Rules have been consolidated with the High Court Rules. It also creates an undesirable situation where summary judgment is technically available in the District Court but not the High Court; this will presumably be addressed by amendments to the District Courts Rules.

Specified torts

Removal of the barrier to summary judgment in defamation, false imprisonment and malicious prosecution cases will have little effect in practice. It is almost inconceivable that a false imprisonment or malicious prosecution case could be decided on affidavit evidence. In the case of defamation, summary judgment on liability is a realistic possibility, although an unlikely one. That could result in a Judge deciding on liability, and a jury on the quantum of damages. In effect, though, this would be little different from a striking out application to determine whether certain words are defamatory.

Judicial review

The removal of the bar on summary judgment in Part VII matters is more controversial. Part VII regulates the procedure for the old prerogative writs, which have largely fallen into disuse because of the Judicature Amendment Act 1972. It may have been thought that such matters were inherently unlikely to generate summary judgment applications, but it does seem rather strange to reawaken the possibility of such an application. At the hands of an ignorant or vexatious plaintiff, the result could be a very messy proceeding.

Part IV

The removal of the bar on Part IV matters can only be welcomed. When the rules were first introduced, all Part IV matters were excluded from summary judgment. It was soon realised that this was too all-encompassing, and various ad hoc adjustments were made over time. There is no reason in principle why Part IV matters should be excluded, and this has now been recognised. It will therefore be a question of determining on a case by case basis whether any such matter may justify a summary judgment application. In a similar vein, the restriction on obtaining damages in lieu of specific performance has also been lifted. As there was never any good reason for this, its passing will not be lamented.

Fraud

The final jurisdictional matter relates to fraud. Prior to the new rules, summary judgment could not be obtained in a claim based on an allegation of

fraud. The fraud exclusion generated much heat over the years and it is a relief that it has finally disappeared. As with the other intentional tort claims, the responsibility will now rest with the plaintiff to determine whether summary judgment is suitable. Clearly any genuine fraud claim which is defended will not be able to be resolved in this manner.

SUMMARY JUDGMENT FOR DEFENDANTS

A major feature of the new rules is the possibility of a defendant making an application for summary judgment. Rule 136(2) now provides that the Court may give judgment against a plaintiff if the defendant satisfies it that none of the plaintiff's causes of action can succeed.

The notion of summary judgment for defendants is not new. It is a feature of the procedure in Canada, Victoria, Western Australia and a number of jurisdictions in the United States (see Beck *Summary Judgment Procedure* 2.23). Up until now, however, defendants in New Zealand have had to rely on applications to strike out when they believe that the plaintiff has no case.

The disadvantage with a striking out application is that the affidavit evidence which may be adduced is extremely limited: *CED Distributors (1988) Ltd v Computer Logic Ltd (in rec)* (1991) 4 PRNZ 35 (CA). The general idea is that a striking out application is not a vehicle for dealing with factual issues. In summary judgment applications, on the other hand, a comprehensive case may be made out on the facts with appropriate supporting documents. There is no reason in principle why a defendant should not have the same opportunity as a plaintiff to establish this at a preliminary stage of the proceedings.

It is important to note that, in order to succeed on the application, the defendant must be able to refute all of the plaintiff's causes of action. The situation where this will be most likely is where the facts are against the plaintiff. If only some of the causes of action cannot succeed as a matter of law, the proper course will remain an application to strike out.

It seems unlikely that there will be a large number of cases which justify the use of this procedure; it is inherently more probable that there is no defence than that there is no claim. A defendant making the application would normally need to have irrefutable documentary evidence in order to justify taking the step. However, just as a plaintiff may see advantages in making a tactical application, so may the defendant, particularly where no evidence has been previously disclosed. The risk for either party will be an adverse costs order.

Rule 138(4) requires the defendant to serve a notice of proceeding in Form 13A, which is a new form introduced by the amendment rules. This is an inexplicable requirement (see below), but as it is mandatory defendants will have to ensure that they comply with it.

TIME FOR APPLICATION

One of the disadvantages in the summary judgment procedure as initially introduced was that it was interpreted as an originating procedure. A plaintiff therefore had to decide when issuing proceedings whether or not it wished to apply for summary judgment: *Bendalls Importers v General Accident Fire Insurance Co* [1986] 1 NZLR 459. If a plaintiff wished to apply for summary judgment after issuing proceedings, the only course open to it would be to discontinue and begin again. That would naturally have consequences in costs: see for example *Cowley v Shortland Publications Ltd* (1991) 5 PRNZ 76. Interestingly enough, an exception to the originating procedure rule was recognised for admiralty matters in *International Factors Marine (Singapore) Pte Ltd v The Ship "Komtek II"*. That has of course now become irrelevant.

In many cases the plaintiff will know at the outset that the matter is an appropriate one for summary judgment, but there are also likely to be situations where the whole picture only becomes clear at a later stage. If it is indeed possible to resolve a matter at that stage by a summary judgment application, then it would seem very unfortunate to insist that the parties go to a full trial.

Plaintiffs

Rule 138(2) recognises this by permitting an application to be made by the plaintiff at a time later than the service of the statement of claim. This may, however, only be done with the leave of the Court. No guidelines are given as to the basis on which leave will be granted; it will no doubt be important to show that summary judgment is a realistic possibility rather than an expensive extra step in the proceeding for little benefit.

One of the dangers here is that the leave application is likely to cover the same ground as the merits of the summary judgment application. There is not much which can be done about this. As far as plaintiffs are concerned, it seems clear that it will not generally be a good idea to wait before making a summary judgment application. If it does not appear to be a good idea at the commencement of proceedings, it will require a very strong case later on.

One of the potential uses of the procedure at a later stage may be once there has been discovery and exchange of briefs. It may then be apparent to the plaintiff that there is nothing on which the defendant can succeed. In such a case, it would still be more efficient to decide the matter on a summary judgment application than to go to trial. A plaintiff following this course would probably take the risk of bringing the summary judgment and leave applications together.

Defendants

The general rule for defendants is that the application for summary judgment must be made at the same time as serving the statement of defence. An application at any later time also requires leave. The defendant is therefore in essentially the same position as the plaintiff in that the decision to apply must be made without the advantage of the other party's evidence. If the defendant has strong supporting evidence in its possession, the application may well be appropriate.

As with plaintiffs, there may be a suitable opportunity to use the procedure once all the evidence has been disclosed. This is a better option than a non-suit because it can produce a judgment for the defendant, and it would not require the plaintiff to present its case.

DOCUMENTATION

A number of changes have been made to the rule governing the documents to be filed in support of a summary judgment application. These are chiefly by way of clarification of issues which have arisen in the past.

Prior to amendment, R 138 required only that the application be accompanied by an affidavit by or on behalf of the plaintiff, verifying the allegations in the statement of claim, deposing to the plaintiff's belief that the defendant had no defence, and stating

the grounds for that belief. The particular difficulties with this rule occurred in connection with corporate plaintiffs, concerning who could make the affidavit, and whose belief was important.

The new R 138 is more detailed. It requires the applicant to file and serve a statement of claim or statement of defence. This is a little strange, as the application has to be made at the time of service of that document. The rule also clearly cannot apply to an application made later with leave and would probably have been better omitted.

The applicant is expressly required to serve a notice of proceeding in the prescribed form. While this is understandable in the case of a plaintiff, it is unheard of for a defendant to file a notice of proceeding. The notice of proceeding initiates the proceeding, and the application for summary judgment by a defendant is not a new proceeding; it is simply an interlocutory application within the proceeding. This peculiar requirement may well have to be altered.

As far as the plaintiff's affidavit is concerned, the belief requirement has been changed from the plaintiff's to the deponent's belief that there is no defence. The person making the affidavit will therefore not have to follow the ritual of deposing to the "plaintiff's belief". This amendment brings the rule into line with its English counterpart (see *Summary Judgment Procedure* 3.11) and removes one of the fishhooks from the procedure. It will, however, be important to ensure that the maker of the affidavit has sufficient knowledge of the facts to be able to justify the belief that there is no defence.

Where the application is made by the defendant, the affidavit is not required to state any belief. It must show why none of the plaintiff's causes of action can succeed (R 138(5)(c)). The affidavit will, of course, not be directed to matters of law, but to establishing facts which refute the plaintiff's claim. As noted above, those facts must be a complete answer to all the causes of action pleaded by the plaintiff.

In cases where the affidavit is made on behalf of the corporation, some difficulties have been caused by the provisions of R 517. These were effectively dealt with by the Court of Appeal in *Hempseed v Durham Developments Ltd* (1998) 12 PRNZ 298. Confirming this approach, R 138(6) now expressly provides that R 517 does not limit the persons who may make an affidavit on behalf of a corporation.

APPLICATIONS SERVED OVERSEAS

Rule 138A has been amended so as to allow for the possibility of applications by defendants and the consequent fixing of time limits for the plaintiff's documents.

In the case of *Hodder Moa Beckett Publishers Ltd v Weinbaum* (1997) 11 PRNZ 373, it was noted that the rule did not make it clear whether a party applying for summary judgment also had to apply for directions under the rule. The amended rule provides that the Court "must" rather than "shall" give these directions, but remains ambiguous. No doubt the suggestion in *Weinbaum* that directions are required in every case where service is effected overseas will continue to be followed.

DISPOSAL OF APPLICATION

Prior to amendment, R 142 contained a number of detailed provisions relating to the disposal of summary judgment applications, including a specific reference to the payment of amounts into Court or into a trust account, which was inserted by the High Court Amendment Rules (No 2) 1988.

These details have now been swept away in favour of a general provision which requires the Court, on dismissal of a summary judgment application, to give appropriate directions. There is no commentary accompanying this amendment, but it appears that the language of the old rule was largely otiose. All the necessary powers of the Court, including the discretion to refuse judgment, are contained in R 136. The changes therefore do not signify any change in approach.

There is also an important change to R 142A, which reduces the time for filing a statement of defence, where a summary judgment application by the plaintiff is refused, from 30 days to 14 days. This is subject to any other directions made by the Court.

PERSONAL INJURY CLAIMS RESURFACE

General dissatisfaction with the compensation provided by the accident compensation scheme has led plaintiffs to find ways of circumventing it. One of the avenues which looked promising for a time was a claim for exemplary damages, which were not precluded by the legislative bar. This was effectively closed by the Court of Appeal decisions in *Daniels v Thompson* [1998] 3 NZLR 22 (currently on appeal to the Privy Council) and *Ellison v L* [1998] 1 NZLR 416. It therefore comes as something of a surprise that the Court of Appeal has opened another potential route in *Queenstown Lakes District Council v Palmer* unreported, 2 November 1998, CA83/98.

Mr Palmer was a tourist who suffered mental injury as a result of the death of his wife in a white water rafting accident on the Shotover River. Although he sustained no physical injuries, he claimed that, as a result of the accident, he had suffered post-traumatic stress disorder, a major depressive disorder, and an associated speech impediment. He brought claims in negligence against the rafting company and the District Council. The defendants applied to strike out the claims on the grounds that they were barred by s 14(1) of the Accident Rehabilitation and Compensation Insurance Act 1992. The argument was that they arose indirectly out of personal injury covered by the Act.

The unanimous judgment of the Court, delivered by Thomas J, rejected this contention as a "stilted approach to the interpretation of s 14(1)". The Court held that the scope of the Act is coterminous with cover provided under the Act. In other words, if cover is not available under the accident compensation scheme, there is no barrier to bring a claim at common law.

To reach this conclusion, a number of hurdles had to be surmounted. The first of these was the reference in s 14(1) to a claim by the person suffering injury "or any other person". These words were held to have been added ex abundanti cautela to exclude claims by persons such as legal representatives. No explanation was given as to what "indirectly" might be intended to cover.

The Court also held that the "relevant" personal injury for the purposes of s 14(1) is personal injury to the

claimant. As Mr Palmer was seeking damages for his own suffering (which was not covered by the Act) he was not barred by s 14.

When considering the history of the legislation, the Court homed in on the "social contract": the exchange of the right to sue for compensation under the scheme. The fact that mental injury was covered under the previous Acts but only to a limited extent under the 1992 Act was not seen as an obstacle:

> The express restriction ... must, in the absence of an express provision abolishing such claims, be taken as showing an intention that the corresponding right at common law would be revived where the mental injury is not an outcome of physical injuries suffered by the plaintiff.

The Court concentrated on the anomalies which would be created by preventing a secondary victim claiming where an accident is witnessed, while allowing it where the trauma results from a personal ordeal. The anomaly of preventing a common law claim for mental injury by sexual abuse victims (because this is covered by the Act) was, however, glossed over. Likewise, the fact that a secondary victim has a better claim for mental injury than a primary victim. These were dismissed as anomalies inherent in the Act.

The truth is, of course, that anomalies either way are thrown up by the legislation. They certainly cannot be used as a conclusive argument that the intention was to allow secondary victims to claim. It may well be, however, that the greater the anomalies, the less likely it is that the interpretation is the correct one.

REVIVAL OF COMMON LAW RIGHTS

Section 20(f) of the Acts Interpretation Act provides that the repeal of an Act does not revive anything not in force when the repeal takes effect. Thus, when s 5(2) of the Accident Compensation Act 1972 was repealed, that did not revive the common law right to sue for loss of consortium (*Barlow v Humphrey* [1990] 2 NZLR 373). In effect the Accident Rehabilitation and Compensation Act 1992 repealed the right to claim for mental injury which had existed under the previous Acts. Yet the Court did not even consider the rule against revival. Instead it held that an express provision would have been required to abolish such claims.

When it comes to anomalies, the greatest of these must be the case of the sexual abuse victim. It appears that such claims were singled out for special treatment under s 8(3) because the legislature recognised that there was likely to be substantial mental injury but possibly no physical injury. These victims now learn that their "special position" makes them far worse off than if they had been ignored completely. It is hard to see this as being the legislative intention.

When it comes to anomalies, the greatest of these must be the case of the sexual abuse victim. Their "special position" makes them far worse off than if they had been ignored completely

As far as secondary victims are concerned, there would undoubtedly be an anomaly if they could claim for any mental injury except that resulting from personal injury to another, but there is an argument that all claims for mental injury by both primary and secondary victims were removed by the legislation from its inception in 1974.

CONSEQUENCES

Whatever the merits of the decision, it is clearly one which provides some scope for those who have suffered mental injury. The ironic aspect is that there is now a major incentive to claim that a personal injury is not covered by the Act so as to justify a common law claim.

Secondary victims are in a good position, for they will generally have suffered no physical injury from which their mental injuries flow. The *Palmer* case contains no discussion as to the level of injury required in order to sustain a claim. Mr Palmer's allegations amounted to clinically recognised disorders caused by an event which would be sufficient to ground a claim in nervous shock. These allegations had to be taken as proven for the purposes of the striking out application. It is not clear, however, whether the Courts would be prepared to entertain a claim for mental injury which would not satisfy the nervous shock requirements of *Alcock v Chief Constable of South Yorkshire* [1992] 1 AC 310 (HL).

Primary victims who have suffered minor physical injury but significant mental injury are in a quandary. One of the courses which may be open to them is to argue that the mental injury is not an "outcome" of the physical injury, but rather the direct consequence of the conduct by the defendant. As the compensation for mental injury under the Act is likely to be negligible, there is a strong incentive to pursue this line of argument and it will be of interest to see what approach is adopted by the Courts.

Sexual abuse victims are perhaps in the most unenviable position. In order to bring a claim at common law they will have to argue first, that there was no physical injury giving rise to the mental injury, and secondly that the conduct did not amount to one of the offences listed in the First Schedule. This could result in the anomalous situation of a victim supporting a defence to a crime. If that were to happen, there are two possible advantages. The first is that there would be no prosecution, and a claim for exemplary damages could be brought (although it may be fruitless, depending on the nature of the defence). The second is that a claim for mental injury might be available, again depending on the nature of the defence. Even this might fail, however, if a narrow interpretation is placed on s 8(3): the section refers to an act "within the description of any offence" in the Schedule. Conviction is clearly not required, but it seems that, if there is an established defence, the act will not be within the description of the offence.

The circuitous nature of the arguments likely to be raised is obvious. No doubt great ingenuity will be displayed in devising new ways to procure some compensation for personal injury and success will depend to a large extent on the approach taken by the Courts. Given the lead by the Court of Appeal in *Palmer*, there is no need for plaintiffs to feel discouraged. At the heart of the problem lies the accident compensation scheme, which is increasingly perceived as not delivering value for the right to sue which was given up. It may only be a matter of time before the wheel turns a full circle. ❑

WHAT IS SUITABLE MEDIATION FODDER?

ALTERNATIVE DISPUTE RESOLUTION

edited by
Carol Powell

The number of mediations now taking place in New Zealand has increased to the stage where it is now common for counsel to consider whether mediation is an appropriate step as a matter of course during the early stages of a dispute. Where proceedings are issued counsel continue to monitor whether the dispute should be referred to mediation and if so, when.

What then, does a lawyer take into account when making this assessment?

The short answer is, unless there is a good reason not to attempt resolution now, then the dispute may benefit from mediation.

It has long been the case that parties or their lawyers have settled disputes by negotiation before they get to hearing. This should not be overlooked or undervalued. Of course there will be matters where an agreement can be reached, generally with a payment from one party to another, without going through the mediation process. If this is an option then it may well be the quickest and most cost effective outcome and arguably the best result for your client, provided that there are not other issues which need to be resolved which will be left outstanding.

There will also be situations where negotiation may not achieve the outcome the client wants or needs.

Issues to consider when determining whether mediation is an appropriate forum include:

Disputes between parties in an existing commercial or personal relationship

It is not uncommon for there to be an ongoing relationship between the parties to a dispute, whether they are doing business together, living next door to each other or are related to one another. Disagreements cause ill feeling which grows as the dispute becomes formalised.

A Court proceeding can take several years during which time the parties become entrenched in their position and harbour ill will . This can result in the loss of future business with one another and rifts which become long-standing and difficult well past the resolution of the dispute.

Mediation enables the parties to air their perspective of the dispute in a forum which is confidential and allows parties to speak for themselves and be heard.

The effect of the overall process is often to repair and build relationships, indeed it is not uncommon for an outcome to include agreements in relation to future dealings with one another or even to agree to further business arrangements.

Flexibility of outcome

Court proceedings are generally limited to rulings which require the payment of money from one party to another. The range of potential outcomes in mediation is far more diverse. Settlements can and do involve a range of terms, some of which can be agreements to pay money and others which deal with issues in a more diverse way. Settlement can include:

- terms dealing with payments in flexible ways, for example providing for time to make payments or payment in kind;
- terms which can have value to one party without involving great expenditure for the other, for example a party may offer the use of their holiday home or boat as part of a settlement; and
- terms dealing with issues by solutions which have no financial value, such as agreements to write certain letters, apologies and acknowledgments;
- terms dealing with the way in which the parties will deal with each other in the future, thereby reducing the possibility of future disputes.

Precedent

Some disputes can involve issues which, if determined in Court, are likely to create a precedent which may be undesirable to one party. For example, a party which is an insurer may face a challenge to the extent of cover offered under a policy which it did not anticipate at the time of selling the policies. A Court determination against the insurer could leave it facing potentially a large number of claims whereas a confidential settlement may alleviate that risk. Similarly a patent could be challenged, the outcome of which could severely affect the business of the party holding the patent. In these types of cases containing the risk could be a major issue for one of the parties.

By contrast, it may also be that one party desires a precedent from a Court, for example in a situation where it faces litigation from a number of parties which would all be resolved by one judgment in that party's favour.

Cost and timeliness

Cost and timeliness are the most often touted reasons given in support of mediation as opposed to litigation. There can be no doubt that a process which can take place in one or two days and organised to take place within a few weeks or even days of the parties agreeing to submit to the process will save considerable time and money. When taking these issues into account parties need to consider their own time and the associated stress and loss of productivity that the ongoing proceedings may have on themselves, their business and family.

It is necessary to flag at this point, however, that mediation is more likely to achieve a satisfactory outcome for a

party when they attend fully prepared. This means that some of the work that would be done prior to trial should have been undertaken beforehand. A party needs to know the likely outcome of any proceedings, including the cost and time they are likely to take. They also need to have given thought to what are the important issues for them and what issues will need to be resolved in order for them to reach a satisfactory conclusion at mediation. This does involve time and these preparation costs should not be overlooked in the overall equation.

Dissolving long-standing relationships

Where the parties have been involved in a lengthy relationship, be it personal or business, there are likely to be a whole raft of issues which are not necessarily immediately apparent from the dispute as it is initially presented.

This is often a pointer to mediation as an appropriate means of resolving the dispute as it allows these other issues to be aired and for the outcome to take account of those issues where necessary. While mediation may well be the most appropriate forum for resolving the dispute, beware of referring the dispute too soon. If the relationship has only recently come to an end, one or both of the parties may need to spend some time working through the issues for themselves before they enter the mediation process.

History of harm to one party

It has long been recognised that where there is a history of abuse between the parties that mediation is not usually appropriate. For obvious reasons one of the parties in these types of situations may not be comfortable facing the party with whom they are in dispute and may feel unsafe. While in some cases there are procedures which a mediator can employ to overcome these issues a referral to mediation should not be taken without serious consideration of these issues with the relevant party and the mediator.

CONCLUSION

In conclusion, in determining whether a dispute is appropriate for reference to mediation start with an open mind. Ensure that the client's needs are clear and ascertain whether these needs could be best served by a quick outcome which may involve settlement terms which go beyond a pure agreement to pay money. Take the attitude that in most cases mediation is a good option and then consider whether there are any strong reasons against mediation. A pragmatic approach will often point to trying to resolve the dispute quickly, in a cost effective manner and in a confidential forum.

SIXTH INTERNATIONAL CONFERENCE IN AUSTRALASIA ON ALTERNATIVE DISPUTE RESOLUTION

Nigel Dunlop
Barrister and mediator, Christchurch

> *"Small matters*
> *win great commendation"*
> *Francis Bacon*

Whilst LEADR's 6th international conference held in Christchurch 2-4 October 1998 was a small one, its quality was tremendous. The 120 or so delegates, about half from New Zealand and half from Australia with a smattering from elsewhere, did not go home disappointed.

Undoubtedly this was due in large part to the quality of the speakers but the enthusiasm of the participants also played a big part in the success of the conference, not to mention its smooth organisation.

The first keynote address was by Dr Christopher Moore of ADR Associates, Boulder, Colorado. If you ever want to learn something about mediation, you can't go wrong having Chris Moore teach you. His international reputation as a mediator, dispute system design expert and author in the field of conflict resolution is well founded.

Chris Moore summarised the lessons learned over the past 25 years (ie the lifetime) of the ADR movement as follows –

- It has become a field and a profession;
- Distance no longer makes a difference;
- Relationships matter;
- Good process can make a difference and capable third parties can help develop them;
- Focus on identifying, understanding, and trying to meet interests is a good first step;
- Power relationships and dynamics cannot be ignored, but we should move to create structures for guaranteeing rights, and ultimately, for meeting interests;
- Active engagement of the participants in the design and implementation of their own dispute resolution processes results in greater effectiveness, ownership and commitment;
- Advocacy and peacemaking go hand in hand in developing fair solutions and a more just world;
- Effective dispute resolution attitudes, procedures and skills can be learned;
- Peace is not a short-term process or goal – in interpersonal life and the lives of societies and nations.

Equally impressive as Chris Moore was his good friend Dr Dudley Weeks who has worked as conflict resolution facilitator throughout the world for which he has twice been nominated for the Nobel Peace Prize. His poetry, personally recited to the conference sums up his deeply held philosophy –

> *"... we are connected*
> *one to the other*
> *with more in common*
> *than we want to see,*
> *for you need me*
> *and I need you ..."*

Dudley Weeks highlighted three myths

- Dominance is a natural social law (no, dominance is inherently unstable);
- Conflict is principally an adversarial competition (no, conflict arises from diversity and difference);
- It is the outcome that is important, not the process used to get there (no, process empowers the parties to resolve the conflict and improve relationships).

What Chris Moore and Dudley Weeks said was of value because they managed to combine theoretical notions with the purely practical. And this is after all one of the appealing features of alternative dispute resolution: it injects philosophy, morality, and structure into the successful resolution of disputes, whether those disputes be big or small, international or local, commercial or personal.

That alternative dispute resolution is both a science as well as an art was very well illustrated in the presentations of the many other conference speakers, including from New Zealand, Helen Bowen (Justice Alternatives Ltd), Stephen Hooper (Waikato University) and Alan Isaac (KPMG).

Alan Isaac, the National Chairman of KPMG told the conference –

I've completed the LEADR mediator's course and am convinced that

> in most cases, mediation produces a better result than going to Court ... but it is not perfect, and there certainly are occasions when mediation isn't the best option ... there is evidence that business people are realising that [mediation] offers advantages over the Court system ... The successful legal providers in the 21st Century will be those that embrace the advantages that mediation and ADR have, over the traditional legal process.

The conference Chairman, John Hardie, barrister of Christchurch, and his team are to be congratulated on a job well done.

MEDIATOR PROFILE

Nigel Dunlop

Barrister, Christchurch

Nigel Dunlop is one of the four new members of the LEADR New Zealand Board of Directors and he represents the South Island interests in mediation and alternative dispute resolution on that Board.

Nigel has mediated over twenty mediations in a range of areas from matrimonial to community/neighbour hood and commercial disputes. Several of these mediations have been multi-party with up to 12 separate interests being represented.

Nigel's training began with an Arts degree in psychology which led on to the study and practice of law in the late 1970s. In 1993 Nigel attended a LEADR mediation workshop and since that time has extended his training and skills at six further workshops with Jane Chart of Canterbury University, the dispute resolution programme of Harvard Law School, CDR Associates of Boulder, Colorado, LEADR and Prof. Baruch Bush of Hofstra University, New York.

Nigel is a member of the AMINZ mediation panel and the LEADR advanced mediation panel.

For Nigel the key guiding principles in mediation are:

- with appropriate assistance and given enough time, most disputants are capable of resolving their disputes provided that the individuals involved are accorded dignity and respect;
- flexibility is crucial as each mediation is different and demands of a unique approach by the mediator, what works in one case will not work in another; and
- above all else, mediation is a practical process in which common sense must prevail.

The diversity of Nigel's legal practice, which includes a large dollop of criminal work and family law and as a member of the Mental Health Review Tribunal, assists him in his mediation by maintaining a balance and perspective and maintaining a variety of legal skills.

MEDIATION MONTH – A NATIONAL ANNUAL EVENT?

The Summary and Evaluation Report from the ADLS Mediation Month held in May of this year is an indication of the growth of the use of alternative forms of conflict resolution in New Zealand. All of the five objectives for the Month were exceeded by impressive margins.

The first objective was to increase awareness among Auckland lawyers about mediation. This was achieved on a mass basis through publications in Northern Law News, the New Zealand Law Journal and other legal publications. There were also presentations given to Court Staff, the Judges, practitioners through a LEADR function, University and AIT students. A seminar on Counsel Representing Clients in Mediations was conducted by LEADR and there was a travelling roadshow of mediation role-plays presented to ten Auckland Law firms. There were also presentations to the Chamber of Commerce, CAB's and Rotary and Kiwiana Clubs. A before and after survey of lawyers was conducted to gauge the impact of Mediation Month. The results of the survey showed that there was a high level of recall of the Mediation Month initiative and its messages. Eighty-nine per cent of lawyers saw one of the benefits of mediation as being that it is less expensive and time consuming than going to Court, over 70 per cent of lawyers saw other benefits as including: confidentiality; the agreements more likely to "stick"; the process helps to preserve relationships between parties; and is more approachable than litigation for many clients.

The second objective was to foster initiatives that will assist in promoting the ongoing use of mediation. The Month resulted in assisting the Cool Schools programme both by growing mediation initiatives and with fund raising, it provided two scholarships to train mediators to serve the Maori, Pacific Islands and Asian communities, whose needs are not currently met. There was extensive liaison with the Department for Courts encouraging the progress with their mediation pilot. It assisted with media coverage to raise the profile of Restorative Justice mediators and has continued the 0800 LETS MEDIATE Information Line to provide an ongoing mediation referral service for as long as required.

The third objective was to initiate 50+ mediations. During the month 95 mediations were initiated and 60 actually commenced in May itself. Since then there has been continued interest and LEADR has reported a marked increase in the number of referrals it has received since the Mediation Month initiative.

The fourth objective was to raise public awareness through media. The media coverage was well in excess of expectations with television appearances, radio interviews and printed articles. There was even reference to mediation in New Zealand's Shortland Street and the Mediation Month poster was included in a prominent place on the Shortland Street set during and shortly after the Month.

The final objective was to achieve a positive awareness about mediation among those who influence legal aid candidates. CAB staff were selected as a "key influencer" of legal aid candidates and presentations on mediation made to CAB groups.

Given the huge interest and achievements of ADLS during the Month, Network Communications, which co-ordinated the Month's activities, has recommended a co-ordinated national effort on a regular basis.

> The time is right for a co-ordinated national effort to promote mediation. Auckland has built on the solid foundations set down by the Wellington District Law Society. Waikato Bay of Plenty District

Law Society was able to "dovetail" with the Auckland initiative, using many of the resources we had developed. We now have a working model for promoting mediation that could be applied anywhere in the country.

We strongly recommend that the Auckland District Law Society run another Mediation Month initiative in 1999, inviting all other Law Societies to take part. The Auckland District Law Society could "lead the chase". As an annual event, Mediation Month will grow from strength to strength. Each year we could have a theme that emphasised a slightly different aspect of mediation. Each year it would have a positive impact on the way lawyers are perceived in the community – proactive and not litigious.

With the backlogs in the Courts and the cost of taking matters to Court the suggestion that every Law Society District run its own mediation month programme on an annual basis is well worth considering.

LEADR UPDATE

LEADR New Zealand Inc recently held its AGM and elections. The following people were nominated and elected onto the Board:

Deborah Clapshaw (Chair), Mike Crosbie (Vice-Chair and Treasurer) Roger Chapman, Nigel Dunlop, Paul Hutcheson, Carol Powell, Geoff Sharp, Allison Sinclair.

Deborah Clapshaw has also been elected onto the Australasian Board of LEADR. She will represent New Zealand interests on that Board which meets quarterly in Sydney.

1999 WORKSHOPS

Our Four Day Mediation Workshops for 1999 will be held as follows:

- 24-27 March 1999 in Auckland
- 23-26 June 1999 in Wellington
- 6-9 October 1999 in Auckland

The flow-on effects of Mediation Month continue to be felt as there has been a significant response to the March workshop which is nearly full. If you would like to attend this workshop or obtain a place on the waiting list, please register as soon as possible.

SIXTH INTERNATIONAL CONFERENCE IN CHRISTCHURCH

In early October LEADR held its 6th LEADR International Conference in Christchurch which has been described as a conference with a difference with its focus on the big picture, namely the social role of mediation. The conference was an outstanding success.

LOCAL COMMITTEES

Auckland

Following the success of Mediation Month, the Auckland Local Committee organised on 8 October 1998 a forum entitled "Resolving Conflicts and Disputes in Organisations". The forum was addressed by Dr Christopher Moore and Ms Judy Mares-Dixon, partners in CDR Associates and was introduced by Graeme Norton, company solicitor for Air New Zealand. The forum was attended by over 60 people. It was particularly pleasing to see the number of non-LEADR members from a wide variety of organisations showing an interest in dispute resolution.

The final event of the year is to be held on 1 December 1998. The function is in the form of a Christmas drink, local elections and a review of activities of the Committee in 1998. As well, it is proposed that there be a general discussion of possible events and activities for the Local Committee to pursue next year and for a general discussion of initiatives which members would like to see progressed.

This year has seen a considerable growth in the awareness of mediation and other dispute resolution procedures in the community. It is important that initiatives are taken up in 1999 to continue to grow and encourage the use of alternative dispute resolution procedures.

Wellington

A group of Wellington LEADR members have been meeting regularly over the past few months to discuss how to promote and support the group and dispute resolution in Wellington. Issues we have discussed are:

- establishing regular columns in the Law Society newsletter;
- training, promoting, providing peer support; and
- establishing a database.

On 4 December 1998 a team is making a presentation to a group of Chief Legal Advisers from government departments. It is believed this is an area where interest will be shown in learning and using dispute resolution procedures.

Members of the group are: Ross Crotty; Denise Evans; John Marshall; Helene Ritchie; Geoff Sharp; Keith Huntington; Jeannie Warnock; and Judy Dell. ❑

WHAT'S HAPPENING

1999

March 1-5
International Congress of Maritime Arbitrators (ICMA XIII)
Auckland

March 24-27
LEADR 4 day Workshop
Auckland

March 26
LEADR Workshop
Personality, Mediation and Mediators
Auckland

June 22
LEADR Refresher Mediation Course
Wellington

June 23-26
LEADR 4 day Workshop
Wellington

October 6-9
LEADR 4 day Workshop
Auckland

October 10
LEADR Refresher/Accreditation Day, Auckland

LITIGATION ODDITIES AND QUIDDITIES

Richard Fowler, Phillips Fox, Wellington

ponders some mainly civil litigation puzzles he has had to deal with

The intention of this article is to identify some odd issues of litigation practice and, should any be moved to do so, to invite debate. Some are shibboleths of courtroom practice supposedly expressed as universally accepted fundamental principles, but pose real difficulties when their boundaries are prodded or tested. Perhaps that should not be surprising. After all, litigation will always be testing and resetting boundaries. That is a function of a living common law.

Others are gaps of uncertainty left between new procedural stepping stones carefully laid in recent times to modernise litigation processing or even manifest outright tension between those procedures and some traditional rules of evidence or procedure.

But what they all have in common is this: they seem to fall between the stools of legal scholarship and advocacy skill. Research in the texts on evidence or practice and procedure does not reveal much of assistance. On the practical front the manuals and writings on advocacy skills similarly have little of much help.

Yet they are real issues for those at work every day in our courtrooms. Convention (correctly in this author's respectful view) generally discourages counsel from expressing views on past cases in which they have been involved. But what this author can say is that on each of these issues he has been at different times on each side of the particular issue and with apparently differing or conflicting High Court rulings. That is why they truly remain "issues".

The Rule in *Browne v Dunn* (1893) 6R 67

This Rule requires that on any matter upon which a cross-examining party asserts contradictory evidence to that witness's evidence-in-chief, the contradictory evidence must be put to that witness by the cross-examiner.

The Rule is an age old trap for young players – particularly for those first defending prosecutions in the District Court. It is usually learnt at some cost and embarrassment at an early stage in one's courtroom career.

Its rationale, based on fairness and preventing ambush, remains sound and uncontroversial – especially in a trial where all evidence is given viva voce. But in the first years of swapping written briefs in the civil Courts (and prior to R 441K) divergent practices emerged: some counsel took the approach with apparent judicial acquiescence that the mere fact of exchange would often supplant the rationale for the Rule in that the opposing witness was able to study at his leisure (sometimes weeks ahead of the hearing) exactly what was to be said by way of contradiction.

Very well then, one might say, but does not R 441K render such approaches of mere historical interest? Does not the introduction of R 441K put the position beyond doubt? No, on its express wording it does not. It merely has the effect that the Rule in *Browne v Dunn* shall continue to apply. So what does the Rule in *Brown v Dunn* actually require in a practical sense?

As mentioned earlier, its rationale is to ensure that no one is caught by surprise. There is no difficulty then in translating that to, say, a defendant's obligation to put proposed contradiction to a plaintiff's witness.

But does the Rule in *Browne v Dunn* apply the other way around – ie the plaintiff's obligation to put contradictory evidence (by now already given) to a defendant's witness? Remember we are discussing here an obligation, not a tactical choice. For many reasons pertinent to a particular trial, it may suit plaintiff's counsel to put the (already given) contradictory material anyway or it may not. But is he/she obliged to put it?

The rationale for the Rule in *Browne v Dunn* has, by now, gone. The plaintiff's case has closed and the witness has given his evidence-in-chief (containing the contradictory material). A close reading of the oft cited dicta of Lord Herschell LC at 70-71 could suggest he was speaking only of the need to put prospective contradictory evidence – not evidence already given. And there is at least one New Zealand Court of Appeal authority that could be said to confirm such an approach: *Gutierrez* [1997] 1 NZLR 192. On this approach the Rule in *Browne v Dunn* never extended that far and R 441K changes nothing. For an approach that contrasts with *Gutierrez* see *Rae v International Insurance Brokers* [1998] 3 NZLR 190 CA.

Those arguing for the more expansive interpretation might point to the criminal context and the absence of exchanged written briefs as being some sort of distinction, but it is hard to see how, as a matter of principle, those features make any difference.

It may be useful to demonstrate the impact of the above in a practical courtroom context. Consider a situation where a plaintiff asserts a representation has been given by a defendant in a conversation. In his exchanged written briefs the plaintiff asserts that the conversation occurred on a particular date and states the content. In his exchanged written brief the defendant does not assert a different content or date, etc – he flatly denies that the conversation took place at all. At trial the defendant's counsel duly puts the defendant's denial that the conversation occurred at all (which the plaintiff has already read in the briefs) and draws the expected response that it did occur and in the terms already

detailed in his evidence-in-chief. Thereafter, as one would expect, attention focuses on surrounding or contextual matters that may or may not be corroborative of either version. The plaintiff's case closes and the defendant then reads out his brief and, as expected, denies the conversation ever happened. When the plaintiff's counsel rises to cross-examine, is he obliged to put the plaintiff's (by now already twice affirmed) version that the defendant has already heard? If he chooses not to, and focuses instead on the surrounding or contextual matters, should that failure have any bearing on a credibility choice? Should it properly be a matter worthy of any comment at all?

The answers would be very different depending upon which approach is taken to the breadth of the Rule in *Browne v Dunn*. It does not even end there: still to be addressed is the further question, if the more expansive approach is to be applied, namely whether it is a sufficient compliance with the Rule in *Browne v Dunn* to put every detailed contradiction to the witness – or whether it is compliance just to put a cursory and very bald proposition summarising the contradictory evidence in one or two questions, and then move on to what is probably regarded as potentially more productive ground? For an endorsement of the more cursory approach see *Allied Pastoral Holdings v Commissioner of Taxation* [1983] 1 NSWLR 1, 24 per Hunt J.

NON-PARTY WITNESSES EXCLUDED FROM THE COURTROOM

Here is another "Rule" that would be regarded as elementary to most, if not all, counsel regularly appearing in our Courts. Yet it is interesting that when one examines the authorities on which it is said to be based, the position is not so clear-cut. Even more interesting, there is a myriad of interpretations as to permissible "briefing" of such witnesses that ostensibly does not offend the "Rule".

The fundamentals are easy enough to identify – the exclusion order is made on counsel's application but is entirely discretionary in the hands of the Judge and is founded on the inherent jurisdiction ("protocol" might be a more accurate description in this situation) of the Court to control the proceedings in the courtroom: *Southey v Nash* (1837) 7 C&P 632. As is well-known, the classic litmus test for whether such an order is appropriate is whether there are likely to be any credibility issues involving that witness. What may be less well-known is that if a witness breaches such an order, the Judge cannot refuse to admit the evidence, but may adversely comment or even treat the breach as a contempt: *Chandler v Horne* (1842) 2 Mood & R 423 and *Cobbett v Hudson* (1852) 1 IE&B 11.

The Rule of course has no application to the parties themselves who, almost without exception are entitled to be present in the courtroom throughout. The rare exceptions would be such matters as repeatedly demonstrated attempts to disrupt the proceedings. Non-natural legal persons such as corporations are likewise entitled to have a party representative remain in the courtroom.

But returning to the non-party witness exclusion Rule, interesting differences surround the "briefing" of such witnesses. The detail of acceptable New Zealand practice differs with who you talk to.

We can commence the discussion by setting one sure stepping stone in place: the Court has the ability to exclude non-party witnesses until they are called. To this, another can be added: there is no doubt that there is some legitimate capacity to continue to brief witnesses after a trial has commenced but before they give their evidence: ie it must be acceptable for counsel to emerge from the courtroom and to ask an excluded prospective witness what he would say about a certain proposition which had not been discussed in pre-hearing briefings – but without disclosing to the witness what other witnesses have just said in the courtroom.

Around and between those two stepping stones is a myriad of different approaches:

- Some counsel regard it as acceptable to ask the witness a whole series of questions predicated upon "what if the evidence were ...". (It would have to be a remarkably obtuse or ingenuous witness who failed to infer what had been just said in the courtroom.)
- Some counsel conduct the same exercise without the "what if ...".
- Incredibly, there have even been some instances of counsel who have been scrupulous about observing the physical dimension of an exclusion order, but consider it perfectly acceptable to have a copy of the transcript delivered to the witness overnight. (Better this, they say, in the context of a hearing with media attention, than to read the "highlights" in the newspaper as the witness surely otherwise would.)
- Some counsel regard it as acceptable to inform the witness of events in the courtroom right up to the point the witness is called.

And of course there is the unimpeachable position of safety whereby the briefing process is regarded as complete at the moment of the exclusion order and thereafter neither counsel nor the witness have any communication or take any steps that could amount to any form of briefing.

The proponents of the less rigid approaches would say that this unimpeachable position of safety is tactically naive. An exclusion order merely excludes the witness from the courtroom – it does not and cannot cocoon him/her from learning about the day's courtroom events through other sources if he/she chooses. They say that such witnesses are merely being conscientious and meticulous in their preparation.

The differences in approach rarely, if ever, surface for judicial or other comment. It is an unlikely area for productive cross-examination requiring a most probably speculative foray into the sensitive details of witness briefing.

At the heart of the problem is uncertainty over exactly what is entailed in an exclusion order. The way the direction is commonly given, it sounds merely as if it is nothing more than a physical exclusion of the witness from the courtroom. Yet it must mean more than that, otherwise the exclusion would be always effectively circumvented by any means of relayed commentary. No one could deny the place of such anti-collusive measures in a fact finding process – as every schoolchild who has waited outside the principal's office while his or her accomplices are individually interviewed, can attest. But sometimes, one cannot help pondering the awkward interface between the effect of an exclusion order and the fact that most hearings are open to the public – unlike the principal's office.

Recent litigation trends have very probably exacerbated that awkward interface:

- Trials are longer thereby extending the periods of "quarantine" for an excluded witness.

- Witness statement exchange is now the norm thereby de-emphasising the skill and onus of examination-in-chief, yet encouraging a culture of witness "ownership" of his/her written brief, and promoting a degree of witness conscientiousness and participation.
- The use of modern technology (not just in trials but in all commercial dealings) thereby heightening the role of documents in even relatively uncomplicated hearings and greatly increasing the amount of paper or stored information that can be generated and reproduced, conveyed and reported.

Has a point been reached where it is insufficient to simply exclude the presence of non-party witnesses from the courtroom when the Court is satisfied, say, that credibility is in issue, without saying more? Or is it the case that the entire viability of such an order needs examination? Has, say, the witness exchange regime now substantially eroded the potential utility of the witness exclusion order with the vast majority of witnesses having at least read all the evidence-in-chief and supporting documents beforehand?

LATE ADDITIONAL EVIDENCE

Rules 441B to 441E now enshrine a regime of evidence exchange. Indeed, the timing of that exchange is even more exacting and earlier than what was commonly directed prior to the introduction of those Rules. Under R 441B the plaintiff virtually needs to have his/her/its evidence briefed at the point that a praecipe is circulating because service of the completed briefs will be required 21 days after setting down. Yet even under the pre-Rule 441B regime observance of the exchange dates could be quite casual. Rules 441E and 441G are obviously intended to provide some supervision and restraint on late evidence but it is difficult to see a Judge realistically refusing leave when the evidence is, on its face, cogent and relevant. The fact of the matter is that the Courts have really struggled to find any effective sanction to ensure exchange dates are observed.

Take this common scenario: a trial date in the medium to long causes category is carefully set (ie say a trial of two weeks' duration) involving multiple parties. Evidence has been duly exchanged. The parties prepare for weeks, or even months, beforehand on a basis that there being no evidence of X, the case is of the type Y, with all the consequential factual implications, legal presumptions, etc. Suddenly, on the eve of the trial, one party discovers and briefs evidence of X lifting the entire case out of the Y category. The disruption is immense. The well prepared have gained nothing but exhaustion. The under prepared have caught up at one stroke. What is to happen?

First and foremost, if the evidence is on its face cogent and relevant, no Judge is going to refuse its admission in the interests of justice, etc. Just, but badly or even incompetently prepared causes should still prevail – as long as someone can discern the justice in them. So the debate quickly turns to sanctions. The standard ones that are muttered are "adjournment" and/or "costs".

Adjournment frequently only punishes a plaintiff – and the plaintiff may not even have been the party seeking to admit the late evidence. Medium to long causes are difficult to allocate fixtures for. Losing one can easily mean a delay of many months.

Costs orders may provide a better sanction, but there does seem to be a judicial reluctance to visit this in any meaningful way – keeping instead within the traditional mould of costs following the event and understandably leaving the pre-hearing snarlings well behind in the wake of the substantive considerations of the "real issues".

Even if raised, it may even be that counsel can submit, with justification, that they or their client had only become aware of the evidence of X on the eve of the trial.

Possibly this is fertile ground for the development of a principled approach (within the costs jurisdiction) or even for a further amendment to R 441. The Courts can hardly confidently insist upon an earlier exchange regime in the face of chronic disobedience under less exacting Court managed regimes unless there is some real incentive to comply. After all, the exchange regime is one of the core mechanisms of the new enlightened and streamlined case management system intended to render use of Court time and resources more efficient and to focus hearings more expeditiously on the "real issues". That is difficult to achieve if it can be readily (or even cynically) sabotaged with a late brief or two.

Perhaps bad breaches of exchange dates could be examined in the costs aftermath to make some assessment as to whether the existence of the evidence could have been ascertained on reasonable inquiry. Following on from that, could such breaches result in a change, in some more than token degree, to the normal costs presumptions?

Before closing this topic, the approach of one very senior practitioner in the Environment Court is worthy of mention. The Environment Court has for many years prior to RR 441B to 441E operated under a pre-hearing written evidence exchange system. This practitioner always contacts the other parties on the due date for exchange to ascertain if they have all their evidence ready. If they do, he arranges exchange. If they do not, he politely ascertains when it will be ready and will only exchange on that date and when that party has confirmed that he/she is ready – and that is the practice he follows regardless of the timetable direction.

This is not a panacea. Delays through "all or nothing" exchange may be the last thing the "innocent party" wants. It does not work where counsel says his/her evidence is complete and then changes his/her mind. Furthermore, it does not fit within RR 441B and 441C which countenance a staggered exchange. But in certain circumstances it is a useful and effective mechanism that turns the late brief exchanger's culpability back on that party.

SEQUENCE OF ADDRESSES

A convention (not to be found in any "black letter" law) is that senior counsel for any particular party always addresses first – even if it is merely to acknowledge that all submissions are in fact to be presented in the particular case by junior counsel (see Practice Note [1961] NZLR 509). This is unremarkable and it is efficacious to have one counsel who is identifiable and accountable to the Court for the overall stewardship of his/her client's case.

But what of the situation where junior counsel has been allocated a sliver of the submissions (or even a sliver of the evidence and submissions) that is better presented before senior counsel's chunk? It may even be that the case is most easily and logically comprehended by hearing from senior counsel first, then as to junior counsel's sliver, and then with senior counsel picking up the traces again.

This certainly happens as a matter of practice (often with senior counsel alerting the Judge that submissions will be presented in a particular sequence that the Judge may find "helpful") without any adverse judicial reaction or even any

comment at all. Nevertheless, once in a while a Judge will remark on it and although this author has never seen or heard of an instance where a Judge insisted on the strict application of the convention, it can leave counsel with the vaguely uncomfortable feeling that he/she is introducing some nefarious practice which is at odds with the fundamental foundation stones of British justice.

It is not suggested here that it is other than an incidental matter but, again, practice and judicial responses vary.

ALLIED WITNESSES AND LEADING QUESTIONS

When counsel for an allied party of the party who has called a particular witness rises to cross-examine, to what extent should he/she be permitted to ask leading questions?

This is a curious issue which seems to have attracted more attention in the last decade or so and yet, strangely, cannot be said to be a by-product of recent litigation changes because the dynamics that trigger the issue have always been there. Furthermore, there is authority for the proposition that there is no absolute right to put leading questions in cross-examination in this situation and that the Judge has a general discretion to forbid them if partisanship is perceived: *Mooney v James* [1949] VLR 22.

There is certainly a significant school of thought (and practice) that the use of leading questions goes hand in hand with good cross-examination and therefore the use of leading questions by counsel for an ally is quite unobjectionable. That school would make the point that since cross-examination does not have to be via the leading question mode, the choice of open or leading questions can properly be a matter of weight that the particular Judge may accord to the witness's answers.

However, another school of thought (and practice) treats the issue of leading questions by an ally as inherently objectionable. It is not difficult to understand this and it is not uncommon to see counsel for an ally cheerfully making apparently astonishing advances with a particular witness after the truly "antagonistic" cross-examination has taken place, and, of course, before re-examination commences. Likewise it is not uncommon to see counsel having a "briefing" with the ally's witness prior to such cross-examination. There is an artificiality about this and an unfairness to other parties that might not always be apparent to the Judge, and certainly is not apparent to the public.

Responses to this issue vary:

- Some, as indicated above, do not regard it as an issue at all and such situations pass without comment.
- Some regard it as nothing more than a matter going to weight. (This, of course, assumes a particular and immediate level of judicial perspicacity in advance of having heard all the evidence.)
- Some regard it as objectionable but more a matter going to style.
- Some consider that the best way to address this issue is not to focus on the use of leading questions at all, but to have the sequence of cross-examination varied so that the truly antagonistic goes last. (This approach does not address the multi-party situations where several parties have varying allied or antagonistic positions vis-à-vis the witness to be cross-examined.)
- And there are at least two current judicial officers who address the issue by asking counsel for an ally on rising to cross-examine an ally's witness whether he/she adopts any part of the witness's evidence and if he/she does, then leading questions are forbidden on the subject matter of the evidence adopted.

It would be unfair to leave this topic as necessarily a black or white issue readily capable of an easy resolution. Multi-party hearings will commonly involve amongst defendants and third parties for example, some issues where parties are allied, and others where the same parties are in direct conflict. A very common dynamic is the spectacle of multiple defendants who join hands against the common enemy, the plaintiff, to resist any liability at all, but as against the possibility of the plaintiff succeeding, have issued cross-claims against one another. Although this can complicate the identification of an allied stance, it does not mean that it is impossible if it needs to be done.

AGREED BUNDLES OF DOCUMENTS

This is an area where the traditional and the modern clash headlong in a number of ways and one has the impression that the Courts have not yet quite worked out all the necessary answers.

Starting with the "modern", the utility of the "ABD" (the agreed bundle of documents) is undeniably an important tool of good case management with a useful element of self-policing built into the nomination system involved in its creation that largely or entirely bypasses any judicial supervision. But once assembled, what exactly is its status?

A common direction used in a number of Courts includes the following:

> Each document shall be deemed to be what it purports to be and to have been signed by any person by whom it purports to have been signed on the date which it bears and, if a communication, to have been received in the ordinary course of post or facsimile transmission by the named addressee and, if a copy, to be a true copy of the original, and to be admissible (saving all just exceptions on grounds other than authenticity).

A standard Wellington High Court direction puts this even more crisply:

> The parties agree that, unless expressly stated otherwise on the bundle or at trial, leave is given on adequate grounds to argue the contrary, each document in the bundle:
>
> (1) was signed by any purported signatory shown on its face;
> (2) was sent by any purported author to, and was received by, any purported addressee shown on its face;
> (3) was produced from the custody of the party indicated in the index;
> (4) is accurately described and dated in the index;
> (5) is admissible in the proceedings.

Consider here, for example, the heightened significance of the index to the ABD to matters of proof and admissibility.

At this point it is worth pausing to also note two common criticisms of the use of ABDs, often with justification. First, that by the end of many trials only a small portion of the ABD has been used to any significant extent. Secondly, that contemporary trials are needlessly top heavy with paper compared to equivalent trials 20 or 30 years ago (when many of the current judicial officers were in practice).

If one steps away from the ABDs and considers the traditional position prior to their widespread use, it is easy to see why the amount of paper referred to in evidence was previously more limited. It is not simply because more paper has been created in commercial activity. There were, and in

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CONDITIONAL LEAVE TO APPEAL TO THE PRIVY COUNCIL

Richard Best, Bell Gully Buddle Weir, Wellington

outlines the principles

The long running debate on whether the Privy Council should continue to be New Zealand's Court of last resort is well-known. The fact remains, however, that until Parliament enacts otherwise litigants unsuccessful in the Court of Appeal may seek conditional leave to appeal to the Privy Council. (Appeals directly from the High Court appear outmoded and are not discussed in this article.) Notwithstanding that the majority of applications for discretionary leave are denied and that only approximately 36 per cent of all appeals to the Privy Council are successful, applications are not uncommon. (*Appeals to the Privy Council: Report of the Solicitor-General to the Cabinet Strategy Committee on Issues of Termination and Court Structure* (1995, p 18) and LINX/Briefcase search for cases between 1990-1997 incl) Further, the volatile climate in today's Court of Appeal may encourage disappointed litigants to apply for conditional leave to appeal. The frequency with which Thomas J dissents and the vigour with which he sometimes does so must surely give disappointed litigants food for thought and fuel for appeal. (See, for example, *Neumegen v Neumegen and Co* [1998] 3 NZLR 310 (CA); *Pharmaceutical Management Agency Ltd v Roussel Uclaf Australia Pty Ltd* [1997] NZAR 58; and *Russell McVeagh McKenzie Bartlett & Co v Tower Corporation* 25 August 1998, CA 86/98.) Furthermore, we are seeing a more open acknowledgment that certain decisions, sometimes effecting significant changes in the law, depend on policy considerations with the doctrine of precedent becoming secondary. (See, for example, *Daniels v Thompson* [1998] 3 NZLR 22, 49, 55; NZLS Seminar *Appellate Advocacy* June 1997, p 4)

The aim of this article is simple: to synthesise the case law on applications for leave to appeal to the Privy Council and thereby provide an accessible point of reference for the principles upon which conditional leave may be granted, either as of right or at the Court's discretion. The focus is on R 2 of the relevant Privy Council rules. (For commentary on other rules, see *McGechan on Procedure* (Privy Council tab); *The Laws of New Zealand* Courts; and *The Laws of New Zealand* Civil Procedure: Privy Council and Court of Appeal.) Particular note is also made of whether an appeal may be brought as of right in judicial review proceedings. One final introductory point is that even if New Zealand abandons the Privy Council in favour of an alternative second tier of appeal, these principles will still likely remain relevant because presumably it will still be necessary to apply for leave to appeal to that second appellate level.

THE APPLICABLE RULES

Two sets of rules govern appeals to the Privy Council. The first set of rules is contained in the English Order in Council of 10 January 1910 providing for appeals from the High Court and Court of Appeal of New Zealand as printed in the Privy Council (Judicial Committee) Rules Notice 1973 (SR 1973/181) ("the 1910 Order"). The second set of rules is contained in the Judicial Committee (General Appellate Jurisdiction) Rules Order 1982 (UK) ("the 1982 Rules"). Applications in the Court of Appeal for conditional leave are governed by the 1910 Order. The applicable procedure once an appeal reaches England and for matters originating in England are governed by the 1982 Rules.

Depending on the circumstances, an appeal from the Court of Appeal to the Privy Council may be sought as of right or at the Court's discretion. The all important R 2 of the 1910 Order provides as follows:

> 2. Subject to the provisions of these Rules, an Appeal shall lie –
>
> (a) As of right, from any final Judgment of the Court of Appeal where the matter in dispute on the Appeal amounts to or is of the value of [five thousand New Zealand dollars] or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of [five thousand New Zealand dollars] or upwards; and
>
> (b) At the discretion of the Court of Appeal from any other Judgment of that Court, whether final or interlocutory, if, in the opinion of that Court, the question involved in the Appeal is one which by reason of its great general or public importance, or otherwise, ought to be submitted to His Majesty in Council for decision;

Under R 4 of the 1910 Order, an application for leave must be filed and served within 21 days after the date of the judgment appealed from. According to the learned authors of *McGechan on Procedure* (8-25), if a motion for leave to appeal is to be opposed and likely to take more than a few

minutes then a Court of Appeal fixture should be obtained. Leave obtained under R 4 is subject to conditions under R 5, namely, conditions as to payment of security (R 5(a)) and conditions as to timeframes (R 5(b)). For this reason leave obtained under R 4 is known as "conditional leave", whether the plaintiff is granted leave as of right or at the Court's discretion. Although additional conditions cannot be imposed if conditional leave is granted as of right, as "there can be imposed only such conditions as the rules prescribe" (*Lyon v Public Trustee (No 2)* [1934] NZLR ss 156, 157 (CA)), it would seem additional conditions may be imposed if conditional leave is granted at the Court's discretion (*McGechan on Procedure* (4A-17); *Lyon*).

APPEALS AS OF RIGHT UNDER R 2(a)

There are two limbs to R 2(a) of the 1910 Order. Each should be considered separately when determining whether a would-be applicant for leave may appeal as of right.

The first limb of R 2(a) provides an appeal as of right from any final judgment of the Court of Appeal "where the matter in dispute on the Appeal amounts to or is of the value of five thousand New Zealand dollars or upwards". The authorities establish the following governing principles:

(a) the judgment appealed from must be final in the sense that it is not interlocutory (*Exchange Finance Co Ltd v Lemmington Holdings Ltd (No 2)* [1984] 2 NZLR 247 (CA); *New Zealand Maori Council v Attorney-General* (unreported, 26 June 1996, Court of Appeal CA 78/96)) and in the sense that no issues await determination by New Zealand Courts such that the Privy Council may deal finally with what is at stake in the proceeding (*Attorney-General v Gray* [1982] 2 NZLR 22, 26; *Ngati Kahu Trust Board v Southern Lights Floral Exports Ltd* (1995) 8 PRNZ 320 (CA); *Re Registered Securities* [1991] 2 NZLR 48 (CA));

(b) the first limb only applies to cases where the applicant's claim involves directly, in financial terms, the subject-matter of the litigation, such as a claim for debt or damages. A direct claim to property or damages must have been made. The applicant's right to leave is determined by the value of the property or sum of money claimed (*Re Bateman Television Ltd (in Liquidation)* [1974] 2 NZLR 221, 222-223 (CA));

(c) the value of the matter in dispute must be looked at from the point of view of the party seeking conditional leave to appeal (*Meghji Lakhamshi & Brothers v Furniture Workshop* [1954] AC 80, 88 (PC)). The proper course is to look at the judgment as it affects the interests of the party who is prejudiced by it and who seeks to relieve him, her or itself from it by appeal (*NZ Insurance Co Ltd v Commissioner of Stamp Duties (No 2)* [1954] NZLR 1011, 1022-1023 (CA));

(d) Rule 2(a) should be strictly construed. In providing that the automatic right of appeal should only arise where the matter in dispute was of the value (or upwards) of a precise figure, R 2(a) does not encompass awards of unliquidated damages (*Zuliani v Veira* [1994] 1 WLR 1149, 1155 (PC));

(e) there is no appeal as of right under the first limb of R 2(a) where the party seeking leave simply seeks the directions of the Court as opposed to making a direct monetary claim or a direct claim to affected property (*Liggett v Kensington* (unreported, 24 July 1992, Court of Appeal CA 296/90, p 4));

(f) there is no appeal as of right under the first limb of R 2(a) in judicial review proceedings because, without additional causes of action, damages and proprietary remedies are unavailable in such proceedings.

Without getting into the detail, it may be noted that the Court of Appeal's decision in *Budget Rent a Car Ltd v Auckland Regional Authority* (unreported, 15 November 1985, Court of Appeal CA 29/85), in which leave was allowed under both limbs of R 2(a), appears to be inconsistent with the advice of the Privy Council in *Royal Hong Kong Jockey Club v Miers* [1983] 1 WLR 1049. However, the Court was, and has since been, at pains to emphasise the special facts of *Budget Rent a Car*. In later cases *Budget Rent a Car* has been confined to its facts and *Royal Hong Kong Jockey Club* has been applied (*Jenssen v Director-General of Agriculture and Fisheries* (unreported, 9 November 1992, Court of Appeal CA 313/91); *Auckland Casino Ltd v Casino Control Authority* (unreported, 7 March 1995, Court of Appeal CA 181/94). Indeed, *Budget Rent a Car* would not seem to be a first limb case at all. Further, application of the Privy Council's advice in *Royal Hong Kong Jockey Club* would have precluded leave being granted as of right under the second limb.

The second limb of R 2(a) provides an appeal as of right from any final judgment of the Court of Appeal "where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of five thousand New Zealand dollars or upwards". The governing principles are as follows:

(a) again, the judgment appealed from must be final in the senses outlined above;

(b) the second limb is designed for, or is more suitably applied to, cases where the applicant's claim is not a direct one for the subject-matter of the litigation but is for something else, such as an interest in part of that subject-matter, or is asserting a right of an indirect nature arising out of or incidental to the central question in the proceedings (*Re Bateman*) p 223);

(c) in such circumstances it is permissible to determine the right to appeal by an estimate of the value of the applicant's right or interest (*Re Bateman* pp 223-224);

(d) however, not every indirect interest in an issue touching property of a value of $5000 or more gives the owner of that interest an automatic right of appeal. The indirect interest must amount to something more than "a nebulous possibility of having some day a claim to damages" (*Re Bateman* pp 223-224);

(e) again, the value must be looked at from the point of view of the party seeking conditional leave to appeal (*Meghji Lakhamshi & Brothers v Furniture Workshop*(PC));

(f) it is the value of the property or civil right, not the claim or question, that is the determining factor under the second limb of R 2(a) (*Meghji Lakhamshi & Brothers* p 88; *Oertel v Crocker* [1947] 75 CLR 261, 266 (HCA); *Becker v Marion City Corporation* [1977] AC 271, 283-284 (PC));

(g) even if the party seeking leave can identify relevant property or a relevant civil right, leave cannot be granted if no money value can be assessed in respect of the

applicant's claim itself (*Stininato v Auckland Boxing Association (No 2)* [1978] 1 NZLR 609, 611 (CA));

(h) the word "respecting" in the second limb of R 2(a) requires a close, immediate or proximate connection between the claim, demand or question and the valuable property or civil right (*Oertel v Crocker* [1947] 75 CLR 261, 271 (HCA));

(i) the second limb of R 2(a) refers only to matters arising as between the parties to the litigation and it is not permissible to have regard to claims that may arise between one of those parties and other persons unconnected with the litigation (*NZ Insurance Co Ltd v Commissioner of Stamp Duties (No 2)* p 1027 (CA));

(j) unlike, for example, a contractual right to a licence or other valuable commodity (as to which see, for example, *W & R Jack Ltd v E & J Fifield* (unreported, 20 August 1998, CA 53/96)), a civil right in the nature of a hearing conducted or decision-making process effected in accordance with the rules of procedural fairness is not susceptible to monetary valuation and therefore leave to appeal is not available as of right where the appeal involves some claim or question respecting such a civil right. In other words, the value of a discretionary decision, if made in the appellant's favour following the Court holding that the decision-maker did not act with procedural fairness, is not the test for determining value under R 2(a). So, for example, the value of a licence to which there is no right, if granted or renewed to the appellant, is not the test (*Griffin & Sons Ltd v Judge Archer and the General Manager of Railways* [1957] NZLR 502 (CA); *Royal Hong Kong Jockey Club*; *Jenssen*; Auckland Casino). *Budget Rent A Car* appears to be inconsistent with the foregoing authorities (most notably the Privy Council's advice in *Royal Hong Kong Jockey Club*);

(k) this principle applies even where there would be continued enjoyment of a licence or other financial benefit until such time as the impugned decision is remade, potentially differently, following different procedures. This is because the relevant "civil right" is the right to procedural fairness. The actual licence or benefit is not in issue. This seems clear from three Court of Appeal decisions (*Griffin*; *Graham v Callaghan* (1903) 23 NZLR 56; *Lancaster v Manawatu Catchment Board (No 2)* [1957] NZLR 507);

(l) it follows that there will never be an appeal as of right under the second limb of R 2(a) in judicial review proceedings where the remedy sought, if granted, merely declares invalidity and/or requires the remaking of a discretionary decision because the discretionary decision, if made rationally and with procedural propriety, may be the same as that challenged by way of review;

(m) costs cannot be added to make up the minimum sum in R 2(a) because costs, even if in dispute and finally dealt with in the judgment, are outside the scope of the rule (*Karikari v Agyekum II* [1955] AC 640, 647; *Elders Pastoral Ltd v Bank of New Zealand* [1990] 3 NZLR 129 (PC)).

Some of the foregoing principles under R 2(a) may appear fairly restrictive given the wording of the rule. However, they are well established.

APPEALS AT THE COURT'S DISCRETION UNDER R 2(b)

For leave to be granted under R 2(b) the following must be satisfied:

(a) there must be a final or interlocutory judgment of the Court of Appeal;

(b) a question involved in the appeal must be of great general or public importance such that it ought, in the opinion of the Court, to be submitted to the Privy Council for decision; alternatively, a question in the appeal must "otherwise" be such that it ought to be allowed to be submitted to the Privy Council for decision; and

(c) the Court must exercise its overriding discretion in favour of the applicant for leave.

The authorities establish the following principles or propositions concerning the granting of leave under R 2(b):

(a) the onus rests on the applicant for leave to satisfy the Court that leave should be granted. If the nature of the case so requires affidavits should be filed to enable the Court to decide on a proper basis whether the case is one where leave should be given (*Rich v Christchurch Girls' High School Board of Governors (No 2)* [1974] 1 NZLR 21 (CA));

(b) something more must be shown than that an important question of law may be involved. Usually it must be shown to the satisfaction of the Court that the question involved is one which, by reason of its great general or public importance, ought to be carried further (*Rich*);

(c) it is not sufficient that a matter is of great importance to the particular appellant (*Stininato v Auckland Boxing Association (Inc) (No 2)* [1978] 1 NZLR 609, 611 (CA));

(d) the power of the Court to grant leave is not, however, limited to cases of great general or public importance, because of the inclusion in the rule of the words "or otherwise". The "or otherwise" limb of R 2(b) empowers the Court to grant leave to appeal in special cases not otherwise falling within para (b) where the justice of the case so requires (*Rich*; *Ryan v Hallam* [1991] 1 NZLR 700 (CA)) and is concerned with matters of substance in the case itself rather than with the procedural ability to raise an issue before the Privy Council (*Rainbow Corporation Ltd v Ryde Holdings Ltd* [1991] 3 NZLR 434 (CA)). The "or otherwise" limb must always involve a proper exercise of discretion on the part of the Court because it is limited to special cases (*Stininato* p 613);

(e) a measure of control may be needed over the possibility of a sequence of appeals if the stage has been reached where the public interest requires an end to law suits (*Re Registered Securities Ltd* [1991] 2 NZLR 48, 52 (CA)). Examples are where applications are made for purposes of delay or because what is involved is a liability that cannot possibly be met so that every avenue of extrication is explored even if the appeal has very little chance of success (*Re Registered Securities*, p 52) or where prolonged litigation would deplete limited funds (*Liggett v Kensington* (unreported, 24 July 1992, Court of Appeal CA 296/90));

(f) leave may be refused where, although the case is of general or public importance, the questions for appeal are of fact, degree and discretion as opposed to law or principle (*Taiaroa v Minister of Justice* [1995] 2 NZLR

1 (CA); *Morgan v Khyatt* [1964] NZLR 667 (PC); *AMP Society v CIR* [1962] NZLR 449, 552 (PC));

(g) where a clearly hopeless appeal is not permitted as of right the Court is likely to refuse leave (*Ryan v Hallam* [1991] 1 NZLR 700 (CA));

(h) it may not be appropriate for an important issue of New Zealand common law or statute law to go before Their Lordships without any prior review by the Court of Appeal of the position from a New Zealand point of view (*Finnigan v New Zealand Rugby Football Union (No 3)* [1985] 2 NZLR 190, 193 (CA));

(i) however, the fact an appeal raises indigenous public interest considerations (for example in cases involving claims by Maori under the Treaty of Waitangi or otherwise) does not necessarily render the case unsuitable for submission to the Privy Council (*Te Runanga o Muriwhenua v Te Runanganui o Te Upoko o Te Ika Association Incorporated* (unreported, 26 June 1996, Court of Appeal CA 155/95; CA 165/95; CA 184/95);

(j) where no live issue exists between the parties which could be affected by a decision of the Privy Council or, in other words, where the issue(s) become academic, leave to appeal may be refused (*Brown v Mulgrave Central Mill Co Ltd* (1917) 23 CLR 609 (HCA); *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111 (HL); *R v Lewis* [1949] NZLR 779 (CA); *Finnigan v New Zealand Rugby Football Union (No 3)* [1985] 2 NZLR 190 (CA); *Ainsbury v Millington* [1987] 1 All ER 929 (HL); *Minister of Foreign Affairs v Benipal* [1988] 2 NZLR 222, 233 (CA); *Montarello v Berkman Capital Finance Pty Ltd* (1997) 15 ACLC 556 (SCWA (FC)). The Courts have noted the importance of this principle in publicly-funded litigation (*Ainsbury v Millington*; *Benipal*);

(k) the unanimity of the Court of Appeal's decision and the extent to which it affirms the judgment below, although not a ground for refusal of leave in itself, is a material element in considering whether the Court has any reasonable doubts of the accuracy of its decision (*Lancaster*);

(l) under R 2(b) it is the nature of the question, not the amount, that matters, and as to that the scope of R 2(a) does not assist (*Bhasin v Elite Lifestyles Ltd* [1991] 1 NZLR 95 (CA));

(m) as indicated by the opening words of R 2(b), ultimately the Court has an overriding discretion as to whether to grant leave (*Rich*) which, one imagines, could only be challenged in the rarest of case.

Somerset Maugham said "[y]ou can't learn too soon that the most useful thing about a principle is that it can always be sacrificed to expediency". (*The Circle* (1921) Act 3) That insight may have some force in the context of Privy Council leave applications. However, the foregoing principles should at least assist in framing argument when making or opposing an application for discretionary leave under R 2(b). ❑

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theory still are, some important rules that acted as chokes on the ability to introduce documents into evidence – or even to refer to them. For example, it is interesting to ask oneself when was the last time one saw the following applied in a civil trial:

- That it is generally not permissible to cross-examine a non-party witness on the content of a document unless it is both admissible and an existing or intended exhibit. (This is part of the principle established by the *Queen's* case (1820) 2 Brod & Bing 284 unaffected by s 11 Evidence Act 1908.)
- That even though a party witness can be cross-examined on the content of a document, without the document necessarily being an existing or intended exhibit, hearsay apart, it must still be admissible. Further:
  - even if asked about the document, the party witness is not compellable to answer, *Henman v Lester* (1862) 12 CBNS 776; *Darby v Ouseley* (1858) 1 H&N 1;
  - if the party witness accepts the correctness of the document it can and must be produced as an exhibit;
  - but if the party witness either rejects the correctness of the document or, more commonly, makes qualifications to it, it cannot be produced – at least through that witness, *R v Gillespie and Simpson* (1967) 51 Cr App R 172, *R v Cooper* (1985) 82 Cr App R 74 (CA).

Perhaps one of the strongest manifestations of the extent to which the ABD system has carved inroads into the traditional rules for production of documents is the instance where a hearing has been completed and documents in the ABD are referred to in closing submissions that have not been mentioned in evidence by any witness.

One senior silk has suggested an interesting solution to the author. The suggestion is that at the end of the evidence the documents in the ABD only become evidence in the proceeding if they have been referred to in evidence-in-chief or by a witness. At the end of the hearing the ABD would be accordingly culled with the cost of the production and deletion of the "surplus" borne by the party responsible.

But it is not just the extent to which the ABD system has carved inroads into traditional rules affecting production of documents: it has also had some impact on courtroom practice where it overlaps with aspects of style and technique. Methods of cross-examination such as "silent read" or "oral only reference" are good examples. They are certainly acknowledged as current legitimate strategies (see *Phipson on Evidence*, 14th edition, paras 12-18 to 12-19) and while one still sees them utilised from time to time, that is often subject to at least a challenge as to why documents that are playing such a role in the hearing are not in the ABD. After all, cross-examining counsel is hardly likely to acknowledge that the documents are immaterial and/or the point insignificant. But then, if they are to be in the ABD, under the standard direction they become exhibits, which is fundamentally at odds with the basis of the strategies of "silent read" or "oral only reference".

It is not suggested by this that a return to a cumbersome series of chokes should be promoted in civil trials in lieu of the ABD system. However, it is plain that the interface between the traditional rules and the ABD system is untidy, even if it is simply to acknowledge that the like of the above traditional rules no longer apply in civil trials. Nevertheless, the general complaints about the ABD system might indicate that the time is approaching for some additional checks and balances on how the ABD is compiled and its trial functions.

Then a lawyer said, but what of our laws, Master?
And he answered:
You delight in laying down laws,
Yet you delight more in breaking them.
Like children playing by the ocean who build sandtowers with constancy and then destroy them with laughter.

Kahlil Gibran "The Prophet". ❑

LEARNING THE "A-B-C" WITH "E"

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rejects recent calls to reclassify Ecstasy as a Class A controlled drug

The death of Aucklander Ngaire O'Neill in mid-October is believed to be New Zealand's first fatality associated with the dance-party drug Ecstasy. Ms O'Neill's death almost immediately prompted calls from senior law enforcement personnel, such as the officer in charge of the Wellington Police organised crime unit (*The Dominion*, 26 October 1998), for all such amphetamine-type stimulants to be reclassified from Class B to Class A controlled drugs under the Misuse of Drugs Act 1975. Indeed, this proposal is currently before an inter-agency group of senior government officials for consideration.

As a Class B controlled drug, drug trafficking offences involving Ecstasy carry with them a maximum sentence of 14 years' imprisonment. Reclassified as a Class A controlled drug, such offences would attract a maximum sentence of life imprisonment. Lower-level possession and use offences would naturally also carry higher maximum sentences if Ecstasy were reclassified.

Such calls to impose heavier sentences on offences involving Ecstasy need to be treated with caution. The danger in acting too hastily after a widely-publicised death like Ms O'Neill's is that public policy can be driven by what criminologists sometimes refer to as "moral panics". Typically whipped up by sensationalised media reporting, lawmakers can feel pressured to act decisively to protect the country from the latest drug threat, lest they be guilty of "fiddling while Rome burns". Often such anxieties are sharpened by the depiction of drug traffickers and street-level dealers as evil figures who peddle social misery – what criminologists would call "folk devils" – modern day Pied Pipers who come to rob the community of its children, with a strange music that parents either cannot hear or do not understand.

To continue the metaphor, when there is the first death linked to such a "new" drug the fairytale is over. (Others may argue that it is only when a white, middle-class person dies that the spell of "drug use without consequences" is broken.) Arguably, the death of Ngaire O'Neill has been the catalyst for just such an atmosphere in New Zealand. It echoes the clamour for action that followed the Ecstasy-related deaths of English schoolgirl Leah Betts and Sydney schoolgirl Anna Woods in the early 1990s.

My purpose in this article is to encourage resistance to any knee-jerk reclassification of Ecstasy as a Class A drug. In my view, while it could be good politics, such a response would not be good policy.

BACKGROUND

Ecstasy was first synthesised by a German chemical company in 1914 as an appetite suppressant, and enjoyed popularity in the United States during the 1970s in a variety of therapeutic settings. By the early-1980s, however, abuse of Ecstasy had become an issue in a number of countries, prompting the World Health Organisation to declare it "non-beneficial". The drug was placed under the most stringent international control regime in 1986 (Sched 1 of the United Nations Convention on Psychotropic Substances 1971).

Although Ecstasy has been a feature of the New Zealand drug scene for a number of years, large-scale seizures of "E" have only been a relatively recent phenomenon. During 1997, the Police and Customs Service seized over 9500 tablets of Ecstasy, as compared with only 871 tablets from all previous seizures of the drug since 1989. This increase has prompted law enforcement authorities to re-assess the risk posed by Ecstasy from low/medium to high.

RELATIVE RISK

While the risk assessment done by law enforcement authorities suggests that Ecstasy is now a bigger component of the illicit drug market in New Zealand, it is important to note that this is an operational judgment based on the needs of policing and border management. From a public health perspective, however, the use of Ecstasy poses significantly less risk than the use of other (legal and) illegal drugs.

A mid-1997 survey of treatment patterns by the National Centre for Treatment Development (Alcohol, Drugs and Addiction) estimated that less than one per cent of out-patients and less than five per cent of in-patients who present to drug and alcohol treatment services have used Ecstasy during the past month. Similar reports have been received from hospital accident and emergency rooms throughout New Zealand. Relative to other drugs such as cannabis and opiates, this is a very low presentation rate for treatment. It indicates that there are comparatively few cases in New Zealand in which Ecstasy is consumed to the point where it causes negative health effects, that are felt to be sufficiently serious to require treatment.

Fatalities associated with Ecstasy are also considerably lower than those associated with other drugs. To this point, Ms O'Neill's death appears to have been the only New Zealand case where a person has died from taking Ecstasy. By way of comparison, around 5000 New Zealanders die

each year as a direct or indirect result of drug use. According to the Ministry of Health, about 4250 of these will die from tobacco-related causes and approximately 700 will die from alcohol-related causes. Only around 50 deaths each year (roughly one per cent of all drug-related deaths) are associated with illicit or other drug use.

On the current evidence, therefore, at least from a public health perspective, the case for reclassifying Ecstasy as a more serious Class A drug does not seem to be a strong one.

UK COMPARISON

It might be objected that the public health significance of Ecstasy may well change in a more "mature" Ecstasy market, one presumably characterised by more people taking more doses of Ecstasy than is currently the case. To weigh the merits of this counter-argument, it is instructive to consider the situation in the United Kingdom, which many analysts believe is the largest centre in the world for Ecstasy consumption.

According to the UK Department of Health, in the decade since such deaths have been recorded (1987-1997), there have been 60 deaths associated with the use of Ecstasy in the United Kingdom. During the same period, there have been over 1500 deaths due to inhaling solvents, 2500 deaths due to heroin, over 300,000 alcohol-related deaths, and in excess of one million deaths attributed to smoking.

If one attempts a rough calculation of the relative risk of death from taking Ecstasy, the point becomes even clearer. The standard Ecstasy consumption figure used by the UK Central Drugs Co-ordination Unit is between 500,000 and one million doses per week. (In itself, this is likely to be an underestimate.) If it is assumed that the wide-spread use of Ecstasy increased steadily from nil in 1987 to 500,000 doses per week by 1992, and remained constant until 1997, then the total number of Ecstasy doses taken in the United Kingdom over that period is 182 million. Divided by the 60 Ecstasy-related deaths during that time, the relative risk of death from taking Ecstasy would be roughly one in three million. Using the higher consumption level of one million doses a week would yield a mortality risk of about one in six million.

By way of comparison, the risk of dying from a parachute accident, for example, is one in 82,500 jumps according to the British Parachuting Association.

From even this crude statistical exercise, it is apparent that the risk of death from taking Ecstasy, even in a "well developed" Ecstasy market, is relatively remote. Similarly remote are the chances of experiencing other significant physical health problems, such as damage to the brain, liver or heart (see, further, the review at: [1998] 10 *Social Policy Journal of New Zealand* 86-100).

The risks of psychological harm from Ecstasy use are also likely to be much lower than what some recent studies have suggested (eg U D McCann et al, *The Lancet*, Vol 352, No 9138, 31 October 1998). Indeed, according to Dr Karl Jensen, a psychiatrist at Maudsely Hospital in London, Ecstasy use is an extremely rare cause of psychiatric referral, despite the drug's wide-spread use in the city. He reports seeing a number of people who have taken in excess of 2000 Ecstasy pills each, including binge use of ten pills or more over a single weekend, and who have all been given a "clean bill of health". Dr Jensen concludes that, because Ecstasy consumption levels in the UK have been substantial for over a decade, it is reasonable to think that there is no "neurological time bomb" waiting in the wings, and it is possible to take much higher doses of Ecstasy far more frequently, without significant health risks, than many commentators claim.

OPTIMAL CLASSIFICATION

In other words, there is no need to enter into any moral panic about Ecstasy as a potential killer; at least, as a potential killer that is any worse than tobacco or alcohol

The reason for traversing the British experience with Ecstasy is not to downplay the risks associated with taking "E" – the use of any drug, even prescription medication, carries with it some risk to the user – but to illustrate the bankruptcy of citing Ecstasy-related deaths in countries like the United Kingdom as a ground for imposing harsher penalties on offences involving Ecstasy in New Zealand. In other words, there is no need to enter into any moral panic about Ecstasy as a potential killer; at least, as a potential killer that is any worse than tobacco or alcohol, which are legally available in New Zealand.

In the short term, I would argue that this counsels against any knee-jerk decision to reclassify Ecstasy as a Class A controlled drug. Behind this is an assumption that the categorisation of drugs within the Schedules of the Misuse of Drugs Act should be based on their relative weighting of benefit/harm. This broadly reflects the international understanding of the need, on the one hand, to ensure the availability of different narcotic drugs and psychotropic substances for medical and scientific purposes, and on the other hand, the need to protect against abuse and any dependency-producing effect. This understanding was at the heart of the movement away from the old Narcotics Act 1965 (which for example made no distinction between heroin and cannabis) towards a more flexible classification system, as conceived of by the so-called Blake-Palmer Committee in the late 1960s and early 1970s.

Balancing any therapeutic value with potential for harm or diversion into illicit channels is, of course, not the only basis on which to differentiate between different types of drugs. Competing socio-political considerations can and do come into play in other jurisdictions. But it is clearly the approach that offers the most consistent basis upon which to make rational, evidence-based decisions about the appropriate control regime that should apply to a particular drug.

The Courts have also noted the importance of ensuring that any review of sentencing levels for drugs within a particular Schedule of the Misuse of Drugs Act "is an exercise to be embarked upon only on the basis of relevant evidence" of physical and psychological effects and any other social considerations (*R v Stanaway* [1997] 3 NZLR 129, 142; see also *R v Liava'a & Ors* (CA175-9/98, 17 August 1998), p 6).

It follows from what I have said about the relative risks associated with Ecstasy use that, in my view, Ecstasy is most appropriately listed as a Class B drug (the same classification as for cannabis oil/resin), rather than a Class A drug (the same classification as for heroin, cocaine, LSD and Bromo-DMA).

SENTENCING

From a practical viewpoint, as well, it might be added that in countries where Ecstasy has been put in the highest available drug classification, such as the United Kingdom, the harsher penalties which can be imposed on offenders do not appear to have affected the drug's popularity with traffickers or users.

As outlined above, the use of Ecstasy in the United Kingdom has risen steadily for the past decade. The street value of Ecstasy has fallen to between £10-£15 a tablet – between a third and half the price which Ecstasy sells for in New Zealand – despite the Police and HM Customs and Excise intercepting almost 580,000 tablets of Ecstasy in 1996 (see *Home Office Statistical Bulletin*, Issue 10/98, 9 April 1998). And this despite the fact that Ecstasy was made a Class A controlled drug as early as 1977, and carries with it a maximum life sentence for offences (Misuse of Drugs Act 1971, Sched 2, Part 1, para 1(c)).

The leading English authority on sentencing levels for importation of Ecstasy is *R v Warren and Beeley* (1996) 1 Cr App (S)233. The main point to be taken from this case is that sentencing should be based on a more absolute criterion (the number of units of drug combined with the concentration per unit) than the market-led vagaries of the "street value" of the drug itself. The Court established guidelines whereby 5000 tablets of Ecstasy, each containing the average dose of 100 mgs of the active constituent, is to be regarded as equivalent to 500 gms of cocaine or heroin at 100 per cent purity (attracting a sentence of ten years or above). Similarly, the Court held that 50,000 tablets of Ecstasy, each containing the average dose of 100 mgs of the active constituent, is to be regarded as equivalent to five kgs of cocaine or heroin at 100 per cent purity (thus attracting a sentence of 14 years or more). (For a useful review of other UK sentencing decisions involving Ecstasy, see D Webber, *Controlled Drugs – a handbook for the legal profession* [London: Institute for the Study of Drug Dependence, 1998], ¶A-15.)

Only a small number of cases involving Ecstasy have come before the New Zealand Courts, and none have yet led the judiciary to attempt similar guidelines. In *R v Watkins* (CA354/97, 26 February 1998), a case involving the importation of 5200 tablets of Ecstasy containing 322 gms of active constituent, on the main charge of importing Ecstasy, the trial Judge adopted a starting point of nine years' imprisonment. This was reduced by two years because the defendant was not the principal offender, he pleaded guilty early on and cooperated with police. The eventual sentence of seven years' imprisonment, for what the Court described as "a large-scale commercial operation", was later upheld on appeal.

In the other major case involving Ecstasy importation, *R v Poleman* (HC, Auckland Registry, T132/98, 30 October 1998), the defendant was found guilty of arranging the importation of 1990 tablets of Ecstasy (the purity of the drugs is not reported). There was no allowance for a guilty plea. Taking into account the quantity of drugs involved, the fact it was the first time the defendant had imported drugs and his apparent lack of involvement in the drug scene, Salmon J fixed the starting point for sentencing at between six and seven years' imprisonment. A further small reduction was allowed for the defendant's lack of previous criminal convictions. Salmon J thus settled on a sentence of five and a half years' imprisonment.

Although they are very much test cases for how the New Zealand Courts will set sentencing levels for offences involving Ecstasy, the lengthy prison terms imposed in *Watkins* and *Poleman* send a clear message to prospective importers of Ecstasy. Moreover, the Courts have previously upheld sentences of eight and a half and ten years' imprisonment for importing other Class B drugs, even allowing for guilty pleas: see *R v Schnellinger* (CA223/82, 18 May 1983) [hashish]; and *R v Collier* (CA188/81, 30 October 1981) [morphine]. Based on the sentences given in *Watkins* and *Poleman*, there is no reason to think that New Zealand Judges will shy from imposing equally stern penalties in appropriate cases involving Ecstasy.

The approach taken by the New Zealand Courts to date make it unlikely that prospective traffickers or users would be encouraged into "classification arbitrage" – whereby they would elect to import/use the Class B drug Ecstasy in preference to any given Class A drug, solely because of its lower penalty tariff.

CONCLUSION

The Government's five-year *National Drug Policy*, which was launched in July 1998, seeks to minimise the harm caused to both individuals and the community from illicit drugs such as Ecstasy. It includes a number of initiatives that are relevant to reducing the prevalence of Ecstasy use in New Zealand, and foreshadows a full-scale review of the legal classification of chemical drugs such as methampethamines.

But the relationship between the legal status of a drug, the law enforcement practices that are associated with it, and an individual's decision whether to commit offences relating to that drug, is a notoriously complex one (eg S Maddox and S Williams (1998) 5:1 *Drugs: education, prevention and policy* 47-58). There is also a generally low level of awareness of the typical sentencing range for simple possession offences involving illicit drugs, particularly amongst young people, so the distinction between Class A, B or C classification may be lost on most potential purchasers of Ecstasy. This inevitably renders speculative the discussion of any additional deterrent effect of reclassifying Ecstacy as a Class A drug in New Zealand.

Thus, rather than demonise Ecstasy as a potential "killer drug" following the death of Ngaire O'Neill, and respond to the moral panic about its use in the community with ad hoc scheduling changes to the Misuse of Drugs Act, perhaps here is an opportunity to think much more broadly about the issues.

Despite the current emphasis on law enforcement as a means of controlling the supply of Ecstasy, I suspect that no matter how rigorous New Zealand's border management and policing practices are, Ecstasy will continue to be a feature of the New Zealand drug scene. Moreover, it must be accepted that some people, for whatever reason, will continue to use Ecstasy as well as many other illicit drugs.

So long as markets for illicit drugs like Ecstasy are demand-driven, strategies aimed exclusively at supply control will not prevent these markets from being supplied. Thus, if there is a serious desire to minimise the harm that can result from using drugs like Ecstasy, policymakers should ensure that supply-control measures are balanced with initiatives that seek to reduce the demand for such drugs. Inevitably, the criminal law can only play a small part in this wider process of drug demand reduction. ❑

PARTNERSHIP BY ESTOPPEL AND RELIANCE

P R H Webb, Emeritus Professor of Law, The University of Auckland

reviews the appellate judgment in Nationwide v Lewis

Nationwide Building Society v Lewis, noted earlier by the writer at [1997] NZLJ 442, has been reversed by the Court of Appeal: [1998] 2 WLR 915. It may be recalled that Cliff, the buyer of a London property, sought a mortgage loan from the plaintiff building society and named as his solicitor Mr Bryan Lewis, the sole principal of a one-man law firm called Bryan Lewis & Co. The Society then retained the firm to act for it. Mr Williams, the second defendant, was a solicitor who became an employee of the firm, though he actually enjoyed the status of a salaried partner. His name appeared on the firm's notepaper in a manner which did not differentiate between him and the true and only principal, viz Mr Lewis.

In the events which happened, Cliff fell into arrears, the Society sold the premises at a loss, and sued both Mr Lewis and Mr Williams for negligence or breach of contract on the footing that they were both partners in the firm. The Society claimed that it had suffered loss because it had relied on an allegedly negligently prepared report on title. This report, which was unqualified, had been supplied under cover of a letter signed by Mr Lewis in the firm's name. Although Mr Williams had played no part personally in tendering this advice, it was contended that Mr Williams was liable as he had been held out as a partner in the firm at the relevant time. Rimer J held that there was a rebuttable presumption that the Society had relied on the report as constituting the advice of a firm with two partners in it and that Mr Williams was liable as having been held out as Mr Lewis's partner.

Mr Williams left the firm a few months after the events here related. He appealed – successfully, as will appear – the essence of his case being that there was no direct evidence of actual reliance by the Society upon the holding out of himself as a partner. Indeed, no act of reliance by the Society on the holding out was pleaded.

Peter Gibson LJ, who gave the principal judgment, was at some pains to consider the relevant documents and correspondence (at pp 917-918). He noted that the various references were always to "B Lewis & Co", "Bryan Lewis & Co" or "Mr B Lewis" and adverted to the fact that there were other references to "the solicitor". Two letters from the Society which were addressed to the firm began with the words "Dear Sir". The report on title had been signed "Bryan Lewis & Co" as had the letter accompanying it.

Evidently the writ and the statement of claim were the first indications in the papers before the Court of Appeal that the Society had become aware of the existence of Mr Williams as being a person connected with Bryan Lewis & Co. Mr Williams admitted that he was held out as a partner by reason of the appearance of his name on the notepaper. He defended himself by saying that he had had no personal dealings with the mortgage transaction and he accordingly denied liability. It was this defence that apparently alerted the Society to the possibility of Mr Williams not being an equity partner.

Having stated that the Society had to show that it had relied on, or acted on the faith of, the holding out of Mr Williams, Peter Gibson LJ went on to say (at p 921):

> The position in law was that when the offer of a contract was accepted by the letter of 10 May 1991 it was accepted by Mr Lewis and not by Mr Lewis and Mr Williams. Lewis had no actual authority to accept the retainer on behalf of Mr Williams and it is inconceivable that he intended to accept on behalf of his employee. [Counsel for the Society] has not argued for Mr Lewis having ostensible authority to act on behalf of Mr Williams and in any event for that to be established it would require proof that the plaintiff acted on the faith of the implied representation of authority.

His Lordship then proceeded (at pp 922-923) to consider whether reliance on the doctrine of holding out could be presumed. He considered *Hudgell Yeates & Co v Watson* [1978] QB 451 (CA). In His Lordship's judgment, whether one looked at s 14 of the Partnership Act 1890 (UK) (which is the precise equivalent of s 17 of the New Zealand Partnership Act 1908) with its clear requirement that it was on the faith of the representation that the person held out was a partner in the firm that credit was given to that firm, or whether one looked to the common law, reliance was a necessary ingredient to be established by a plaintiff.

Counsel for the Society had submitted that it would make the doctrine of holding out wholly artificial and unworkable if a person claiming an estoppel had to prove his or her actual reliance on the holding-out. Peter Gibson LJ (at pp 922-923) declined to accept this, stating:

> It does not seem to me to be impractical or unjust for the law to require a person claiming an estoppel to have to prove in a partnership context what he would have to prove in other contexts. Given that a reliance is a necessary requirement, it is not obvious that there should be a presumption in favour of the person who claims reliance and is in a better position to know whether he did rely on the holding-out and who should thereby be able to prove it. The person held out, who is not in fact a partner, may well have difficulty in proving the negative, that the other person did not rely on the holding-out. Of course, there may be circumstances from which it would be appropriate for the Court to infer that there was reliance on a holding out.

He went on to say (at p 923):

> There is no evidence that anyone in [the Society] noted from the letter that Mr Williams's name appeared as a partner, still less that it was relied on by the [Society]. It was not suggested that there was some personal characteristic of Mr Williams that would bring him to the attention of the [Society]. It is merely the fact that Mr Lewis had a partner that is said to be significant. I have to say that this seems to me unrealistic. It did not matter to the [Society] whether or not Mr Lewis was the sole principal when the [Society] retained the firm. Why should it matter to the [Society] whether or not Mr Lewis was the sole principal less than a week later when it received the letter of 10 May and the report on title?

It was considered (at pp 923-924) that it was certainly not obvious that the Society would have noticed Mr Williams's name appearing in print alongside Mr Lewis's at the top of the letter of 10 May and that it was even less obvious that the Society would have placed any reliance on the fact that Mr Lewis had a partner. Nothing was to be seen in the circumstances of this case to make it of significance that Mr Williams should give the report on title his imprimatur. Rimer J had been prepared to assume the work to be Mr Lewis's exclusive work and that Mr Williams was not personally responsible for the act or omission complained of. There was no evidence that Mr Williams had ever done any work for the Society. Indeed it would be astonishing if the significance of Mr Lewis's having a partner ever crossed the mind of anybody in the Society. It was difficult to accept the assertion made by Rimer J that Messrs Lewis and Williams intended the report prepared by Mr Lewis to convey that imprimatur. It did not follow that anything that Mr Lewis did on his own for clients was intended to have the authority of Mr Williams. The presence of the latter's name on the notepaper might be explained by the fact that it would lend authority to him in his communications with the firm's clients. Not being a partner but a mere employee, Mr Williams was thereby made to appear to be on a par with Mr Lewis. It was noted (at p 924) that the Society did rely on the report on the title and the representation therein contained that the title to the property was sound but that it did not follow from that that the Society relied on the suggested representation that Mr Williams was a partner giving his authority to it.

The appeal was accordingly allowed and it was declared that Mr Williams was not liable on the basis that he was held out as Mr Lewis's partner. Sir Christopher Slade and Evans LJ concurred in holding that reliance could not be inferred or presumed here see at pp 934-936.

It is interesting to note that Sir Christopher suggested (at p 925) that the Court might have been willing to infer reliance by the Society on the representation that Mr Williams was a partner had it been with him that it had had all its dealings.

The underlying philosophy behind s 17 of the Partnership Act 1908 (the marginal note stating "Persons liable by 'holding out'") may presumably be described as akin to that behind s 39 of that Act (the marginal note stating "Rights of persons dealing with firm against apparent members"). Is it now permissible to say of cases such as *Tower Cabinet Co Ltd v Ingram* [1949] 2 KB 397 (DC); *Hudgell Yeates & Co v Watson* (supra) and *Elders Pastoral Ltd v Rutherfurd* (1990) 3 NZBLC 101, 899 (CA) that they were all cases in which reliance by the aggrieved party could not be shown and certainly could not be presumed or inferred? In each of them the aggrieved party was not aware of the "apparent" partner's existence, so could not have been misled or otherwise have acted on the faith of any representation that the "apparent" partner was a partner.

On the other hand, what is to be said of a case such as *Hammond v Hamlin* [1989-1992] BCLD 886, 3674 and 3676? In that case a salaried partner in a firm of solicitors was held liable on a solicitor's undertaking given to another law firm in another city by an equity partner. This undertaking had been given after the salaried partner had retired but before his retirement was publicly notified. His name had remained on the firm's writing paper. Given that he was, like Mr Williams, only an employee whose status had been advanced by "promotion" to the status of salaried partner, was it right that he should have been held liable for the breach of the undertaking? Ought not the firm of solicitors to whom the undertaking was given to have been required to show that it was aware of the holding-out and did in fact rely on his apparently continued status as a held-out partner? It is quite possible that it was immaterial to that law firm whether or not the salaried partner was a partner even though his name was on the notepaper. Or is it a case where, for policy reasons, reliance by the law firm ought to be presumed or inferred?

In contrast is *Pont v Wilkins* (1992) 4 NZBLC 102,894, where a partner in an accountancy firm retired without giving notice and became his former partner's employee. The retired partner's name continued to be part of the firm name and his name also continued to be on the writing paper. The plaintiffs were a married couple who were long-standing clients. They knew the accountant to be a partner before he retired. After his retirement they entrusted another employee with funds to invest. She misappropriated them. The accountant was held liable to the plaintiffs in respect of the loss. It is very likely indeed that the plaintiffs did not in fact rely on the continued apparent partnership of the accountant. Even if they did not, the case may very well be one where the Court should presume or infer reliance.

It remains to be seen whether this kind of approach proves to be correct or whether the principles underlying the two sections must be kept distinct. ❑

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We have carefully considered counsel's speech. Was it a radical blunder? We think not. The word 'blunder' suggests a mistake. This was not a mistake, but a carefully structured well thought out speech.

A re-examination of the merits of the case suggest that the orders made excluding evidence were extremely generous. The same spirit of generosity motivated the Judge's summing-up, which bent over backwards to point out to the jury that what counsel had said was not evidence and should be disregarded.

In our experience, juries will take careful note of a well-crafted judicial direction, and this was a model of its kind.

It cannot therefore be argued that there was any miscarriage of justice. The appeal will be dismissed." ❑

GOLDEN THREAD OR GOLDEN FLEECE?

Ross Burns

uncovers another case to be taken cum grano salis

The recent Court of Appeal decision *R v Blagger* CA 666/98, 6 September 1998 is a pithy but fascinating analysis of an increasingly prevalent ground of appeal. The judgment reads as follows:

"The appeal which we have today is of a type which is coming before us at a regrettably increasing rate. Generally this type of appeal is brought by rather pathetic creatures desperate to exploit any perceived opportunity to be successful on appeal, without consideration of the issues or people affected. Often, their clients are little better.

The ground of appeal is generally described as 'incompetence of counsel' – that somehow trial counsel has failed in his or her duty to present the appellant's case properly to the jury. There is a certain irony in the fact that those counsel who are criticised most often are in fact those who are most competent – even the best advice can easily be criticised after conviction.

Counsel in the Court below in this case is known to us as a most experienced and competent counsel. However, we feel obliged to set out at some length the gravamen of the appellant's complaint against him.

The appellant was charged with aggravated robbery. He was said by the Crown to have entered the St John's Park branch of the Westpac armed with a sawn-off shotgun, and escaped with several thousand dollars. After a car chase, during which the getaway vehicle was lost for some time, the appellant was found driving the vehicle through a suburban street. He claimed that he was driving it to a nearby address on behalf of a man whom he knew only as Mike, who had stopped him a few minutes earlier in the street with a tale of a urgent appointment. He was at a loss to explain the balaclava and weapon in the vehicle. He assumed it belonged to Mike. He was duly committed for trial to the District Court.

His trial, which lasted several days, could be considered to have been something of a forensic triumph for his counsel. Witnesses were discredited, police officers made to look foolish, and the appellant portrayed in an endearing light. All went well for the appellant until final speeches.

Counsel for the appellant addressed the jury thus:

Members of jury, this is my last trial. In forty years at the Bar I have ensured the conviction of a small number of innocent people and the acquittal of a far larger number of guilty ones. You have heard the evidence in this case. Let me tell you about a few things you haven't heard.

My client has a list of convictions as long as his arm. He began offending before some of you were born. He is known to his few friends as 'Shottie' because of his preference for the sawn-off shotgun as a weapon in robberies. Even his mother despises him.

He has a right not to give evidence, but in fact the only thing that stopped him from doing so is that he didn't want to lie to you. Whether that is because he is scared of being caught out or because there remains a spark of decency within the burnt out husk he calls a soul is a matter for you.

In this Court there are rules of evidence. They dictate what you may hear and what you may not. They have evolved over many years to keep you from getting a hint of the truth.

If it was not for them you would by now know that one of the accused's accomplices informed the police the day before the robbery that it was going to take place, and that the accused was going to do it. You would know that he was captured on video without his balaclava shortly before he entered the Bank. The Judge has said that that evidence must be kept from you as it constituted unreasonable search pursuant to the Bill of Rights Act. You would know that on his arrest he admitted to the arresting officer that he was guilty. Sadly the constable had failed to advise the accused that he was not obliged to say anything. That is hardly surprising when the constable had been involved in many fewer arrests than the accused. Again this evidence was excluded. And finally, the stolen money, most of which was found in the accused's jacket, could not be used in evidence because the search which located it took place without the accused's consent and was therefore unlawful.

I have therefore been able to have free rein with the truth, as a result of which I have been able to pull the wool over your eyes in a comprehensive fashion. You have been thoroughly hoodwinked. Thank you for listening.

The appellant argues that counsel failed to represent him properly at trial, and his appeal must therefore be allowed.

We have said repeatedly (see *R v S* CA 467/97, 16 June 1998) that it is not every minor tactical blunder which gives rise to an appeal in these circumstances. There must have been a radical blunder by counsel. Was this speech a radical blunder, or a carefully planned tactical 'warts and all' defence, as the Crown suggests?

We heard from counsel who appeared at the trial as to the reasons for his speech. He told us that he 'had had two double gins and a complete gutsful of the accused'. Privilege having been waived, he told us that his client had told him that he had done it, but insisted on putting the Crown to proof. The appellant apparently enjoys prison life, and the loss of his sentencing discount was an empty threat.

The appellant instructed counsel to 'get stuck into the cops' and insisted that the bank tellers be called to relive their experience. We conclude that this instruction was motivated by the same malice that the appellant's list of previous convictions so abundantly illustrates.

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