

## UNDERMINING THE CONSTITUTION

Just over two centuries ago a remarkable group of men got together to draft what was to become the Constitution of the United States: men of achievement, who had carved a living from virgin countryside, had battled the elements, had been soldiers, had risked their own money, time and even lives. There were no career politicians, no academics, and of those from the service sector, most had some wealth-creating role as well. Many, including some of the most prominent, had been home schooled: neither George Washington nor George Mason, for example, ever went to school. They assembled in response to crisis: the independent colonies' assemblies were undermining the rule of law and were embarked on beggar-my-neighbour policies of tariffs and protectionism. They took as their starting point the self-evident truth that all people had inherent rights to life, liberty and the pursuit of happiness.

The contrast with the group assembling in Wellington as this *Journal* comes out for a conference on "Building the Constitution" could not be more marked. There is no crisis, but the recent lesson of Canada is that discussing the constitution out of the blue is an effective way of creating one.

There are no entrepreneurs and precious few "doers". The business "perspective" is represented by Hugh Fletcher, the manager of a big business known for his corporatist views and Dr Roderick Deane a man of undoubted ability as an economist and the leader of a large organisation, but who was an employee nearly all his life.

Most of the rest are people who have watched, criticised, offered services or obstructed from the sidelines while others have got on with the business of generating wealth. Few have ever been responsible for employing anyone, or put their own capital or even time at risk. Many, like Judges and academics, have led lives deliberately designed (for good reason) to shelter them from reality. They are mostly the product of, and many are current participants in, New Zealand's state monopoly university system.

The papers give major cause for concern. It is left to economists Alex Sundakov and Dr Deane not only to try to inject a note of reality but also to raise values such as the rule of law with which lawyers have become bored.

Sir Geoffrey Palmer and Philip Joseph seem to have been tasked to produce descriptive reviews which refer to the idea of limited government, but not to explain why it is important. Hardly mentioned elsewhere, it is treated as one idea amongst many equally valid points of view. But at a constitutional conference it is not one idea amongst many.

If the object of government is to achieve an election target, or some grand vision such as "equity" or even the fatuous economic growth targets that most parties bandy

about in complete disconnection from their policies, then at some point even the separation of powers, let alone more detailed processes, will get in the way.

A government can only achieve goals in the real world by having untrammelled power to introduce the right policy (assuming it can know what it is) at the right moment, without consultation or warning and often after telling lies about its intentions.

The only purpose of a constitution is to limit government to following certain processes which in turn limits the outcomes it can even pursue, let alone achieve. Consciousness of this is largely absent from the papers published in advance. There is even Sir Ross Jansen's familiar paper about a power of general competence for local government. Isn't the point of a constitution to prevent central government from having a power of general competence?

Although the letter sent out said that the conference sought to represent all points of view, the only paper in the entire collection that even begins to defend limited government, individual freedom and property rights is Dr Deane's.

Instead we are treated to Professor Jane Kelsey with such gems as "free market policies that have increased inequality within and between countries, and in the case of poorer countries condemned millions to entrenched, life threatening poverty". One only has to compare the last 50 years of socialist, centrally planned African states and India with Asian countries such as Taiwan, Japan and South Korea which in living memory had similar standards of living, to see that this is arrant twaddle.

Professor Kelsey cannot distinguish between an outcome which is the product of the decisions of millions of free people and an outcome planned by a government. The processes we call globalisation are simply what happens when people are left free to contract with whom they will, unobstructed by discriminatory taxation and regulation.

It is revealing of the organisers' mindset that they consider this sort of thing worth listening to. Evidently any view is entitled to be heard if it is shouted loudly and frequently enough, except of course, a defence of the traditional values of constitutionalism and the legal system.

We descend to the depths with Moana Jackson with his "all societies developed their own unique (and equally valid) institutions to govern themselves" a description which presumably embraces Pol Pot, Hitler, Stalin and Vlad the Impaler. One of the most dangerous aspects of this conference is the open argument for, and idle assumption by others of, Maori separatism. If this conference causes as little eventual damage as the recent Canadian constitutional controversies, we shall have got away lightly. □

# LAW COMMISSION PAPERS

*D F Dugdale, The Law Commission*

*introduces Law Commission study and discussion papers*

## CONSTRUCTION CONTRACTORS

Construction contractors (head-contractors and sub-contractors) are almost never paid in advance and are rarely in a position to stipulate for security. Retention of title to such materials as they supply is not in practice available to them because title on affixing passes by operation of law to the landowner. So they suffer the disadvantages of any unsecured creditor.

Subcontractors are at the further disadvantage that the cashflow on which they rely dries up if the owner is unable to pay, or if a superior contractor diverts cash which should flow to the subcontractor. An owner may run out of money (an occurrence the likelihood of which is difficult for the subcontractor to measure before committing himself to his subcontract) or the owner may withhold moneys relying on a setoff based on acts or omissions for which a particular subcontractor has no responsibility. A superior contractor may apply towards fending off other difficulties money that should be paid to his subcontractors.

An owner or a superior contractor may, to disguise his impecuniosity, dispute liability on spurious grounds. Such a dispute may take a long time to resolve.

Subcontractors will be even worse off if their contracts restrict their right to cease work on the ground of non-payment, or if as is today common they include a "pay when paid" or "pay if paid" clause. The effect of such clauses is to make the subcontractor's entitlement to be paid conditional on the superior contractor receiving his payment. So the risk of the owner's financial problems and possible insolvency is not borne solely by the head-contractor but shared between the head-contractor and his subcontractors.

Because subcontractors' work is short, they are fearful that tagging their tenders to exclude such provisions will lose them the job. To that extent such provisions are not agreed to as the result of a process of free bargaining.

It is either illegal or commercially impractical for the subcontractor bound by a "pay if paid" provision to insist that his obligation to pay his own employees and suppliers of material be subject to a corresponding condition. So subcontractors tend to be hardest hit by a drying up of the cashflow. They have an obligation to pay, but no entitlement to be paid. Their position is even worse if their contracts prevent their ceasing work on the ground of non-payment.

All sectors of the industry seem to agree that there are superior contractors who wrongly withhold payments from their subcontractors, but there is no agreement as to the extent of the problem.

The traditional method of protecting construction contractors was by statutory provision for liens over the owner's land and charges over moneys due to superior contractors. Statutory schemes often provided for hold-backs or retentions to give charges something to bite on, and common too

were provisions impressing a trust on so much of moneys received by superior contractors as was due to contractors lower in the chain. There is such legislation in every state of the United States of America, in every Canadian province and in some Australian states. New Zealand had such a statute from 1892 until 1987 when Part II of the Wages Protection and Contractors Liens Act 1939 was repealed on the not totally convincing ground that:

it is not possible to reach agreement with the industry on the reform of the revised Liens Act, and the reason is that the interests of contractors and subcontractors are diametrically opposed to each other. Contractors prefer to hang on to the retention money for as long as possible and subcontractors prefer to be paid as soon as possible. The position is hopeless. The law must go (See G W R Palmer at 482 NZPD 503).

The Ministry of Commerce as part of its current review of insolvency law invited the Law Commission to revisit this issue. The Commission's Report to the Ministry has now been published in the Commission's Study Papers Series (*Protecting Construction Contractors* NZLC SP 3).

The solution currently tending to find favour in comparable common law jurisdictions is an abandonment of liens and charges in favour of an imposition of contractual terms aimed at the swift clearing away of blockages in the cashflow. A regular cashflow is essential in itself, but an additional consequence of the removal of such blockages is that concealed inability to pay on the part of an owner or superior contractor comes to light much sooner. If a construction contractor is not going to be paid then the earlier in the course of the contract that he discovers that position the less likely it is that the non-receipt will be ruinous.

The most appropriate reform model is the New South Wales Building and Construction Industry Security of Payment Act 1999. Pay if paid clauses are deprived of effect. There is entitlement fast track judgment for unpaid instalments except to the extent that liability to pay the whole or part of an instalment is contested on grounds clearly stated. Whenever a party is entitled to fast track judgment he is also entitled to stop work. If there is a contest there is a procedure for adjudication by a swift and informal process ("quick and dirty") to determine the amount to be paid. Such rulings will not constitute *res judicata*. The decision is as to the amount of the immediate payment to be made but issues relevant to that determination can be re-litigated later. The purpose of the procedure is to put an end to disputes holding up cashflow.

The Contractors' Federation which includes both head-contractors and subcontractors supports in principle such a statutory regime for New Zealand. The proposal is favoured by the Subcontractors' Federation. The Registered Master Builders Federation has yet to be convinced.

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# WORLD TRADE BULLETIN

*Gavin McFarlane of Titmuss Sainer Dechert and London Guildhall University*

*reports on the latest activities*

## FOREIGN SALES CORPORATIONS

If there is one thing that the World Trade Organisation could do with, it is a substantial period away from media attention to regroup after the "Battle of Seattle". But it seems that this desirable situation is not going to materialise. The collapse of the talks surrounding the ministerial conference last December – intended to draw up the agenda for the new Millennium Round of WTO/GATT negotiations – came at the end of a conspicuously difficult year for the organisation. This was due to the increasingly bitter disputes between the world's two largest economic blocks in the WTO forum for settlement of trade differences. Far from setting an example to the rest of the member states on how to achieve settlement by negotiated agreement, the European Union and the United States seemed to monopolise the new trade litigation system, in that their disputes were always the most bitter, and certainly caught the headlines. First the long running battle over the importation of bananas into the EU dragged on for months against the background of increasingly hostile exchanges between Leon Brittan and Charlene Barshefsky; this was followed by the still unsettled contest over whether the EU can legitimately impose a prohibition on the importation of beef which has been subject to growth hormone treatment. In both cases trade sanctions were imposed by the United States on selected importations of goods sent there by EU member states, and in both cases these sanctions – in the form of 100 per cent duties – have been approved by the WTO.

Now fuel has been added to this fire. This time the issue is the system of Foreign Sales Corporations (FSCs). These are subsidiaries of American based corporations which have been set up in offshore tax havens. Typically they will have been established in Guam, Barbados or the Virgin Islands. These subsidiaries in effect act as agents for their parent companies in the process of exportation. The effect is that up to 65 per cent of the income which they obtain from these export sales is free from US domestic business taxes. And although the balance is in theory subject to local taxation in the tax haven, in practice this will either be at a low rate, or may even be a nil rate. Well over 5000 US companies are thought to conduct their export operations through FSCs; the result is that conservative estimates put the total annual value of FSC channelled exports at around \$250 billion, resulting in a loss to the American exchequer of around \$3.5 billion in that year.

The dispute resolution system in the WTO operates at first instance, through a panel, and there is then a single tier for appeals, through the appellate body. The EU having won its case before the panel on the FSC issue, it has just had the matter confirmed by the appellate body. The finding is that these reliefs from US taxation provided by FSCs constitute an infringement of the WTO's rules, and amount to illegal

subsidies. The United States has been given until 1 October of this year to dismantle the system, otherwise it could now face sanctions imposed by the EU. As the value of goods moving under FSCs is so much greater than the value of bananas and hormone treated beef about which Washington complains, the sanctions which will have to be borne by American exports to Europe will be very much greater in round terms. This has to be seen against the antipathy to the WTO and all its works, by the isolationist lobby in the United States. This lobby never wanted the US to sign up to the dispute resolution process in the first place, and some elements in both Congress and the Senate have suggested that the US should withdraw from the WTO altogether if it were to suffer three defeats in the dispute forum – "three strikes and out" in popular parlance.

So there may be a tendency this time to play down the effect of the decision, but the reality is that the decision is momentous in trading terms, and is not going to go away. The USA lost on two counts. First the FSC system amounts to a prohibited export subsidy under the WTO Subsidies Agreement; second, where these goods are agricultural products, they will be export subsidies breaching the WTO Agriculture Agreement. Nor is the issue one which has suddenly blown up; it is a long-standing source of friction between America and Europe. Foreign Sales Corporations are nothing more or less than a successor to a previous scheme operated by US companies. Domestic International Sales Corporations (DISCs) had been set up as long ago as 1971, and had been the subject of a complaint by the EU to the old GATT administration. Rulings by GATT panels were not enforceable in the same way as are the WTO decisions. Nonetheless on the basis of a complaint brought by the EU, the DISC scheme was declared an illegal export subsidy by a GATT panel in 1976, and adopted by the GATT administration in 1981. As a result of this decision, the United States abandoned the DISC scheme, and brought in the new FSC system in 1984 by way of replacement. Although the EU objected to this innovation at the time of its introduction, it did not carry this complaint through into the negotiations for the Uruguay Round which were then beginning. This decision is the result of a recent complaint brought by the EU since the establishment of the settlement system which followed the Uruguay Round.

## GST on exports

It is not just the possibility of inflaming isolationist opinion which is of most importance, nor even the possibility of the EU ameliorating its balance of payments situation through claw-backs on trade sanction payments. It was suggested on behalf of the United States that the FSC payments were perfectly consistent with WTO rules, and did not amount to a distortion of international trade. One of the grounds on

which argument was founded was that FSC payments merely granted to US companies the same tax benefits which companies in the EU receive through the system of zero rating on exports. This submission did not find favour with either the WTO panel or the subsequent appellate body, but the issue is now out in the open. If feelings do run high in the United States in consequence of the FSC decision, it may well be that Washington will decide to lodge a formal complaint with the WTO that zero rating on exports from the European Single Market are as much an illegal subsidy as are the benefits obtained hitherto by American companies which operate the FSC system.

### MIKE MOORE'S MUSINGS

WTO Director-General Mike Moore recently gave an interview to the *Guardian* newspaper in London. As that radical journal puts it, he could be forgiven for wishing that things had turned out differently. "If he had stayed in his native New Zealand, he would probably be foreign minister by now, glad-handing around the globe talking about butter and lamb, and halting Russian mafia money-laundering in the South Pacific. Instead, he has swapped a pleasant enough job for one of the world's toughest billets." He is said to be remarkably cheerful as he confronts the task of rebuilding the WTO, though apparently not quite as jaunty as in the days before Seattle. Interestingly, he considers that if the non-governmental organisations consider that they won a famous victory by bringing the talks there to a halt last

December, then they are fooling themselves. As he puts it wryly, "We didn't need their help to fail". But how much can Moore himself do to retrieve the situation? Some consider that the powers of the Director-General are too limited, and his authority too weak. He certainly considers that further progress on getting a new round of negotiations under way will depend on individual countries taking the political initiative, together with a willingness to be flexible. Given the clear absence of interest in re-convening the conference in the United States while Al Gore and George Bush are slugging it out, he does appear to be accepting that nothing further will be done until one or the other is firmly installed in the White House.

Some attempts have been made to make him the fall guy for the failure in Seattle, but Moore is having none of that. As an experienced politician, he seems likely to rise above the criticism, and is robustly claiming that the WTO is back on track and in business. He is certainly his own man, and in a keynote speech he made in February to UNCTAD, he did not shrink from pointing out that Bill Gates' wealth alone is estimated to be equal to the combined GDP of all the least developed countries (LDCs) put together. So as he tries to put Humpty Dumpty together again, he underlines the new division which he perceives in the world – the distinction between inclusion and marginalisation; those who are inside and those who are outside the modern global economy. "This is true both within and among countries." □

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### LIMITATIONS

In 1988 the Law Commission published a report (*Limitation Defences in Civil Proceedings* NZLC R6) proposing the replacement of the Limitation Act 1950 by a new statute. The 1988 recommendation may have been seen by some as radical and has never been acted upon.

Meanwhile the world of time-bars to civil claims has not stood still. The Court of Appeal has developed a new test involving reasonable discoverability of when a cause of action accrues which the Privy Council has endorsed.

There is uncertainty as to just which sorts of situations the reasonable discoverability test applies to. Except as provided by the Building Act 1991 s 91 the risks imposed on potential defendants by the reasonable discoverability test are not tempered by any long-stop provision.

Consider a retired lawyer. If he was a member of a firm it is in practice likely that he is protected in respect of negligence claims by the terms of his old firm's current insurance cover. In other cases however (if which is not clear the reasonable discoverability test applies to professional negligence claims) his potential liability could continue up to and indeed beyond the tomb. Particularly where insurance cover is available only on a claims made basis the law as to limitations is defective if it gives no clear guidance to the retired professional as to when he no longer needs to insure.

There are other problems. Thomas J has hinted at a degree of disquiet at the effect of the existing law on claims for financial recompense for infant sexual abuse. While the law remains as it is the Courts are likely in such cases to be faced with arguments that such abuse constitutes an actionable breach of a fiduciary duty.

*Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349 (HL) provides a reminder that as the law now stands the bringing of an action to recover money paid under a mistake may be postponed indefinitely.

All these matters are explored in a discussion paper (*Limitation of Civil Actions* NZLC PP 39) published by the Law Commission in February. The problem is as always that of devising a general rule that holds the balance fairly between the plaintiff's desire to procure a remedy and the defendant's entitlement not to be hounded by claims that have been slept on. The Commission proposes that the Limitation Act 1950 remain, but the Commission's tentative view is that it should be amended in the respects discussed below. The proposed amendments can be succinct.

The Commission suggests that the matter of discoverability be dealt with by entitling an intending plaintiff to an extension of time beyond the normal six year period if the plaintiff can satisfy the onus of proving that he or she could not have reasonably been aware of the cause of action during the six year period. This seems less conceptually dubious an approach than wrestling with the definition of when a cause of action arises and has the further advantage of putting beyond doubt where the onus lies.

It is proposed that there should be a ten year long-stop from the time any cause of action accrues, though the long-stop will not apply where there is fraudulent concealment.

The proposal is made to solve the problem of time-barred abuse claims (following some observations of Gault J in *M v H* (CA 188/98 9 September 1999 para 41) by extending the definition of disability to include the situation where the intending plaintiff can establish that he or she is unable by reason of some or all the matters on which the claim is founded to make reasonable judgments in respect of the bringing of an action.

It is suggested that actions for relief from the consequences of a mistake be subject to the same limitation provisions including a long-stop as other causes of action.

Submissions close on 30 April 2000. □

# EXPERT EVIDENCE

*Bernard Robertson*

*reviews two major works edited by Freckelton and Selby*

*The Law of Expert Evidence* and *Expert Evidence in Criminal Law* both by Ian Freckelton and Hugh Selby (eds) LBC 1999.

These two books, criminal practitioners will be dismayed to read, are designed to be read together. *Expert Evidence in Criminal Law* assumes that the reader has read or has access to *The Law of Expert Evidence*. In practice of course, arguments about evidence, let alone expert evidence, seem almost eliminated from civil trials, partly as a consequence of new systems of pre-trial exchanges, agreements and conferences. Nonetheless, a number of expert evidential issues can, in theory at least, arise in civil trials and there is doubtless value in publishing one volume for civil litigators and another that follows on going into greater detail on certain subjects, for criminal lawyers. One must wonder, however, at the inclusion of the chapter on expert evidence in sentencing in *The Law of Expert Evidence*, which could have been swapped with the traffic accident material in the criminal volume.

Both books draw substantially on the five volume loose-leaf magnum opus *Expert Evidence*, the assemblage of which by the same writers (also published by LBC) assures them of a honoured place in the bibliography of evidence. Presumably, these works are intended to be the individual practitioner's version with the looseleaf as the library edition.

*The Law of Expert Evidence* starts with the bases for challenging the admissibility of proffered expert evidence, which the authors had already usefully organised as the expertise rule, the area of expertise rule, the basis rule, the common knowledge rule and the ultimate issue rule. There are two possible ways of viewing these rules. The authors' structure falls in with the traditional postulation that all relevant evidence is admissible unless it is excluded under some pre-existing exclusionary rule. The authors label their five rules as exclusionary rules.

The alternative view, which seems to drive many codification attempts, is that something called "expert evidence", which now has to be rigorously defined, is only admissible if it meets certain tests of which these five rules would be exemplars. Strains of this thinking are noticeable in the Australian DNA cases cited by the authors in the relevant chapters, in which Judges appear to accept that obviously relevant evidence has to be found "admissible", simply because it is novel. This, it is submitted, is mistaken. If evidence is relevant it is for the objector to demonstrate that it is covered by an exclusionary rule.

The general volume goes on to discuss discretionary exclusion, judicial notice and appeals before traversing the main forms of expert evidence to be found in all forms of

litigation. This includes trauma and DNA evidence. The latter, of course, may be used in paternity cases and would, if available, have saved years of major civil litigation in the *Tichborne Claimant* case. The volume then examines a number of procedural issues, such as the potential liability of expert witnesses, procedures surrounding their reports and their payment and examination and cross-examination in Court.

*Expert Evidence in Criminal Law* has chapters going in much more detail into fingerprinting, document and firearms examination, drugs, forensic pathology, forensic medicine physiological and psychological, traffic accidents and eye witness evidence.

The end result is the assemblage of a vast quantity of information. Some is essential reading for all litigators. Some, such as the history of fingerprinting, makes for interesting recreational reading and much is best treated as reference material, not to be read and mastered but to be referred to whenever one deals with a particular kind of evidence.

If there is a fault, it is the tendency of the authors, in the manner of many lawyers, uncritically to accept confusion and not to apply their own critical faculties to the issues. In particular there is a tendency to accept the words of Judges and wrestle to accommodate them rather than to label certain cases as just wrong. Especially, it seems to this reviewer, the rulings of Judges in criminal trials should, bearing in mind the conditions under which they are produced, almost never be referred to. One has to accept that rulings have to be made in trials at speed and often after hearing argument for which only the defence was prepared, but these rulings should not be regarded as any sort of precedent. If all trial rulings were removed from the DNA chapters in particular, and only appeal judgments focused on much confusion (and many pages) would be saved.

One area where trial rulings have caused much confusion is insanity. The authors recite cases in which Judges have allowed witnesses to express a view on whether or not the accused was sane. But no expert witness should be allowed to offer an opinion on that topic for reasons so basic that any appeal Court decision reiterating the point would seem too unremarkable to report. First "sanity" is not a psychological concept, as any psychologist will cheerfully tell one, it is a legal concept. Second, the issue for the jury is not whether the accused was "insane" at the time the witness conducted an examination, but at the time the alleged offence occurred. The authors quote *R v Shields* [1967] VR 706 in which a Full Court did not object to a statement that the accused suffered from a condition which under certain circumstances would cause him to be unable to control his behaviour and form an intent to kill. Additionally, and

objectionably, the witness appeared to state that the accused was affected by these factors. That was clearly a matter for the jury. The only other quibble about the evidence is that the Court must bear in mind that what a psychologist means by an "intent to kill" is probably not the same as what the law means by an "intent to kill". This should have been the subject of cross-examination.

The conventional view that the ultimate issue rule is outmoded is reported without much comment. In fact I and my co-author Professor Tony Vignaux go to some lengths to defend the rule in our own slim volume *Interpreting Evidence: Evaluating forensic science in the courtroom*. If one accepts (as the authors appear to do) the basic Bayesian logical structure, then one can quickly see that expressing an opinion on the ultimate issue requires making assumptions about matters which are either outside the expert's area of expertise or which the witness has not even been told about. It was the Courts' lack of self-confidence in the face of apparently consensus scientific evidence in paternity cases which led Courts to accept for generations evidence of a "probability of paternity" with which they then tied themselves in logical knots trying to combine with the rest of the evidence in the case. The correct solution is that witnesses should never have been allowed to give such evidence but only to state how strongly their own evidence supported or undermined the proposition of paternity, and this is how the ESR and some medical laboratory witnesses in New Zealand now give their paternity evidence.

The authors in fact report, again uncritically, the debate over whether mere disagreement between experts should cause evidence to be excluded from jury consideration. They do not discuss the dynamic that such a rule would create which is that the defence in criminal cases would have a huge incentive to introduce evidence which was irrelevant or plain wrong but so clouded in scientific detail that it was difficult to explain briefly why it was irrelevant or wrong. This is, in fact, exactly what happened in *R v Lucas* [1992] 2 VR 109, a trial ruling which makes almost no sense at all.

This leads to the area of expertise rule, one of the authors' five basic rules, and to the question of who should give evidence in DNA cases. The authors seem to incline to the idea that evidence from population geneticists and statisticians should be required. This raises the issue whether "forensic science" is an area of expertise. It is frequently the case that a forensic scientist with a PhD at most is faced by eminent professors with strings of qualifications and fellowships as defence witnesses. The trouble is that these eminent professors have no experience at all in answering the question a forensic scientist deals with daily, namely what is the probability that this particular evidence would have been found given certain specified conditions.

Population geneticists and statisticians by and large deal only with long run experiments in which they consider the frequency of event X in series Y. In fact classical statisticians will straight facedly assert that the forensic scientist's question above cannot be answered. They then proceed to answer another question of more interest to themselves, but again cloud the matter with so much detail that few lawyers will notice that the witness is now giving irrelevant evidence (exactly what happened in *Lucas*).

This question also fogs the first National Research Council report into DNA technology, to which the authors are far too kind. They reiterate the face saving waffle at the beginning of the second NRC report that it builds upon the first. In fact the decision to recall an NRC committee and rewrite

a report was unprecedented and reflected the deluge of dissatisfaction, some of it exceptionally strongly worded (Morton at (1995) 96 *Genetica* 139 provides an example both hilarious and deadly serious), which greeted the first report much of which was clearly wrong.

The authors' recite, for example, that the second report said that the "ceiling principle" could by then be discarded when it was always ridiculous and certainly was not a principle, but an entirely arbitrary distortion of evidence, in fact an instruction to witnesses to mislead the Court. The second report is an enormous improvement, although there are matters, such as the use of the suspect's racial data and data-base searching reported at pp 460-461 of *Law of Expert Evidence*, on which it is still wrong. It is not worth the time and effort involved to point out the errors and identify the useful parts of the first report. It should be discarded and no reliance placed on anything in it.

One of the consequences of the fact that these volumes are a compilation of material by different authors is that the section on interpretation of DNA evidence by Gutowski in *Expert Evidence in Criminal Law* does not appear in tone to be wholly consistent with the chapter on DNA Profiling Evidence written by Freckelton in *The Law of Expert Evidence*. Gutowski sets out a more realistic view of the NRC report. He also sets out the Bayesian approach, without calling it that, by saying on p 40 that "we must calculate the probability of the profile given that the individual is indeed the source of the material (essentially unity) versus the probability that the profile comes from someone else by chance".

Three quibbles here. First, the words "by chance" are redundant and possibly misleading. If the sample came from someone else it will not have been by chance. Second the parenthesis "(essentially unity)" is correct in the case where one mark is compared with one suspect. The trouble is that this is the case in which the frequency approach appears to give a correct answer. But there are numerous other cases, eg a group offence has been committed and two suspects are being compared with a mixed stain, or where a person has disappeared and a bloodstain found on clothing is compared with relatives, or where a data-base is searched, where the frequency approach will give an answer which is wrong.

The third quibble is perhaps the most important from the point of view of persuading reluctant lawyers that expert evidence, including forensic scientific evidence, should not be thought of differently from other forms of evidence. That is that who the "someone else" might be who left the mark is determined by the defence story. If the defence do not have any detailed story then the "someone else" might well be considered to be "random man". But if the defence do have a story, or eyewitness evidence helps to describe the perpetrator, then that will determine who the "someone else" is. The effect may well be to alter the value of the evidence. Like all other evidence, the value of DNA and other scientific evidence is determined by its ability to distinguish between hypotheses of interest and not by any intrinsic quality.

This review is by someone interested in the field who has his own particular views. It inevitably therefore focuses on issues about which the reviewer has some comments or rejoinders. These should not detract from the obvious value of these two volumes to litigators as a commentary on the case law and a compendium of information on the most important forms of scientific evidence. All criminal lawyers need ready access to these volumes and all civil litigators to *The Law of Expert Evidence*. □

# TAX UPDATE

*Susan Glazebrook and Laal Bhullar, Simpson Grierson, Auckland*

*discuss some important issues raised by the tax rate increases*

The Taxation (Tax Rate Increase) Act 1999 introduced a third tier into our income tax rates for individuals. The new tax rates are as follows: for income that is not more than \$38,000, the rate is 19.5c, for income of more than \$38,000 and not more than \$60,000, 33c, and for income above \$60,000, 39c. The new tax rates apply to the 2000-2001 income year. This Act also increased the rate of fringe benefit tax from 49c to 64c, bringing the FBT rate into line with the top tax rate of 39c. Company and trustee tax rates remain at 33c.

The Labour-Alliance Government has yet to deal with the implications of these changes. These implications include an unfair FBT tax rate and incentives for avoidance due to the disparity between the corporate and personal income tax rates. The government plans to raise around an extra \$1.9 billion over the next three years from the new top tax rate of 39c. However, the IRD estimates that up to \$250 million of the \$1.9 billion that could be raised may be lost through tax avoidance (*Press Release 18 February 2000*).

The Hon Dr Michael Cullen, Minister of Finance, has said that the government is not going to increase the company and trust tax rates to counter avoidance. Instead, the government will rely on the general anti-avoidance rules and other specific rules which will be introduced to counter any avoidance. He warned people to think very carefully about making changes designed to avoid the tax (*Press Release 27 January 2000*).

The first of these changes are contained in the Taxation (FBT, SSCWT & Remedial Matters) Bill which was tabled in Parliament on the 27 March 2000. The rest will be introduced in a Bill likely to be introduced in May.

## FBT

The new 64c FBT applies to all employees regardless of income level. The government has recognised this is unfair and the Remedial Matters Bill will introduce a three-tier FBT regime to avoid these inequities. The new regime will operate as follows:

- specific benefits that exceed \$1000 will be attributed to individual employees. The employee's FBT rate will depend on their remuneration level from that employer or associate of that employer. The rates will be either 27c, 49c or 64c (FBT rates that correspond to the 19.5c, 33c or 39c tax rates respectively);
- employers may choose to pay FBT at a flat rate of 64c (not likely to be a popular option for employees);
- benefits not attributed to specific employees will be taxed at a flat rate of 49c. Classes of fringe benefits will be traceable to groups of employees;
- rules will be introduced to ensure that employers cannot attribute benefits to classes of low-income earners and allow high-income earners to get the benefit of the non-attributed rate;
- anti-avoidance rules will be introduced to prevent employees negotiating to be paid by an associated employer, limiting the exposure to the higher rate;
- an employer can opt to pay FBT at a flat rate of 64c in every quarter except the 3rd quarter where a square up process can be undertaken for that year.

Such an FBT regime (while certainly fairer than the present regime) will increase compliance costs for employers that provide fringe benefits.

An effect of this amendment to the FBT regime may have been overlooked by the government. The reason why FBT rates are higher than income tax rates is because the regime allows an employer a deduction for FBT paid. This gives an effective FBT rate which should correspond with an employee's marginal tax rate. The fact that the corporate tax rate and the personal tax rates are no longer aligned means that the effective FBT rate for companies paying FBT at 64c for example is approximately 42c, which is greater than the top marginal tax rate for individuals. The effective rate is only equal to the top marginal rate of 39c if the employer is a sole trader or partnership.

## SUPERANNUATION FUNDS

Employer contributions to superannuation schemes are taxed under the specified superannuation contribution withholding tax regime ("SSCWT") at 33c. This is in line with the taxation of superannuation based on the "taxed, taxed, exempt" model – ie contributions are taxed, scheme earnings are taxed but withdrawals via pension or lump sums are exempt. To mitigate the top tax rate, salary earners may have been considering diverting income over \$60,000 into a superannuation fund.

The Remedial Matters Bill will introduce measures to counter avoidance through the use of superannuation funds. These measures will apply from 1 April 2000 and will operate as follows:

- a "fund withdrawal tax" of 5c per dollar withdrawn by an employee from a fund will be introduced. If the trustee can identify the specific employer contribution, this tax will be restricted to that amount;
- the withdrawal tax will not apply when funds are withdrawn after the employee ceases employment or withdraws money on the basis of significant hardship;
- existing contributions and contributions continuing at current levels will not be subject to withdrawal tax;



- to reduce compliance costs employers may apply a 39c SSCWT rate for all employees. Only those whose employees earn over \$60,000 a year are likely to use this.

This will remove any benefit to those earning over \$60,000 from substituting employer contributions to a superannuation fund for salary or wages.

## COMPANIES AND TRUSTS

Given the difference between the trustee, company and the top marginal tax rate there is an incentive for taxpayers to put their business into a company or trust. Dr Cullen has indicated that most of such arrangements would be covered by present anti-avoidance measures, but he has also promised to introduce specific anti-avoidance measures in a Bill likely to be out in May. There has as yet been no announcement as to the form of such measures.

If a company structure is chosen the company could pay salaries of no more than \$60,000 to its employees, whose income would be taxed at 19.5c up to \$38,000 and 33c up to \$60,000. The rest of the income received by the company would be taxed at the flat company rate of 33c. The company can then distribute this income amongst its shareholders as fully imputed dividends. If these shareholders have a marginal rate of less than 39c then this would be tax efficient. Efficiencies can also be gained by having a family trust as a shareholder.

If a shareholder/employee is on the 39c rate, any distribution will only have imputation credits attached up to the 33c tax rate. The shareholder/employee already earning \$60,000 salary will be liable to pay an extra 6c per dollar tax on the imputed dividend and will therefore be liable to pay the top tax rate of 39c. This applies equally to qualifying companies.

Using a trading trust structure as the vehicle to own the business works in a similar way. The trust earns income and pays the salaries of its employees, up to \$60,000. The rest of the income is either distributed to lower marginal tax rate beneficiaries or distributed (after six months after the end of the income year) to other beneficiaries after tax has been paid by the trustees at the 33c trustee rate.

Would such arrangements fall foul of existing anti-avoidance rules? Certainly any such restructuring undertaken purely for taxation reasons may well do so. Under general anti-avoidance principles restructuring of activities to attract tax benefits can be voided under s BG 1 Income Tax Act 1994 where one of the purposes or effects of the arrangement is, in the opinion of a Court, "tax avoidance". Where a new arrangement has been entered into, but the substance of the arrangement has not changed and there is no commercial purpose to the new arrangement it could be held to be tax avoidance. In *Halliwell v CIR* (1977) 3 NZTC 61,208, the taxpayer and his father carried on a dental practice. Upon the retirement of his father the taxpayer purchased his share of the practice and sold the plant and equipment to a family trust constituted that day (the trust was advanced money by the taxpayer to purchase these assets). The trust leased the plant and equipment to the taxpayer and supplied him the necessary dental mechanical services. An employee of the practice left his job and was employed by the trust. It was held that the arrangement was tax avoidance. The taxpayer's source of income remained the same but, because of the arrangement with the trust, the incidence of tax was altered. The Court considered the arrangement artificial and stated that in no sense could it be classed as an ordinary business transaction. The principle of

*Hadlee and Sydney Bridge Nominees Ltd v CIR* (1989) 11 NZTC 6,155 whereby personal services income is incapable of being assigned, must also be taken into account.

On the other hand taxpayers still have a choice of structures when setting up new ventures. A company or trading trust structure is clearly a legitimate means of structuring such a new business.

The government intends, however, to introduce specific anti-avoidance legislation aimed at the use of service companies. There is no information to date on exactly what the government is considering. This makes advising clients difficult. Practitioners would not wish to bind clients to structures not ideal commercially only to find that they will not work for tax purposes either.

Dr Cullen has stated that he is looking for guidance on what other countries are doing in this area. Australia has announced measures that ensure that income earned by an interposed entity for the personal services of an individual will be treated for tax purposes as income of the individual. These measures will provide that where 80c or more of the income received by an entity for the services of an employee, are received from one source, the income will be taxed as income of the individual employee who provides those services. These provisions will not apply if taxpayers can show that they are employed in a genuine personal services business. In the UK the law looks through service companies and taxes income as that of the individual if the individual would be an employee if engaged directly.

Another possible measure being considered is a requirement for companies or trading trusts to pay market salaries to employees. Hopefully this will not be the option chosen, given the issues involved in determining market salaries.

## INCOME SHELTERING

The government has indicated that it is aware of a number of schemes that enable high-income earners to shelter their income through the use of loss attributing qualifying companies, limited recourse loans and depreciation of "fixed life" intangible property. These complex schemes cause considerable revenue loss for the government. It has been estimated that in 1998/9 \$55 million of revenue was lost through such schemes (Speech by Hon Dr Michael Cullen to Auckland Public Practice Special Interest Group (ICANZ) 6 March 2000). Dr Cullen has indicated that the government is considering anti-avoidance rules targeted at this area which may be included in the May Bill. However, there are no details available at present as to how the government intends to target such arrangements.

## COMMENT

Against a background of tax simplification, new compliance difficulties are entering into the tax system. As a result of the new tax rates, there are increased compliance costs, especially in FBT. The new FBT regime may be fairer than the present regime, but it will not be easy to administer for employers. The fact that the top personal tax rate and the company tax rate are no longer aligned means that companies will be disadvantaged and will have to pay a higher effective FBT rate than individual tax payers. The differences between the top personal tax rate and the company and trust tax rate also introduce a need for further anti-avoidance measures, which again counter to the move towards tax simplification. □



# BLAME THE LAWYER

*Stephen O'Driscoll, O'Driscoll and Marks, Dunedin*

*advises on how to avoid appeals on the ground of incompetence of counsel*

Clients charged with crime and subsequently acquitted rarely complain about their legal representation. There seems to be an increasing number of appeals, particularly after jury trials, where convicted clients complain about their legal representation. Allegations concerning the standard of legal representation and the following or otherwise of instructions from a client to a lawyer are easy to make. The purpose of this article is to examine some of the more common grounds advanced by disgruntled clients against their lawyers in criminal matters and to suggest ways to reduce the risk of those allegations.

## PRINCIPLES

### *The client's decision*

The most basic and fundamental proposition is that a decision made during the course of criminal litigation is always the client's decision. Decisions on matters such as whether to elect trial by jury or remain in the summary jurisdiction, whether to plead guilty or not guilty, whether to call witnesses or whether the client should give evidence, are to be made by the client, not the lawyer. It is the function of the lawyer to advise the client. The lawyer will use experience, judgment, knowledge of the law and common sense to advise the client on all decisions. The lawyer must not override or overbear the client because they do not personally like the decision that has been made by the client.

Failure on the part of the lawyer to listen to a client's wishes will often lead to an unsatisfactory lawyer/client relationship. This may lead the client to become disgruntled. Clients often have difficulty understanding advice that is given to them. They often have difficulty asking questions. The frustration which can subsequently develop can then spill over when a decision is ultimately given by a Court and it goes against the client.

### *Be direct with the client*

In some cases, instructions given by a client may be misconceived or untenable. Lawyers sometimes blindly follow their client's instructions. Lawyers, however, need to be forceful and able to tell their clients that their instructions are unrealistic or untenable. In addition, it is important to take time and advise the client why that is your advice.

### *Keep the client informed*

Depending on the seriousness of the charge and the complexity of the case, the number of times that a lawyer and client will discuss the case will vary. One of the criticisms frequently made about lawyers and legal aid lawyers in particular, is that lawyers infrequently visit their clients when they are held in remand at a prison. Clients do not realistically know how a lawyer prepares for a defended hearing

or trial and does not know what the lawyer has done between appointments with the client. It is important to keep the client informed as you prepare for trial and progress towards trial.

### *Involve the client*

Clients who feel that they have been involved in the preparation of their trials are less likely to be disgruntled with their lawyers than those who feel they have not had any involvement in the preparation of their trials. Asking clients to put their instructions in writing to you is important for three reasons. First, clients feel involved in their trials and they are able, at their leisure, to put their instructions on paper. Second, having instructions in writing, protects the lawyer if allegations are subsequently made contrary to the written instructions. Third, although in the fullness of time a lawyer will receive disclosure from the police, there may be a number of matters which are not known to the police and which are only known to the client and those matters will be able to be communicated in writing to you.

### *The police file*

It is important once you have received disclosure from the police that a full copy is given to your client. Your client is entitled to know exactly what is on the police file. There may be pieces of information on the police file that you do not think is important. However, your client's detailed knowledge of the background to the alleged offending may provide you with material that will help your defence of the case.

### *Advise in writing*

At an early stage, you should write to your client advising on such matters as the elements of the charge, the nature of the prosecution evidence and prosecution witnesses, issues that you see are not in dispute, issues that you see which are in dispute and the nature of your client's defence which has been disclosed to you by your client.

Where there are real issues such as whether certain witnesses should be called by the defence or whether your client should give evidence, those instructions should ideally be in writing. You should confirm any oral instructions that you are given, particularly if they vary from earlier written instructions, in writing and send a copy to your client.

Frequently clients will allege that they were not allowed to get into the witness box and give evidence. (See eg *Mailo v MOT* (HC Auckland, 21 March 1991 AP 2/91 Smellie J; *R v B* CA 302/99, 11 October 1999; *R v Bennett* CA 468/94, 17 October 1996.) If a tactical decision is made on that issue, it should be made by the client on the advice of the lawyer. There will commonly be reasons why a decision was made

for a client not to give evidence. Such decisions are not made in a vacuum. The options should have been discussed. They should be recorded in writing. Where a certain course of action has been taken for various reasons, those reasons should also be recorded.

### *Be flexible*

It is important not to take an inflexible approach regarding instructions from your client. You need to be continually on guard, particularly during the course of a trial and be able to adjust to the uncertainties and vagaries of the trial process. If a decision has been made that a client will be called to give evidence and a crucial witness changes tack or backs down from what was previously said, you may need to reconsider whether, in those circumstances, it is still desirable that the client gives evidence. In *R v Taorei* (CA 69/93, 9 July 1993) the Court of Appeal allowed a successful appeal against conviction and ordered a retrial on grounds, inter alia, that there was a failure to further advise their client of the situation arising at trial where the Crown case had not been shaken and a conviction was almost inevitable on the evidence presented to give the appellant the opportunity to give evidence. An example where a change of decision was made not to call the alleged victim (acquiesced by the accused at a lunch adjournment) can be found in *Crime Appeal 264/90* (CA 264/90, 5 December 1991). This was regarded by the Court of Appeal as a tactical decision rather than a radical mistake and hence the Court dismissed the appeal.

### *Investigate*

If a client's instructions reveal matters which may be helpful to the case, the lawyer must investigate those matters. In *Sims v R* (CA 489/97, 19 December 1997) a conviction for rape was quashed when a number of matters taken cumulatively may have resulted in the jury taking a different view had further evidence been before them. In that case, counsel's decisions included not calling evidence that the appellant was, at the time of the alleged offending, impotent, not exploring in more detail the possible reasons for clinical findings relating to the complainant's medical examination and not calling additional evidence as to the significance of the absence of trauma and of signs of seminal staining or deposit. In *R v S* (CA 179/95, 14 December 1995) an appellant appealed successfully from conviction for rape of his estranged wife on the basis of a mistake by his trial counsel in not following up the tracing of telephone calls from the complainant's home which would have been helpful in supporting the appellant's version of events. The Court of Appeal held that the fresh evidence gave rise to a distinct prospect that the defence would have been able to show that the complainant lied in her evidence.

### *Follow the client's instructions*

There has been a tendency in recent years for clients charged with criminal offences to want to call character evidence. It is suggested that if a client wants character evidence to be called, you need to discuss the advantages and disadvantages of such a course. If, as counsel, you consider that the evidence would be of little value or might be harmful to your client, it is necessary that this is pointed out to your client. There may be cases where the calling of such evidence is crucial. The result of not calling character evidence was in *R v A* (CA 331/98, 3 March 1999), sufficient in combination

with other matters to result in a conviction for sexual violation being quashed and a new trial ordered.

In *R v Reti* (CA 396/91, 22 November 1991) the Court of Appeal reiterated that counsel have an obligation to follow their client's instructions to call a particular witness, or to withdraw from the case with leave of the trial Judge. However, it is suggested that effective communication with a client, taking time with a client and setting out reasons for your advice, may go a long way towards eliminating the drastic consequence of having to withdraw from a case.

## APPEALS

Any appeal to the Court of Appeal on the basis of the conduct of a lawyer is brought under s 385(1)(c) of the Crimes Act 1961 on the basis that the conduct of the lawyer in the trial resulted in a "miscarriage of justice". The Court of Appeal treats claims against lawyers with scepticism. It has been said that there is a natural tendency of persons rightly convicted to blame their counsel rather than themselves, for their predicament. See *R v Pointon* [1985] 1 NZLR 109; [1984] 1 CRNZ 348.

A miscarriage of justice may occur where a lawyer conducts the defence on lines completely contrary to instructions given by an accused. See *R v McLoughlin* [1985] 1 NZLR 106; [1984] 1 CRNZ 215. A distinction must be made between clear instructions to a lawyer which are to be followed whether the lawyer considers they will benefit the defence or not, and expressions of opinion by the client which counsel may disregard if there are good reasons for doing so and no prejudice ensues: *R v Laverty* (CA 342/95, 14 February 1996).

Where a lawyer makes "mistakes" so serious that the "miscarriage of justice" ground can be made out, then an appeal may be successful. A distinction needs to be made between radical mistakes on the one hand and defence strategies on the other. In *R v Coster* (CA538/95, 19 March 1996) Eichelbaum CJ said that "once again we are obliged to point out that in order to invoke the principle in *R v Pointon* [1985] 1 NZLR 109, more is required than a rehearsal of events during the trial where other tactics might have yielded better results. The appellant must demonstrate mistakes so radical or fundamental to justify describing the result as a miscarriage of justice". In *Crime Appeal 264/90* the Court of Appeal regarded the decision not to call a witness as a tactical decision rather than a radical mistake in the conduct of the defence giving rise to a miscarriage of justice. On the other hand, in *Crime Appeal 179/92* (CA 179/92, 21 September 1992) a new trial was ordered but the Court of Appeal issued a warning that counsel who deliberately adopted a strategy for the defence and chose not to investigate and present all defences, could not expect to succeed on appeal where the strategy was unsuccessful and it was desired to secure a retrial to present another defence.

## CONCLUSION

Lawyers who have acted for clients in jury trials do not like being the subject of criticism by other lawyers in the Court of Appeal. Lawyers that take those cases on appeal do not like having to criticise their colleagues. I am sure the Court of Appeal would prefer not to have to consider these types of appeals. It is suggested that by following the principles set out above, clients will understand your role as a lawyer, will understand what you are doing and why you are doing it and if lawyers can effectively communicate with their clients, the likelihood of appeals based on the alleged conduct or misconduct of a lawyer will be significantly reduced. □

# ISP LIABILITY FOR DEFAMATION

*Steve Keall, Chapman Tripp, Auckland*

*alerts service providers to a potential danger*

In a recent interlocutory hearing *Godfrey v Demon Internet Ltd* [1999] 4 All ER 342 (*"Godfrey v Demon"*) the UK High Court held that the defendant Demon Internet ("Demon"), an Internet Service Provider ("ISP"), had no defence of innocent dissemination where the plaintiff alleged that Demon published defamatory material on its "usenet" service.

The New Zealand Law Commission has recently recommended that the liability for ISP's for innocently publishing defamatory material be minimised to encourage the growth of the Internet. This article therefore applies until whenever Parliament acts on that recommendation.

## **GODFREY v DEMON INTERNET**

### **Facts in *Godfrey v Demon***

On 13 January 1997 an unknown rogue made a posting in the United States to a newsgroup on usenet called "soc.culture.thai". The posting was obscene. It purported to come from the plaintiff. The posting invited reply to the plaintiff's e-mail address. Demon is a large ISP in the UK owned by Scottish Telecom. Like most other ISP's around the world, it automatically reflected the message in its own usenet services.

On 17 January 1997 Godfrey informed the managing director of Demon that the posting was objectionable and a forgery. Godfrey requested that Demon remove the posting from its usenet news server. It did not remove the message. Demon admitted receiving this notice. It also conceded that it was possible to delete the posting from the news-server.

### **Usenet**

Usenet is part of the Internet. Usenet is a bulletin board system consisting of "newsgroups". When a user accesses usenet he or she can read "postings" in newsgroups, or add his or her own message. Unlike e-mail, the message is sent from one person to the newsgroup rather than to the e-mail address of a single person. By visiting that newsgroup, anyone can read the message, or add a new message. ISP's generally delete messages after a few weeks. More detail about how usenet works can be found on usenet itself at the newsgroups news.misc, news.admin.misc and news.answers.

## **DEFAMATION AND PUBLICATION**

A plaintiff must prove that the defendant published the defamatory material. Publication is the communication of defamatory matter to a third party (for example; *Pullman v*

*Walter Hill & Co Ltd* [1891] 1 QB 524 (CA)). This threshold has, over the years, occasionally caught newspaper vendors, libraries and commercial printers. To alleviate the potential for injustice the common law developed the defence of innocent dissemination. The New Zealand Parliament codified this defence in s 21 Defamation Act 1992.

### **Innocent dissemination**

Section 21 states:

in any proceeding for defamation against any person who has published the matter that is the subject of the proceedings solely in the capacity of, or as the employee or agent of, a processor or distributor, it is a defence if that person alleges and proves:

- (a) That that person did not know that the matter contained the material that is alleged to be defamatory; and
- (b) That that person did not know that the matter was of a character likely to contain material of a defamatory nature; and
- (c) That that person's lack of knowledge was not due to any negligence on that person's part.

The key issue for an ISP is whether it has published information solely as a distributor in circumstances where it does not know the material is defamatory, and the lack of knowledge is not due to any negligence on its part. Where an ISP has actual knowledge that it is distributing defamatory material, it is likely that a New Zealand Court would hold it liable for defamation. This may be a surprising result at first blush, but really involves only a mechanical application of the law. After all, the distribution of information is precisely the service an ISP offers to subscribers. Defamation is a strict liability wrong. Provided the plaintiff proves the elements of the tort, the defendant will be prima facie liable whether he or she is at fault or not. There is more latitude concerning what conduct, or lack of it, will constitute negligence for the purpose of s 21(c). This matter is discussed below.

Section 21 adopts the pre-1992 common law test. On that basis it is likely that when interpreting s 21, Courts will draw on common law authority. While *Godfrey v Demon* was decided under the UK Defamation Act 1996 which differs from the New Zealand Act. The UK Act sets out the elements of the defence of innocent dissemination in more detail than its New Zealand counterpart. However, the law on this subject in England and New Zealand is in substance the same.

### Case law on distributors

A distributor of defamatory material will prima facie be a publisher of the material until he or she can prove otherwise. It is sufficient for the distributor to show that he did not know of the defamatory material or that the material was not of a character that put him or her on notice. The lack of knowledge must not be due to any negligence on his part. A representative line of authority on this subject follows.

In *Day v Bream* (1837) 2 Mood and R54; 174 ER 212 an unsuspecting porter delivered some "clearly libellous" handbills. Patteson J directed the jury to find for the porter if they held as a matter of fact that the porter delivered the bills without any knowledge of their contents. Patteson J did not accept counsel's submission that there was no case to put to the jury because the porter prima facie "delivered and put into publication the libel". (Emphasis added.)

In *Emmens v Pottle* (1885) 16 QBD 354 the defendants had handed out copies of newspapers containing defamatory material. As a matter of law, the Court of Appeal stated that this disseminating rendered the defendants prima facie liable as publishers until they proved circumstances indicating they did not publish the libel.

In *Emmens* the jury had held at the trial (as a fact) that the defendants had had no knowledge that the newspaper contained defamatory material. The jury also found that the defendant did not have any reason to suppose the newspaper contained defamatory material. The Court of Appeal held that these were sufficient circumstances to discharge the prima facie burden.

Lord Bowen caveated this holding at 358. He stated:

I by no means intend to say that the vendor of a newspaper will not be responsible for a libel contained in it, if he knows, or ought to know, that the paper is one which is likely to contain a libel.

The Court of Appeal applied the same test in *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170. In this case the library was deemed to have published information where it had distributed defamatory material and ought to have known that the material was defamatory. This appears to be the test contemplated by s 21(c) of the Act.

In *Vizetelly* Smith LJ held that the jury was entitled to reach a guilty verdict on the evidence. The defendant had subscribed to trade publications containing notices that the offending book contained defamatory material. The Court of Appeal appears to have inferred that the defendant had had notice of the offending material by receiving the trade magazine, but had decided to ignore it. This holding was fortified by the library's admission in the trial that as a matter of business practice it was cheaper for it to risk being sued occasionally rather than checking every book. Consequently, the defendants were deemed to have published the defamatory material. In *Jensen v Clark* [1982] 2 NZLR 268 the High Court referred to *Vizetelly* as good authority for determining the circumstances in which the Court will regard a distributor as a publisher (at 275).

There is also abundant US authority on this issue. However, the law is markedly different in that jurisdiction and for that reason must be treated with caution. However, notable cases such as *Cubby v Compuserve* (1991) 776 F Supp 135 and *Stratton Oakmont Inc v Prodigy Service Co*

(1995) 23 Media L Rep (BNA) 1794 highlight one of the policy issues at stake – the downstream effect of potentially burdensome liability on an ISP on the growth and utility of the Internet.

ISP's in the US now have statutory protection. Section 509 of the Telecommunications Act 1996 limits the circumstances in which an ISP or a similar entity will be considered a "publisher" of material provided by a third party. In *Zeran v America On Line* (1997) 958 F Supp 1124 the Court stated that this section created "a federal immunity to any cause of action that would make [ISP's] liable for information originating with a third party user of the service".

*The more interesting case, that does not appear to have arisen in the Courts yet, is where an ISP disseminates information, but has no actual knowledge of the information*

### THE DECISION IN GODFREY v DEMON

In *Godfrey v Demon* Morland J held at 348 that whenever Demon transmitted a defamatory posting, it published that posting to any subscriber who accessed the newsgroup containing the defamatory posting. In circumstances where it had actual knowledge of the defamatory material, the defence of innocent dissemination was "hope-

less" (at 352).

It is submitted that there is nothing novel about the holding in *Godfrey v Demon* – although it may concern ISP's if they have not considered the position already. *Godfrey v Demon* merely represents the application of existing law to facts that did not present any special challenge to the Judge.

While the decision is correct on its facts, it is more precise to describe the ISP as a prima facie publisher. This distinction is a significant one. In regard to most material that is transmitted, but of which an ISP has no knowledge, it should not be difficult for an ISP to discharge the prima facie burden. ISP's should not be left with the impression that they will be liable for all defamatory material that they unwittingly pass on.

The more interesting case, that does not appear to have arisen in the Courts yet, is where an ISP disseminates information, but has no actual knowledge of the information. In this case, the Court must decide whether the lack of knowledge is not due to any negligence on the part of the ISP.

It is submitted that on the authority of *Godfrey v Demon*, where an ISP is informed of a defamatory posting, but neglects or omits to take steps to remove it, it will be negligent for s 21.

There is no reason why this holding would only apply to usenet. If the comment about Mr Godfrey had been on an ordinary web page the Court would have reached the same result. Having said that, there are certain qualitative differences between the varieties of websites an ISP provides.

### HYPOTHETICAL: XYNET

#### XYNet's own website

Consider a fictitious ISP called XYNet. XYNet has its own website at [www.xynet.co.nz](http://www.xynet.co.nz) where it displays information about the services it provides. If XYNet uploads defamatory material onto this website, all other things being equal, it will be exposed to liability for defamation as a primary publisher. It cannot avail itself of the defence of innocent dissemination in this situation.

*continued on p 102*

# EXPERT WITNESSES IN DNA CASES

*James Curran, University of Waikato*

*advises defence lawyers on dealing with statisticians*

**D**NA profiling techniques have proved an immensely powerful technique for settling criminal cases. As quickly as the role of DNA evidence has risen to the top of the forensic evidence ladder, so has the role of the statistical expert. The statistical expert is in Court for one reason alone, to provide the jury with a scientifically sound and objective method for weighing the strength of the DNA evidence presented to it by the forensic scientists. For that reason alone, we encourage practising experts to use a Bayesian approach.

## BAYESIAN APPROACH

The Bayesian approach centres on the use of the odds form of Bayes' Theorem which can be expressed as:

$$\frac{\Pr(H_p|\text{Evidence})}{\Pr(H_d|\text{Evidence})} = \frac{\Pr(\text{Evidence}|H_p)}{\Pr(\text{Evidence}|H_d)} \frac{\Pr(H_p)}{\Pr(H_d)}$$

Posterior Odds = Likelihood ratio Prior Odds

The evidence in this case is the crime scene stain and the DNA profiles of those individuals either known or suspected of involvement in the crime.  $H_p$  and  $H_d$  are the prosecution and defense explanations for the crime scene stain. These hypotheses reflect the circumstances of the crime and the legal reason of both prosecution and defense. We argue that the only part of this equation the statistical expert should comment on is the likelihood ratio (LR). The LR tells the jury how likely the evidence is under each of the two competing explanations. A large LR provides strong support for the prosecution explanation, whereas a small LR (less than 1) provides support for the defense explanation.

It is easy to see why such an approach is desirable. First, it lets the scientist comment purely on the strength of the evidence. The issues of guilt or innocence do not arise, because the scientist is simply commenting on the probability of the evidence if either one of the explanations were true. Second, the prior odds, which represents belief in the explanations given by the prosecution and defense, is left for the jury to decide. Similarly, the posterior odds, which represents the belief in the explanations updated to reflect the evidence presented, is obtained by a simple multiplication.

In a case of a single stain with a single contributor, it has been common to present a profile frequency. That is, a typical case report might state "The frequency of this profile is one person in  $P$  in the Caucasian population". There is a simple relationship between the LR and  $P$  for this case, where  $LR = 1/P$ . Eg If the case report states "The frequency of this profile is one person in one million in the Caucasian population", then the LR is one million. That is the evidence is one million times more likely if the prosecution hypothesis (the defendant is the true contributor) is true rather than if

the defense hypothesis (someone other than the defendant is the true contributor) is true. Such a relationship does not exist for DNA mixtures.

## ISSUES FOR THE DEFENCE

### Sampling error

The numbers presented by the statistician are not carved in stone. They are based on DNA databases which consist of a small sample of individuals (typically less than 500) and a population genetic model. Any statistics presented should reflect the size of the database. You can think of this as the equivalent of reporting the margin of error in a survey. The lower bound on a LR is typically one half to one third the estimated (reported) value. For example the 99 per cent lower bound on a LR of one million might be as low as 300,000. The NRC II (1996) has the formulae for these numbers in simple cases. This is a far more profitable question to ask than whether the database accurately represents your client's ethnicity.

### Relationships matter

Relationships such as brothers or fathers or cousins can have very large effects on the LR. If it is possible that a sibling or close relative could have been the contributor, ask the statistician whether his or her calculations reflect that. Most experts, if given this information ahead of time, will do the necessary calculations. These calculations can be done without additional typings on the relatives. In one of my cases this changed the LR from 18 million to 30,000. The LR is still large, but not anywhere as large as before.

Furthermore, people in the same subpopulation have a low level of relatedness between them. Corrections can be made for this using the "theta-equations" (4.10a and 4.10b) in the NRC II. Typically every increment of 0.01 (one per cent) in  $\theta$ , results in a halving of the LR. A value of  $\theta = 0.03$  is considered very large and quite conservative. We recommend the routine use of these equations and their extensions for mixtures. If this is not done then there must be realistic doubt regarding the validity of the population genetic model in use. Many laboratories in the US are using recommendation 4.1 from the NRC II in conjunction with the product rule. We recommend using 4.2, because all forensic probabilities are conditional and because it relaxes the assumption of independence between alleles.

### Mixtures

Calculations for crime scene stains where two or more people are assumed to have contributed (eg a vaginal swab in a rape case will have DNA from the victim and her attacker) should be analysed as a DNA mixture. Statistical

calculations that calculate the LR for the defendant only will consistently overstate the strength of the evidence. Most forensic scientists are unfamiliar with mixture analyses and a statistician is usually required to make the necessary calculations.

Sometimes an analyst may present what is known as a "Random Man not Excluded" probability. This is the probability of finding someone with at least one of the bands matching at each locus. Such approaches are outdated, illogical, do not gel with the ideas of statistics or population genetics and should not be accepted.

### Databases searches

Unfortunately the recommendation in NCR II is wrong and a well-prepared analyst will quote the appropriate literature. However a less well prepared analyst may be induced into making the NRC II correction which (incorrectly) benefits the defendant. This type of error can be induced by asking that the database be screened for "other matches" and then asking for the NRC II correction.

### The defense and prosecution (or transposed conditional) fallacies

The well prepared attorney should be aware of the prosecutor's fallacy and the defense attorney's fallacy. These fallacies are covered in the NRC II (1996).

### Issues a statistician shouldn't comment upon

Most statisticians do not undergo annual ASCLAD proficiency testing like forensic caseworkers. Therefore, a statis-

tical expert should not be proffering opinions on the typing procedures or typings in the case, nor be asked to do so. Many experts are not peer checked so their calculations would not meet minimum ACSLD requirements.

With very large numbers involved in many cases, statistical experts are often invited to make a statement of identity of source, eg "this stain came from the defendant". Whilst we accept that eventually the evidence will be so overwhelming that statistics will not matter, we don't believe this point has been reached yet. Object strenuously to such statements, especially if no account of relatedness has been made.

Finally a statistician should not talk about the prior odds of the case at all. They are the province of the jury.

### CONCLUSION

Having worked as a statistical expert for some time I believe that this article should not only provide defense attorneys with some fruitful lines of questioning, but also should encourage better practice by statistical experts and forensic scientists. □

### Recommend reading

- Aitken, C G G (1995). *Statistics and the evaluation of evidence for forensic scientists*. John Wiley & Sons Ltd, Chichester, UK.
- Eveitt, I W and Weir, B S (1998). *Interpreting DNA evidence*. 2nd ed Sinaur, Sunderland, MA.
- National Research Council (1996). *The evaluation of forensic DNA evidence*. National Academy Press, Washington, DC.
- Robertson, B W and Vignaux, G A (1995). *Interpreting evidence: evaluating forensic science in the courtroom*. John Wiley & Sons Ltd, Auckland, NZ.

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### Websites that XYNet hosts

XYNet allows its subscribers to locate their own websites on XYNet's file server. Anyone with Internet access may access these sites. Say I want to create my own website. XYNet agree to host my site. It is called hypothetical.co.nz. Assume that I make a defamatory comment on my website and the defamed person elects (wisely) to sue the ISP.

Liability for publishing in this case is more palatable. XYNet has had the opportunity to review the content on hypothetical.co.nz before agreeing to upload the material. It also has ability to disable the site if it chooses. However, XYNet may host thousands of sites. If I have the ability to edit hypothetical.co.nz by myself, as is generally the practice, it will be difficult for XYNet to monitor the content of my website. At first glance this appears analogous to *Vizetelly*. Consider however whether the Court would have reached the same result if in that case authors of the books circulated by the library had the ability to alter the books without the library knowing. In this respect the Internet presents a new factual challenge for the law. This challenge may require the Courts to make a public policy judgment about the utility of the Internet.

### Distributing websites from around the world

An XYNet subscriber logs in and requests a page from some other file server, which may be on the floor below XYNet or in Alaska. XYNet will generally have no knowledge of the content when it responds to the request. It is submitted that in this case an ISP will, on ordinary principles be a "prima facie" publisher. What will amount to negligence in this case, for the purpose of s 21? This author is not aware

of any authority that negligence in this context is synonymous with the common law duty of care. It is submitted that when one reflects on the case law predating s 21 of the Defamation Act 1992, the question is whether an ISP, having no actual knowledge of the defamatory content, "ought to have been aware" of it in the circumstances.

In practical terms the only way XYNet can make itself aware of defamatory material is to check websites before passing them on to subscribers. This checking would necessitate the imposition of an intermediate step between an ISP retrieving a website and passing it on to the subscriber.

There are good reasons of public policy indicating that an ISP should not be negligent by not monitoring content in this context. The public and particularly the commercial sector have a real interest in the growth and accessibility of the Internet. The Internet works by transferring information more or less immediately between computers around the world. This simultaneous transfer is its defining characteristic. If an ISP had to check content before on-sending it, the Internet would lose its utility.

### THE WAY FORWARD

An electronic commerce Bill which would protect intermediaries against liability is currently being drafted in the UK. The relevant clause of the Bill is based on a proposed EU directive. It is understood that Demon did not appeal *Godfrey v Demon* as it was cheaper to wait for the legislation. Likewise, the New Zealand Law Commission has proposed that Parliament enact an Electronic Transactions Act that would also give immunity to ISPs where they unwittingly upload defamatory material concocted by a third party (NZLC R58 at para 260). □

# THE PROPYLAEUM OF PROPERTY RIGHTS

*Charles Rickett and Ross Grantham, The University of Auckland*

*reflect on the nature of property rights*

Late last year, while conducting a New Zealand Law Society Seminar on unjust enrichment, we were somewhat surprised at the reaction we received to comments we made about the nature of property rights. Propositions which we regard as fundamental were greeted with considerable scepticism, if not downright suspicion. We have reflected on this, and have concluded that the reaction is possibly the result of New Zealand's long association with the notion of registration of title under the Torrens system. This has meant that there appears to be little need to understand the fundamental nature of property rights in realty. It is viewed as all rather academic. Even worse, however, is the state of understanding of property rights in personal property. Here, the recent introduction of a further registration system (although not concerned with title as such) by virtue of the Personal Property Securities Act 1999 has the potential to exacerbate the problem. The point really is quite simple. Any system of registration of property rights must be secondary to their very existence and essence. What exactly a property right is, and what we mean by saying a property right exists, are the first order matters. Accordingly, we thought it propitious to articulate a few foundational points. Our initial focus will be the case of the missing bicycle.

Assume that you purchase a bicycle from the local store. It is handed over to you by the store owner on his receipt of your cash payment. You acquire title. No one else has any property interest in, or right over, your bicycle. You ride it to the park. You leave it leaning against a tree while you go for a walk. When you return, the bicycle has disappeared. It has been taken away.

You walk home, somewhat saddened. You spot the bicycle leaning against a lamp-post. Or, alternatively, as you wander down an alley, you happen to peer into a locked shed, and there is your bicycle, up against the wall. Legally, what can you do? What, in other words, is the legal content of your claim, "That bike is mine!"

First, having title (or having a property right or right in rem) means, to start with, having a series of personal rights or rights in personam (and therefore being owed obligations) which are mediated through the thing, the bicycle. Secondly, however, the rights which comprise "title", such as the right to possession, the right to protection from interference, and the right to exclusive benefit (see Honore, "Ownership" in Guest (ed), *Oxford Essays in Jurisprudence* (1961), Ch V), themselves give rise to further rights. To understand this, it is necessary to appreciate the particular quality which marks out rights in rem as a distinct category of legal right.

Rights in rem are qualitatively distinct from rights in personam. The distinction lies in the identity of the subject of the obligation that the right reflects. While a right in personam embodies an entitlement against a person, the subject of a right in rem is not a person but a thing. Accordingly, the right-duty correlation in respect of a right in rem is impersonal. Thus, although the right-holder is clearly owed a duty, this duty is owed by everyone (but by no one in particular). Everyone owes the same duty, and the duty is owed not to the individual right-holder as such but is owed to all the world in respect of the thing. Thus, as Dr Penner states (*The Idea of Property in Law*, 1997, 4):

The reference to things is vital. If a thing stands between the right-holder and the duty-owner, then we can see how the normative guidance of the rights and duties can be impersonal. We do not have to frame the duty to respect property as a duty to particular individuals, but as a duty in respect of things. This will, of course, benefit the individual right-holders, but they need not be individually enumerated in order to understand the content of the duty.

On the other hand, rights in personam are not explicable other than as giving rise to an obligation owed by one person to another.

Notwithstanding the nature of a right in rem as expounded above, when a right in rem is infringed, that infringement is necessarily the activity of a person. Your missing bicycle did not wander of its own accord. It went missing – resulting thereby in an infringement of your right in rem – by the activity of some person. But you still have the right in rem, and you are entitled to exercise that right in rem as against the relevant thing. So, in the first situation, where you spot your bicycle leaning against a lamp-post, you do not need to be concerned that another person took it. On the facts, that is no impediment. You may quite lawfully seize the bicycle and continue your homeward journey in ease. Your right in rem justifies your action.

But what about the other situation, where the bicycle is in the locked shed? For your right in rem to mean anything, in respect of the particular person who took your bicycle and locked it in the shed, it must give rise to a secondary in personam obligation by virtue of which that person's activity is remedied. So your claim can, indeed it must, be stated as being that you are owed an in personam duty by that person. But it is extremely important not to overlook the secondary nature of this in personam obligation. It only ever arises because of the prior existence of the in rem obligation. The person has breached his duty in rem, owed to all the



world in respect of the bicycle. That breach is the event which spawns the in personam obligation owed to you. Your claim is founded on your right in rem, and the law responds directly to the interference with that right, even though it needs to do so by raising an in personam obligation. The secondary in personam obligation is one which always, as a matter of conceptual necessity, follows the breach of the primary in rem obligation. In that respect, the secondary obligation arises as part and parcel of the law of property.

This analysis helps us to understand a particular feature of the common law's approach to property rights. Unlike the Civil Law, the common law does not have an action directly to vindicate property rights in assets other than land. In place of an *actio rei vindicatio*, the common law has pressed into service other causes of action as the means of protecting (or "vindicating" in a loose sense) property rights. Thus, for example, the torts of conversion and trespass, although technically and historically concerned with "wrong-doing", now serve as an indirect means to vindicate property rights. (See *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675 (CA); *Jackson v Anderson* (1811) 4 Taunt 24; and *Moffatt v Kazana* [1969] 2 QB 152; Samuel, "Property Notions in the Law of Obligations" [1994] CLJ 524, 529-30.) It is in personam rights of this type that the right in rem gives rise to. The fact that the law's response might be mediated, as it is, through an analysis of a wrong does not mean that the claim is not one properly regarded as a response to the property right.

So, in the case of the bicycle locked away in the shed, your inability simply to take it means that you are forced into seeking the vindication of your right in rem through the indirect mechanism of the tort of conversion. That requires the raising of an in personam obligation in the relevant person. But the foundation of your claim is the infringement of your right in rem. Indeed, the tort of conversion cannot be understood unless this is the case. The relevant person's conduct (interfering with the bicycle) can only be regarded as wrongful because you as owner have a right (in rem) to be free from such interference. An important consequence of the indirect mechanism of an action in conversion is that what results is not an order for the return of the bicycle in specie, but an order merely for the payment of a (compensatory) sum equivalent to its value (and for the disgorgement of any gain made by its use).

Furthermore, while they are the most well understood, torts are not the only form of indirect enforcement of common law property rights. Involuntary bailment is a further example (see Bell, "The Place of Bailment in the Modern Law of Obligations" Palmer and McKendrick (eds), *Interests in Goods* (2nd ed, 1998), Ch 19). So are the actions for money had and received and debt. Although these actions may and do function in many cases to remedy an unjust (or restorable) enrichment, money had and received and debt also serve to vindicate property rights in money. (See *Trustee of Jones v Jones* [1997] Ch 159 (CA) (debt and/or money had and received); *Lipkin Gorman (a firm) v Karpnale Ltd* [1991] 2 AC 548 (HL) (money had and received); *Chilcott v Goss* [1995] 1 NZLR 263 (CA) (debt), aff'd on different grounds [1996] 3 NZLR 385 (PC)). Money presents special difficulties, to which we will return.

A word first needs to be said about another peculiarity of the common law system. It has to do with the double headed nature of the jurisdictions in which property rights are recognised. Where the property rights in question are

recognised only in equity, the protection of those rights is, like the protection of common law property rights, both direct and indirect. Equity, more effectively than common law, allows the direct vindication of equitable property rights. Thus, the holder of an equitable interest in property can directly assert his ownership of that interest (an equitable proprietary claim, which usually gives rise to a "constructive trust" over the relevant asset). In addition, equity also indirectly protects interests in property. Thus, like the common law, equity mediates its response to an interference with equitable property rights through wrongs and unjust (or restorable) enrichment. Thus, the equitable action styled "knowing receipt" functions as an indirect vindication of the plaintiff-beneficiary's property rights. To some, it looks like a wrong-based claim; to others, a claim in unjust enrichment. The reality, however, is that it is the leading means by which equity indirectly protects equitable property rights. The action styled "dishonest assistance" may well, at least in some circumstances, serve the same function (see, for example, *Brown v Bennett* [1998] BCLC 97 (Eng HC)).

Nor should we be confused by the role of tracing. In pursuing either the direct vindication of property rights, or the mechanisms provided for the indirect enforcement of rights in rem, both common law and equity require some reliance on tracing. But while tracing has its own particular difficulties, there is nothing mystical about the notion of tracing per se. It is a claim- and remedy-neutral process which merely "identifies a new thing as the potential subject matter of a claim, on the basis that it is a substitute for an original thing which was itself the subject matter of a claim" (Smith, *The Law of Tracing*, (1997), 6). Tracing accordingly facilitates the remedy (either personal or proprietary) to a claim founded on property rights (either legal or equitable).

Let us return to the question of money. There seems to be abroad an assumption that the paradigm case of money is one involving money in the form of bank notes or coins and that the title to the money will "pass" to the recipient by virtue of the character of the money as currency (although, technically, the effect of money passing into currency is to raise a new title in the recipient that is not dependent upon on the strength of the payer's title). This assumption, however, is false in two respects. First, although it is undoubtedly true that where the money has passed into currency the recipient gets title to the money which is good against the original owner, the force of the currency exception should not be overstated. In particular, the status of money as currency is dependent on the transaction being bona fide and for value. Where these conditions are unmet, the currency exception will not defeat the original owner's title, and an action in conversion can be brought to recover the (traced) bank notes or coins, or, more commonly, an action for money had and received (*Holiday v Sigil* (1826) 2 Car & P 176; *Moffatt v Kazana*).

Secondly, there is an important, though often overlooked, distinction between money in the form of physical bank notes and coins and money in the form of a chose in action, such as a bank account. Whatever may once have been the case, it is no longer true that most transactions are effected by the exchange of bank notes (see the comments of the English Court of Appeal in *Eso Petroleum Co Ltd v Milton* [1997] 1 WLR 938). Rather, payment transactions are effected by a transfer of credits between the bank

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# FITNESS FOR PURPOSE OF LEASED PREMISES

*David Grinlinton, The University of Auckland*

*warns New Zealand landlords of overseas developments*

The traditional principle with leases of land is that the rule of caveat emptor applies, and the tenant must take the premises as found. In the absence of any express covenant(s) imposing liability, a landlord has generally been regarded as having no positive obligation to put the premises into repair, or to ensure that they are otherwise physically (or legally) fit for their purpose (see *Edler v Auerbach* [1950] 1 KB 359, 374, and *Balcairn Guest House Ltd v Weir* [1963] NZLR 301, 305). Except in limited circumstances, a landlord has no general liability in negligence to a tenant or third party (*Cavalier v Pope* [1906] AC 428 (HL)); an established exception is where a landlord has been involved in the design or building of defective premises (*Rimmer v Liverpool City Council* [1985] QB 1 (CA)).

Part of the rationale for this approach lies in the nature of the lease transaction. The grant of a lease involves the conveyance of an estate in land whereby the tenant becomes the "owner" of the estate and entitled to exclusive possession of the land. The tenant, as owner for the time being, becomes responsible for the condition of the premises unless the landlord is bound by some express or implicit obligation to repair or to otherwise ensure fitness for purpose.

In recent years, however, the general principle has been qualified by common law developments, and by legislation. Obligations of repair and fitness for purpose have been increasingly implied through the application of contract law principles. Similarly an expanding duty of care to tenants and third parties is evident in some jurisdictions. These trends illustrate the increasing complexity of the interrelationships between established principles of the law of landlord and tenant, and other areas of the law such as contract and tort. Consumer protection legislation, targeted residential and commercial tenancy legislation, building standards and health legislation are also increasingly relevant. This article will review some of these developments where new or increased obligations have been imposed on landlords.

## IMPLIED OBLIGATION TO REPAIR?

Generally there is no implied covenant to repair on the part of the landlord, this normally being the obligation of the tenant (*Felton v Brightwell* [1967] NZLR 276). However, the Courts have imposed liability where the landlord retains control of part of the premises and failure to repair causes damage to tenanted areas (*Cockburn v Smith* (1924) 2 KB 119 at 128 (CA)), and where the building is multi-tenanted and repair of common areas is necessary to provide reasonable access and use for purposes of lease (*Liverpool City Council v Irwin* [1977] AC 239 (HL)).

The Australian case of *Karragionis v Malltown Pty Ltd* (1979) 21 SASR 381, applied these exceptions in the context of a commercial lease. In that case the landlord was held liable to maintain full lift and escalator access to leased premises on the 6th floor of a building – notwithstanding the absence of any express covenant to this effect. Wells J considered inter alia that the implication of such an obligation was necessary to render the premises suitable for the purpose for which they were leased and thus to give "business efficacy" to the contract of lease (at p 392, referring to the principle in *The Moorcock* (1889) 14 PD 64).

The "business efficacy" principle was further developed in *Barrett v Lounova Ltd* [1990] 1 QB 348 (CA). In that case a tenancy agreement contained a covenant on the part of the tenant to keep the interior of the (residential) premises in good repair. There was nothing in the lease concerning repair of the exterior. Over time the exterior deteriorated to the point where leaking water made it impossible for the tenant to comply with her obligation to repair the interior. The Court held that it was necessary, to give business efficacy to the lease, to imply an obligation on the part of the landlord to repair the exterior so that the tenant could comply with her obligation to repair the interior.

From these decisions emerges a general principle that, absent an express obligation to repair, a landlord may be obliged to rectify defects or undertake repair of premises where the defect or lack of repair prevents the tenant from performing his or her obligations under the lease, or from using the premises for the purposes for which they were leased. Given the increased application of contract law principles in leasing disputes, this principle is ripe for application in New Zealand.

In addition to these implied obligations, there is a statutory obligation to provide residential premises in New Zealand in a reasonable state of cleanliness and repair, and to comply with all building, health and safety requirements (Residential Tenancies Act 1986, s 45(1)).

## IMPLIED WARRANTY OF FITNESS?

Where premises in the course of construction are leased, there is an implied warranty that they will be finished in a workmanlike manner, that proper materials will be used, and they will be fit for habitation once completed. These implied warranties do not apply if the lease is entered into after completion, when the general rule of caveat emptor applies (Hinde, McMorland and Sim, *Land Law in New Zealand* (1997), para 5.065, nn 6 and 7).

## LIABILITY IN NEGLIGENCE

The Courts have been reluctant to impose a duty of care upon landlords with respect to leased premises (see *Cavalier v Pope*; *Bottomley v Bannister* [1932] 1 KB 458). However, a number of Australian decisions have imposed a general duty of care on landlords who let defective premises. In *Parker v South Australian Housing Trust* (1985) 41 SASR 493 an eight-year-old girl was seriously injured by a defective gas stove in premises leased by her mother from the Trust. Choosing not to follow the traditional view in *Cavalier v Pope*, Legoe J rejected the Trust's argument that it had no duty of care to the daughter and found the Trust liable for the injury suffered (pp 507-509). (See also *Towart v Adler* (1989) 52 SASR 373: landlord found liable for the injuries sustained by a child who fell out of a first floor window while climbing on to a bunk.)

In 1997 the High Court of Australia in *Northern Sandblasting v Harris* (1997) 188 CLR 313; 146 ALR 572 lent its considerable authority to the development of a general duty of care for landlords, at least in respect of residential tenancies. In that case a nine-year-old girl had been electrocuted and seriously injured when turning off an outside water tap. The cause of the accident was a disconnected earth wire coupled with a defective stove which had not been properly repaired. The landlord had contracted with a licensed electrician to repair the stove but the work had been carried out negligently. The combination of the disconnected earth wire and the defective stove caused electric current to be channelled through the plumbing system instead of blowing a fuse. A sum of A\$1.2 million was awarded against the electrician, but the plaintiff also pursued the landlord, possibly because of a lack of, or deficiency in, the insurance cover of the electrician (for discussion of the case see L Griggs "The Tragedy of *Northern Sandblasting v Harris* and the Landlord's Liability to Third Parties" (1998) 6 *Australian Property Law Journal* 169).

Although there was little consensus amongst the seven Judges, a majority of four found the landlord in breach of a duty of care, albeit for different reasons (for a full discussion of the judgments see J Swanton and B McDonald, "Landlord's Liability for Injuries Caused by the Defective Condition of the Premises" (1998) 72 ALJ 345, and Griggs esp at 174-177). Brennan CJ and Gaudron J found the landlord liable for failing at the commencement of the lease to find and rectify the defect with the earth wire. Apparently the defect would have been obvious from a simple inspection. Toohey and McHugh JJ considered the landlord was under a non-delegable duty of care (analogous to strict liability for the safety of the premises) which was not discharged by the engagement of a licensed electrician. It is worth noting here the distinction between employees for whose torts the employer is usually liable, and contractors for whose torts principals are generally not liable – one exception being for a dangerous non-delegable duty.

The consequences of this decision in Australia are uncertain. The only clear consensus is the Court's unanimous agreement with the *Parker* case. In that case the defect had been known to the landlord for some time. In *Northern Sandblasting* however, the landlord apparently had no knowledge of the defect relating to the earth wire (although a competent inspection would, it seems, have revealed the defect). Furthermore the landlord had engaged a qualified electrician to repair the stove. One would expect a landlord in those circumstances to be confident that the repair had been carried out competently. Nevertheless, in the circum-

stances of the case the High Court did not accept that the engagement of the qualified electrician insulated the landlord from liability.

The decision contrasts starkly with the principle established by the House of Lords in *Cavalier v Pope* and appears to have greatly expanded the landlord's duty of care to tenants (and probably to third parties) injured as a result of a defect in tenanted premises. It should be noted that the case was concerned with residential premises, and some of the judgments suggest that the duty may be limited to such tenancies (see eg Gaudron J at pp 357-358). It is, however, difficult to see a rationale for such a distinction as failure to discharge the duty may lead to similar injuries to persons or property in any leasing context.

*Northern Sandblasting* has since been followed in at least two decisions of the New South Wales Court of Appeal. In *Assaf v Kostrevski* (CA NSW, 30 September 1998, noted (1999) 7 *Aus Prop LJ* 185 (M Redfern)) a landlord was found liable for the injuries suffered by a tenant, her husband and a third party where they were carrying out electrical repairs to the leased premises to rectify a lighting deficiency in a laundry/toilet. The defect was known to the landlord at the commencement of the lease. In *New South Wales v Watton* (1999) NSW Conv R 55-885 a landlord was found liable for the injury of a tenant five months after the commencement of the tenancy. The injury was due to faulty wiring caused by unauthorised electrical work which should have been obvious to the landlord who inspected the premises before the letting. The unauthorised wiring should have alerted the landlord to the need for inspection and, if necessary, repair by a qualified electrician.

Although *Northern Sandblasting* concerned electrical defects, the principle would be equally applicable to other defects relating to gas (as in *Parker*), plumbing, appliances and fittings, structural integrity, and perhaps sanitation. In New Zealand of course such liability would not extend to personal injury by accident otherwise covered by the Accident Insurance Act 1998. However, should the Courts here choose to adopt the Australian approach, liability may well attach in circumstances where punitive or exemplary damages are appropriate, and for injuries not otherwise covered by the accident insurance regime (perhaps mental harm, eg *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA)). Furthermore, such a duty of care would probably extend to property damage and other non-personal injury losses caused by a landlord's negligence.

## CONSUMER GUARANTEES ACT 1993

The possible application of the Consumer Guarantees Act 1993 to sale of land and leasing transactions has until recently been largely overlooked by practitioners. The Act provides various guarantees of title (s 5); acceptable quality (ss 6 and 7); and fitness for purpose (s 8) where goods are supplied to a consumer. It would appear to be limited in its possible application to leases as "goods" caught by the Act do not include "whole building[s] attached to land unless the building is a structure that is easily removable and is not designed for residential accommodation" (s 2 definition of "goods"). In *Jackson v McClintock* (HC, Auckland, HC 117/97, 9 February 1998, Laurenson J, [noted (1998) 8 BCB 64] the meaning of the word "whole" in the context of the s 2 definition was considered. In that case a contract to purchase a new cross-lease unit was cancelled by the purchasers relying upon alleged breaches of ss 17 and 18 of the Consumer Guarantees Act (rejection of goods which don't

comply with guarantees). They were unsuccessful on this argument, *Laurenson J* taking the view that the exclusion of "whole buildings" from "goods" caught by the Consumer Guarantees Act was intended to refer to "entire" buildings, even if they were incomplete at the time the contract was entered into. The premises were therefore excluded from coverage by the Act. However, as *McMorland* has pointed out ((1998) 8 BCB 64), this interpretation suggests that a contract for sale (or lease) of premises which are only a part of a larger building or structure may be caught by the Consumer Guarantees Act! As most leased commercial premises would probably fall into this category the effect of this interpretation would be to introduce an entirely new set of remedies into the area of landlord and tenant. Remedies available in Part II of the Consumer Guarantees Act, include repair, replacement or refund (s 19(1)), and rejection (ss 2023).

Leaving aside these possibilities, the exclusion leaves certain leased transportable buildings and structures subject to the Act. Such premises may include substantial structures which are located on land with some degree of permanence, albeit ultimately removable and transportable. (See eg *Neylon v Dickens* [1979] 2 NZLR 714, *Lockwood Buildings Ltd v Trustbank Canterbury Ltd* [1995] 1 NZLR 22 (CA)) on whether a building is a "fixture".)

It would also seem that goods "attached to, or incorporated in, any real ... property" may also be caught by the Act. The goods must be of a kind normally used for personal, domestic or household purposes, and must not be "consumed" in the course of a manufacturing or production process (see s 2 definition of "consumer"). Arguably this may include items normally regarded as "fixtures" (see s 2 definition of "goods" which includes items *attached to or incorporated in ... real property*). Although as yet untested in the Courts, these provisions may give a further remedy to tenants where residential (and perhaps even commercial) premises are leased with defective chattels and other items of a personal, domestic or household character.

Remedies may also be available to tenants against lessors or their letting agents for breach of guarantees relating to the supply of "services" to consumers under ss 28 and 29 of the Act. However, the possible application of these provisions in the leasing context is more doubtful given the limiting definitions of "supplier", "service" and "consumer" (s 2). Perhaps the only situation where such remedies may be available would be where a potential tenant has expressly contracted with a potential lessor or letting agent to search for and make available for leasing a specific type of property. This may constitute a contract of service for the "performance of work" (being the search and securing of property on the tenant's behalf) "with the supply of goods" (the leased premises). However, even this unusual scenario would be further limited by the definitions in s 2 of "consumer" and "goods" already discussed.

#### FAIR TRADING ACT 1986

As with the Consumer Guarantees Act, the possible application of the Fair Trading Act to leasing contracts has seldom been explored in the Courts. The Act provides various consumer protection remedies in respect of the supply of goods and services where there has been misleading and

deceptive conduct or unfair practices (Part I), breaches of product safety standards (Part III), and safety of services (Part IV). The application of these provisions to leases is limited as the definition of "goods" does not include real property or interests in land except for "minerals, trees and crops" (s 2(1)). However, the definition of services includes "any rights ... in relation to, and interests in, real property ..." (s 2(1)), and the Act contains general prohibitions against misleading and deceptive conduct (s 9) and misleading conduct in relation to services (s 11), which could apply in the leasing context.

Importantly, the Act also imposes specific liability upon any person who, "in trade", makes any false or misleading representation concerning the nature of an interest in land, the price payable for land, the location of land, the characteristics of land, the use to which it may lawfully be put, and the existence of availability of any facilities associated with it (s 14(1)(b)). For the purposes of the section "interest" in land includes a legal or equitable estate

or interest, and a right of occupancy pursuant to a "company lease" arrangement (s 14(3)(a)). This section has been relied upon in a number of sale of land disputes (a recent example is *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA)), but seldom in the context of leases (an example is *DSJ (PTE) Ltd v TPF Restaurants Ltd* HC, Auckland, CP 168/96, 23 December 1997, Giles J, although the tenant was unsuccessful in this case). Nevertheless, the principles developed in the sale of land cases will in most cases be equally applicable to contracts of lease.

As the misleading or deceptive conduct must have been committed by a person "in trade", most cases have involved purchasers seeking recourse against real estate agents (eg *Cox & Coxon*; and *Harcourts Real Estate Ltd v Commerce Commission*, HC Christchurch AP 8/93, 8 March 1993, Fraser J), or land developers (eg *Wanaka Farms Ltd v Gray* (1997) 8 TCLR 81; *Rural Management Ltd v Commerce Commission* HC Christchurch, AP 243/95, 4 October 1996, Tompkins J).

In *Dee v Deane* (DC, Auckland, (NP 1209/96), 26 September 1997, Judge R Joyce QC), the purchasers of a house property sought recourse against not only the real estate agency and the agent, but also against the vendors, the Deanes. The purchasers were concerned that the view from the property was not under threat by any possible development on the neighbouring land. The land agent had assured them that there were no such development plans, basing these assurances upon earlier assurances received from both the council and the vendor. In fact, plans to cross-lease and further develop the neighbouring land were well advanced.

The agent's assurances had been given to the purchasers in the presence of the Deanes who had remained silent. Judge Joyce QC found the agent and the estate agency liable for misleading conduct under s 9 (and probably also under s 14(1)(b)) of the Fair Trading Act 1986. He found that the vendors could not be held liable under Part I of the Act, as a person selling their own home is not acting "in trade". Nevertheless, and this is the important part of the decision, the Judge was able to sheet home liability to Mr Deane via the enforcement provisions in Part V of the Act. Section 43(1)(d) of the Fair Trading Act provides that where the

#### *The possible application of the Consumer Guarantees Act and the Fair Trading Act has largely been overlooked by practitioners and seldom explained in the Courts*

Court has found that a person who is a party to proceedings under the Act has suffered loss or damage, it may make orders against any person who has been "in any way directly or indirectly knowingly concerned in, or party to, the contravention of [any of the provisions of Parts I to IV of the Act]". Conduct which may result in such an order may be the doing of an act, or the omission to do an act (see definition of "conduct" in s 2(1)). Mr Deane's denial of knowledge to the agent, and also his silence when overhearing the conversation between the agent and the purchasers, both constituted conduct justifying an order against him under s 43. The Judge also expressed the view that Mr Deane would be vicariously liable under s 45(4) of the Act for the conduct of the agent in passing on the information given by Mr Deane regarding the neighbouring property. In the event the Judge ordered that the Deanes should fully indemnify the other defendants for the \$89,000 damages and other costs awarded to the purchasers.

### OTHER REGULATION

Although there is not the space to deal with such regulation in detail, lessors should not overlook the various provisions relating to building standards and the use of buildings including matters of design, workmanship, safety and health contained in the Building Act 1991 and the Building "Code" (see the Building Regulations 1992).

Other legislation designed to ensure reasonable standards of hygiene and maintenance include Part II of the Health Act 1956 and the Housing Improvement Regulations 1947.

### CONCLUSIONS

It would seem that a landlord can no longer rely upon the rule of caveat emptor to avoid liability for premises which are not fit for their purpose, or are otherwise unsafe or defective. In most commercial leasing arrangements, a comprehensive lease document will spell out in some detail the liabilities and obligations of both the landlord and tenant in respect of repair and maintenance. However, where an informal lease has been entered into, or the lease is deficient, the Courts in England and Australia have implied appropriate obligations of repair to give "business efficacy" to the contract of lease. Landlords would be well advised to ensure that repair and ongoing maintenance obligations are clearly spelled out in lease contracts.

An important recent development in Australia is that landlords are no longer insulated from liability to tenants and third parties for negligence. Australian commentators have advised landlords to have full inspections of their premises undertaken by qualified persons prior to commencement of leases, and on an ongoing basis, and to insure against damage caused to tenants and third parties by defects in premises (see M Redfern, "Northern Sandblasting Again", (1999) 7 APLJ 185, 186).

In New Zealand consumer protection remedies are being increasingly used in sale of land and commercial leasing transactions and this trend is likely to continue. Landlords and their agents should be aware of their responsibilities and potential liability under the Consumer Protection Act 1993, and Fair Trading Act 1986. □

*continued from p 104*

accounts of the payer and payee: the value of the chose in action represented by the payer's and payee's bank accounts are decreased and increased respectively. Where bank notes do make an appearance they tend never to have been in the possession of the plaintiff, but are merely the product of a transfer from the plaintiff's bank account. If a payment transaction is improper as against the owner of the bank account, two consequences follow. To begin with, the currency exception for money has only a limited application (but cf further comments in *Esso v Milton*).

Secondly, the bank account owner's right to the recovery of the value transferred from his account rests, as it does in the case of the missing bicycle, on his property rights in the chose in action. While his claim is not one for proprietary relief, it is nevertheless proprietary in the sense that it is the title to the chose in action which is the basis of the plaintiff's claim to the value now in the defendant's hands. Although a chose in action is an intangible right, and title to it is more clearly associated with an obligation than, for example, are title to land or to a bicycle, a chose in action is nevertheless property (see *Re Bank of Credit and Commerce International* (No 8) [1998] AC 214, 226 (per Lord Hoffmann): "The depositor's right to claim payment of his deposit is a chose in action which the law has always recognised as property"; and in *Lipkin Gorman*, at 574, Lord Goff said "a debt constitutes a chose in action, which is a species of property ..."). As such, the plaintiff is in principle entitled to the usual incidents of ownership, which include the right to hold the property free from interference. However, the intangible nature of a chose does mean that the form which the interference with the ownership will take, and hence what is necessary to vindicate rights of ownership will be different from cases of tangible property. While you may take my bicycle or occupy my land, a chose in action can

neither be taken nor occupied. It is, however, still possible to interfere with my rights of ownership in the chose. The taking of value from my bank account is as much an interference with my ownership of the chose, as the taking of my bicycle is an interference with my ownership of it. The law takes seriously the status of choses in action as property, and responds to that interference in a way which is qualitatively similar to its response to an interference with tangible property. In the common law at least little change is required to accommodate the intangible nature of the chose in action. As argued earlier, the common law's primary response to an interference with property rights is one mediated through torts such as conversion and trespass, and which thereby results not in an order for the return of the asset in specie but effectively in the payment of a sum equivalent to its value and disgorgement of gain made by its wrongful use. Thus, just as my ownership of the missing bicycle justifies my recovery of its equivalent value, my ownership of the chose in action justifies recovery of the value taken from my account. This is clearly what Lord Goff had in mind in *Lipkin Gorman*; and see also *Box v Barclays Bank plc* [1998] Lloyds Rep Bank 185. Recovery of the value taken from my account is achieved by the action for money had and received.

The objective of this brief discussion has been to outline the basic structure of a property right, and in particular to show that the in personam obligation which activates the protection of a property right is both a conceptual and historical requirement of the common law system of dealing with rights in rem. Rights in rem should never be marginalised simply because obligations in personam make an early appearance in most cases. The law of property is still concerned with property rights. If this were not so, how could your taking of the (your?) bicycle leaning against the lamp-post be justified? □

# LIMITATION: TIME FOR CHANGE

## LITIGATION

with

Andrew Beck

We no longer think about limitation in the way that the drafters of the Limitation Act did in 1950. Our primary concerns are with promoting access to justice, and with addressing the merits of claims. Nowhere has this been made clearer than in the Court of Appeal's attitude to R 426A of the High Court Rules in *McEvoy v Dallison* (1997) 10 PRNZ 291. The notion that a claim should be brought within a certain time frame remains a valid concern, but it is a secondary one – it is a background rather than a foreground issue. The issue has been catapulted into the foreground by the arrival of infant sexual abuse claims. It has become imperative that the matter be attended to.

While the subject occupies the limelight, it is useful to focus on other unsatisfactory aspects of the traditional approach to limitation which have been lurking in the wings for some time. The idea that there should be different principles for calculating time limits for different types of claims is inherently unattractive; separate approaches for legal and equitable claims makes no sense; the legislative recognition of the psychological barriers inhibiting plaintiffs has hardly moved despite an entirely different attitude towards psychology and psychiatry. Each of these issues demands thoughtful consideration.

That is no doubt why the Law Commission has produced a new report on the topic: *Limitation of Civil Actions* (Preliminary Paper No 39, February 2000). Unfortunately, the paper is premised on an outdated idea of limitation, and is half-hearted in its proposals. It does not cut to the heart of the matter, and it would be a great pity if the valuable opportunity for change which has been provided led to nothing more than a minor tinkering.

### NEW ZEALAND LAGS BEHIND

The material in the Law Commission report contains a sober reminder that New Zealand has not moved with the times. The Law Commission makes extensive reference to the Alberta Limitations Act in coming up with its proposals. That Act was passed in 1996, and was the result of a law reform report in 1989. All the Canadian provinces apart from Ontario and Quebec have enacted legislation to deal with sexual abuse cases, in several cases removing all limitation periods.

The Western Australian Law Reform Commission has published a report based on the Alberta model, which has not yet resulted in legislation. All the other states apart from Tasmania allow for the possibility of the limitation period being extended in sexual abuse cases. The Law Commission for England and Wales has produced a report recommending a core reasonable discoverability approach.

The fact that there has been such considerable movement in other jurisdictions suggests that there is a clear need for legislative intervention.

### NEW ZEALAND LAW REFORM

The Law Commission has had a long association with the law of limitation. The current paper is its third report on the topic. The Commission's investigation commenced with a ministerial reference in October 1986. At that time, it was aware of reform reports in Alberta and New South Wales.

#### *Preliminary Paper No 3*

In its Preliminary Paper No 3 (1987), the Commission suggested that there should be comprehensive reform, bringing about a single regime for civil proceedings. The appropriate limita-

tion period was suggested as three years, with a long stop period of fifteen years. The period would be able to be suspended as a result of non-discoverability of damage.

#### *Report No 6*

Following on Preliminary Paper No 3, the Commission produced Report No 6 *Limitation Defences in Civil Proceedings* (1988). That report contained wide-ranging proposals for change, involving a new Act and a reduction in the limitation period. It may be that the report was too radical for its time, making significant changes to the language and concepts in the statute. Interestingly enough, the recommendations included a shift towards reasonable discoverability as a fundamental basis for limitation as well as a long stop period of 15 years. Overall, the proposals would have resulted in a drastic shortening of limitation periods, and it seems likely that there was no call for such action. That may have engendered an overreaction to the reform as a whole, because the report was not particularly well received, and nothing came of it. The unfavourable reaction is possibly a reason for the much toned down approach in the current proposal.

#### *Preliminary Paper No 39*

The position adopted in the most recent paper is very disappointing. The recommendations are premised on the old idea of the date on which a cause of action accrues. The Commission suggests that the law be clarified to make it clear that a cause of action accrues when "all the elements of the cause of action are in existence".

The six year limitation period would be retained. An extension would be permitted where the claimant could not reasonably have known within six



years that he or she had a cause of action. There would be a long stop period of ten years from the time of accrual of the cause of action.

The specific issue of sexual abuse claims would be remedied by an alteration to the definition of "disability" in s 24. This would be extended to include the inability, by reason of some or all of the matters on which an action is founded, to make reasonable judgments in respect of matters relating to the bringing of such action (para 80).

There is one additional recommendation relating to causes of action based on mistake, which have been seen as occupying an anomalous position following a decision of the House of Lords.

## CONTRIBUTION OF THE COURT OF APPEAL

In its paper, the Commission mentions the significance of the Privy Council decision in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 in relation to building cases. In general, however, there is little recognition of the significance of the developments brought about by the New Zealand Court of Appeal in this area of the law.

The Limitation Act periods are based on the "accrual" of a cause of action. The meaning of this phrase is, however, a question of law which has been developed by the Courts. In a practical area such as limitation, one might expect the Courts to take a pragmatic approach, and that is what has occurred. In *Invercargill City Council v Hamlin* [1994] 3 NZLR 513, the Court of Appeal departed from the approach followed by the House of Lords, and developed a sensible solution to the problem of latent defects in building cases.

That approach was extended to the entirely different situation of personal injury claims in the case of *S v G* [1995] 3 NZLR 681. This is an example of the dynamics of common law at their best: responding sensitively to the perceived needs of society. As expressed by Lord Goff of Chieveley in *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL) at 377:

the common law is a living system of law, reacting to new events and new ideas, and so capable of providing the citizens of this country with a system of practical justice relevant to the times in which they live.

As is so often the case, however, the problem was too big for solution by a single decision. Further recognition of

the special position of sexual abuse cases occurred in *W v Attorney-General* [1999] 2 NZLR 709. The Court acknowledged the essentially subjective nature of the inquiry in such cases, and it appeared as though it was prepared to craft its own solution for them, possibly even resulting in a sui generis approach: see [1999] NZLJ 329. That was shown not to be the case in the subsequent decision of *M v H* (1999) 13 PRNZ 465. The main difficulty there was that the claim was made in assault rather than negligence. The majority of the Court made it clear there that it was not prepared to mould the rules to deal with the torts actionable per se. Useful indications were nevertheless given as to possible development of the disability provisions to cater for sexual abuse cases.

Instead of viewing this judicial development as heralding a useful trend, the Law Commission comments that some of its members consider the decision in *Hamlin* to be wrong (para 27). This is presumably one factor underlying the Commission's recommendation to return to a pre-*Hamlin* understanding of the limitation rules. As one of the Law Commissioners has previously gone on record as referring to the "Horrible Heresies of *Hamlin*" (see reference by Christine French "Time and the Blamelessly Ignorant Plaintiff" (1998) 9 Otago LR 255 fn 37), it is not hard to see where this impetus comes from.

The reason *Hamlin* is said to be wrong is that it does not take account of the fact that damages can be measured by the costs of repair as well as diminution in value. This is based on a misconception. In principle, damage is determined by diminution in value. The cost of repair is no more than a convenient way of calculating this in most everyday situations; this is amply illustrated by *Ruxley Electronics and Constructions Ltd v Forsyth* [1995] 3 WLR 118.

The Court of Appeal has used the idea of reasonable discoverability in order to respond sensibly to the needs of litigants. The Law Commission apparently does not favour the use of this concept, and sees "practical difficulties" when it is applied outside the area of building negligence (para 28). As a result, it has ended up largely rejecting the developments of the last five years, and retreating to a far more conservative position.

## ACCUAL VERSUS DISCOVERABILITY

The Law Commission's formula starts with the notion of accrual of causes of action. The immediate difficulty with this is that it perpetuates the irrational distinction between those causes of action where proof of damage is an element, and those where it is not. It is not particularly helpful to define accrual as the time when the elements all come into existence. Such a definition does, however, raise difficult questions as to when damage is "in existence". The debate in *Hamlin* is perpetuated.

In the case of trespass to the person, all the elements of the cause of action will exist once the wrongful act has been committed. In the case of negligence, the elements will only exist where there has, in addition, been damage suffered by the plaintiff. Where a breach of contract is relied on, damage is not part of the cause of action. The position with regard to breaches of fiduciary duty is unclear following the decision of Thomas J in *M v H* (1999) 13 PRNZ 465.

The point is that – for present purposes – no one cares when the cause of action "accrued". The question is when it is reasonable to expect a plaintiff to take action to redress a breach of duty owed to him or her. It is not reasonable to expect a plaintiff to act when no reasonable person could have ascertained that any loss had been suffered. Nor is it reasonable to expect a person to institute proceedings when no reasonable person would be able to link present damage with a past act.

A principled approach to limitation should therefore provide for the limitation period to run from the time a reasonable person would have known that it was possible to institute legal proceedings against the defendant. Such a test would involve a small measure of uncertainty, but it would have the significant advantage of being applicable to all claims. It would also be even handed to all potential litigants. There is no unfairness because the claim happens, for example, to be a tort actionable per se.

In its recommendations, the Law Commission proposes a discretion to extend the limitation period on grounds of lack of reasonable discoverability. While this goes some way to meeting the concerns expressed above, it commences from the wrong starting point in principle. It also fails to bring about equality between different causes of action, and perpetuates difficulties



in cases of concurrent liability (see below).

In her article cited above Christine French comes to the conclusion that a comprehensive reasonable discoverability approach is the best one (p 275). Unfairness to defendants can be ameliorated by a long stop provision. This is essentially what has been recommended by the Law Commission for England and Wales in their Consultation Paper No 51 *Limitation of Actions* (1998). Such an approach is very similar to that adopted in the Alberta Limitations Act 1996. The general test there is that all claims must be brought within two years of reasonable discoverability. That is a short time, but it has obviously been seen as a balance to the possibility that a claim may take some time to discover.

### CLAIMS IN EQUITY

The exclusion of equitable claims from the ambit of the Limitation Act is an ongoing anomaly. For the most part, the analogous approach adopted by the Courts has meant that this exclusion is of little consequence. In *M v H*, however, Thomas J suggested that there might be sufficient flexibility in the concept to refuse to apply the Act by analogy in certain circumstances. A similar line was taken by Kirby P in *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497.

The Law Commission refers to the equitable doctrine of laches at paras 41 to 46, pointing out that application of the doctrine accords with common-sense but lacks certainty. As in other areas of the report, the clear preference is for certainty at the expense of fairness. It is not clear whether the Commission envisages any change to the current position. As there is no specific recommendation to bring equitable claims into the Act, it must be assumed that the intention is to retain the status quo.

This is a perfect opportunity to recognise, as has the Law Commission for England and Wales, that the anomaly is purely historical and no longer appropriate. The Act should be amended to regularise the situation as has been done in Alberta.

### CONCURRENT LIABILITY

One of the difficulties with limitation rules is the undesirable situation which results where different limitation periods apply depending on the particular cause of action on which the plaintiff chooses to rely. This is a feature of the

law at present, and is one which any reform of the Limitation Act should address.

The Law Commission's proposal does not remedy this problem. So, for example, where a breach of professional duty by an engineer only results in damage some years later, there will be different limitation periods depending on whether the plaintiff claims in tort or contract. It is inherently undesirable that the same act should have two different limitation periods for no discernible reason.

The only occasion on which this issue is mentioned by the Law Commission is in relation to the possibility of bringing a sexual abuse claim as a breach of fiduciary duty (para 66). The Commission's response, relying on *Paramasiviam v Flynn* (1998) 160 ALR 203, is that fiduciary claims are inappropriate in such situations, and that the real answer is to deal with the limitation point.

While the question of limitation certainly has to be addressed, the problem goes deeper. The decision of the Federal Court in *Paramasiviam* is not in line with the general thinking concerning concurrent liability espoused in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 (HL). The Court of Appeal has not seen fit to criticise the use of fiduciary claims in such circumstances in case such as *M v H* (1999) 13 PRNZ 465. While it is true that "cause of action shopping" in pursuit of a good limitation period is undesirable, the answer does not lie in limiting the plaintiff's options.

If sexual abuse has taken place within the ambit of a fiduciary relationship, there is no reason to prevent the plaintiff claiming for a breach of that duty. The real concern is that the limitation period should be the same, no matter which cause of action is relied on. For this reason, it is particularly important that equitable claims be brought within the purview of any limitation statute as suggested above.

The adoption of a general test based on discoverability would solve this problem, and would also deal with the situation of concurrent liability in contract and tort. Once it is recognised that the appropriate touchstone is the plaintiff's knowledge of the particular act and its consequences, the anomalies of the current position disappear.

### SEXUAL ABUSE CASES

A significant portion of the Commission's report is devoted to the specific

issue of sexual abuse claims. While this is not surprising, in that that was the springboard for the report, it has resulted in a rather skewed focus for reform. The Commission's response to the particular problem of sexual abuse claims is to extend the definition of disability. This is undoubtedly a move in the right direction.

The difficulties with sexual abuse claims are essentially of two types. The first relates to the aggregation of the facts relevant to the cause of action; this inevitably takes much longer than the period allowed for by the law. It is fundamentally an objective matter, which can be dealt with by introducing a suitable limitation principle based on discoverability as suggested above.

The second issue concerns the position of the particular plaintiff. This is essentially a subjective consideration which relates to the difficulties in recognising and understanding the links between abuse and its effects, as well as finding the courage required in order to face up to the humiliation of sexual abuse and to make it public.

The only concession in the Limitation Act to subjective considerations of this nature is contained in the disability provisions of s 24. The established view of a disability is that it involves being "of unsound mind". This is because of the deeming provision in s 2(2) of the Act. The Court of Appeal in *T v H* [1995] 3 NZLR 37 accepted that the expression goes as far as including someone who (at 49):

from established psychiatric or psychological causes is unable to bring him or herself to initiate proceedings is to that extent of unsound mind and so under a disability while that condition lasts.

The difficulty created by this approach is in the words "established ...causes". Plaintiffs who cannot prove a recognised syndrome are left without a remedy, and it is unacceptable to require sexual abuse victims to plead that they are mad.

It has subsequently been suggested that "disability" is wide enough to encompass the mental position of a sexual abuse victim without having to go as far as establishing "unsoundness of mind": *M v H* (1999) 13 PRNZ 465. This would appear to be correct, and it is worth noting that s 2(2) the Act does not in fact define "disability"; it simply deems certain persons to be under a disability.

The Law Commission's proposal might therefore be seen as going no

further than the existing law. There is, however, a matter of concern. The proposed extension limits "disability" to an inability to make reasonable judgments *by reason of some or all of the matters on which an action is founded*. It is suggested that this is an unnecessary restriction, and one which would narrow the scope of the provision more than either *T v H* or *M v H*.

In some cases, one of the byproducts of sexual abuse will be a psychological or psychiatric condition, such as post-traumatic stress disorder, which prevents the victim from making reasonable judgments. In other cases, it may be nothing more than the cultural difficulty inherent in addressing sexual abuse. The latter situation is not caused by any matters on which the proceeding is based; it is the result of extraneous factors. Both situations may nevertheless justify a suspension of the limitation period.

There does not seem to be any reason to impose this additional hurdle on a sexual abuse victim. The Alberta Act includes as a person under disability an "adult who is unable to make reasonable judgments in respect of matters relating to the claim". That strikes a more acceptable balance. In response to the inevitable complaint that this would result in great uncertainty, it may be noted that there is a threshold to be met. It will still be necessary for such a person to show that he or she was unable to make reasonable judgments, and to explain how the situation has altered. In most cases this would be related to counselling of some sort.

## LONG STOP

Many of the limitation statutes which have been the subject of reform in recent years include some type of long stop provision. The only such provisions currently in force in New Zealand are the 30 year period related to land and charges on land in s 28(e) of the Limitation Act, and the ten year long stop contained in the Building Act 1991.

The Law Commission recommendations include a proposal for a long stop provision of ten years after the accrual of the cause of action. Bearing in mind that the Law Commission's definition of accrual refers to the time the elements of the cause of action came into existence, this is a very short time period in respect of sexual abuse claims. It would mean that proceedings would have to be instituted before the victim reached the age of 30 unless some other disability could be relied

on. This is considerably shorter than the period currently available under the reasonable discoverability test.

There is no supporting discussion relating to the long stop period. If such a proposal is to be implemented, careful consideration will have to be given both to whether it is desirable as a general measure and, if so, what time period is appropriate.

## RESPONSE TO THE LAW COMMISSION

### Sexual abuse claims

Any response to the Law Commission report has to deal with two basic matters. The first is the proposal to deal with sexual abuse claims by extending the concept of disability. This is relatively more urgent than the other matters in the report, and it is important for the legislation to recognise the subjective nature of the task faced by sexual abuse victims in instituting proceedings. A solution to this problem can be adopted relatively simply without tackling broader issues.

As a stopgap measure, an amendment along the lines proposed by the Commission would be appropriate. It is important to ensure, however, that the legislative remedy does not cut back on what has already been achieved by the Courts. As noted above, the wider notion of disability has already received the stamp of approval from a number of Judges in the Court of Appeal.

There is also scope for thorough investigation of the whole basis on which sexual abuse claims ought to be founded. A temporary measure attending only to procedural issues should not be seen to inhibit this process.

### Wider reforms

In respect of the many other issues thrown up by a reform of limitation rules, it would be a pity to rush into the legislative process without addressing the situation comprehensively. The Commission's latest report is a much more timid response to the problems than the 1988 report. It is a fundamentally conservative document which does not even raise, let alone deal with, a number of important subjects.

The inclusion of causes of action based on mistake as an area for reform addresses only one of a number of anomalies thrown up by other legislation. The report expressly avoids dealing with other statutory limitation

periods, such as those contained in the Fair Trading Act 1986.

All these issues are properly the concern of the legislature when embarking on a reform of this nature. They should be fully canvassed in a Law Commission report before the amendment process begins. Report No 39 has not asked the questions, and will not generate the appropriate responses on which to build a good Limitation Act for the future. While it is understandable that a less than comprehensive approach has been suggested in the light of the previous report, that is not a satisfactory response to a subject in obvious need of reform. The project needs to go back to the drawing board. □

### The Expert in Litigation and Arbitration by D Mark Cato (LLP 1999)

This is a veritable tome (some 1300 pages) relating to the role of expert witnesses, but any book dedicated to life members of the Twisted Arm Club has to be worth a look. It performs a useful function in collating much information readily available elsewhere.

There are helpful discussions by many distinguished contributors on the meaning of independence of expert witnesses, the duties of experts and to whom they are owed, privilege in respect of experts and what to do when experts change their minds. There is also a detailed section by the author on procedural matters involving experts. Because the book takes the form of contributions, these issues are not discussed comprehensively by topic, and it is necessary to consult several places in order to gain a complete picture. The index is adequate to the task, but the process is complicated, and leaves the reader unsure as to the conclusion.

The book focuses on practice in England and, to some extent Europe, but also contains sections on experts in the USA, Australia and China. These sections are inevitably cursory, and may be of more use to experts themselves than to lawyers. Perhaps the most interesting aspect of the book from a New Zealand legal standpoint is the section on the role of experts in specific types of cases, such as medical, construction and maritime disputes. Some of these contain sample reports as models.

The book is certainly a valuable resource for expert witnesses, and contains much useful information for lawyers dealing with such witnesses. Most New Zealand lawyers will probably find that it is a work to consult in relation to a particular problem rather than one they need to have on their shelves. □

# UPDATES TO YOUR MATERIALS

## STUDENT COMPANION

*edited by*

*Richard Scragg*

### ADMINISTRATIVE LAW

**Hamish Hancock**

*McGuire v Hastings District Council* (CA 224/99, 16 December 1999, Richardson P, Henry, Thomas, Keith and Tipping JJ)

The respondent council sought judicial review of the decision of the Maori Land Court to issue an interim injunction to prevent the council from proceeding to designate the northern arterial route (linking Hastings and Havelock North to the motorway to Napier) through the lands subject of the application until further order of the MLC.

In dismissing the appeal, the Court of Appeal held the exercise or intended exercise of a statutory power of the council must be accepted as lawful unless and until set aside by a Court of competent jurisdiction. Section 19(1)(a) does not purport to give the MLC jurisdiction to question decisions of the council which on their face are squarely within the Resource Management Act and there could be no justification for reading in a controlling jurisdiction by implication.

The appellants submitted that resort to s 19(1)(a) should be viewed as a collateral means of challenge and referred to recent decisions in the House of Lords. The Court of Appeal said the availability of a collateral challenge to the validity of an Act, whether as a shield or a sword, necessarily depended entirely on the construction of the relevant statute. The RMA was intended to be self-contained as to all matters capable of falling within its compass. The Environment Court is designed, through its constitution and by its statutory focus and through the ability to call on alternative Environment Judges and Commissioners with particular expertise, to take account of relevant Maori values. Apart from its general appeal jurisdiction it has extended declaratory jurisdiction and enforcement powers. As well, the High Court has jurisdiction under the Judicature Amendment Act 1972 and the

prerogative writ procedures. There is no warrant for attributing jurisdiction to the MLC the ordinary area of operation and expertise of which is far removed from the resource management and judicial review matters.

*Randle v Minister for Food, Fibre, Biosecurity and Border Control* (HC Dunedin, CP 14/99, 25 February 2000, Chisholm J)

Section 90 Biosecurity Act 1993 authorises the imposition of a levy for funding of a pest management strategy. The Biosecurity (Bovine tuberculosis – Otago Land Levy) Order 1998 made on the recommendation of the first defendant imposed a levy on occupiers of Otago rural properties of four ha or more for the purpose of partially funding the implementation of the National Bovine Tuberculosis Pest Management Strategy. The levy was payable to the second defendant as the agency responsible for the strategy.

Fifty-six plaintiffs by judicial review challenged the validity of the Order imposing the levy. Most plaintiffs were horticulturalists, orchardists, viticulturists and lifestyle block owners. They complained that dairy, beef, deer and pastoral farmers were the landowners who benefited from the levy and should therefore pay for it without contribution from the plaintiffs.

The Court held that the newspaper advertising campaign which preceded the making of the Order targeted the livestock farming sector and did not adequately convey that activities such as horticulture, viticulture or lifestyle blocks might also be levied. However, when the personally addressed letters and accompanying booklet were also considered, the consultation process as a whole was sufficient to inform potential levy payers about public meetings and their right to make submissions.

As to the bias allegations against the Minister, Chisholm J found that regardless of the Animal Health Board's attitude, MAF carried out its own analysis of the submissions

and levy options and on that basis reported to the Minister who made his own decision. As to the allegation of predetermination, while there was a close association between the Animal Health Board and the Department it would be a quantum leap to suggest that if there was predetermination by the Animal Health Board it must taint MAF, let alone the Minister.

The plaintiffs further claimed that whilst assurances were given to potential levy payers that all submissions would be forwarded to the Minister, in fact none of the submissions was so forwarded. The Minister only received the MAF report which included the analysis of the submissions. The Court held that whilst this assurance was capable of giving rise to a legitimate expectation, it was necessary to consider whether the breach had altered the outcome and thereby prejudiced the plaintiffs. Here the breach was a technicality and did not justify the relief sought.

Claims by some foresters, fruit producers, vine growers, arable farmers and sheep farmers that they would receive no benefit and should not be required to pay the levy were discussed in the MAF report which concluded that the Minister could be satisfied that the uses to which the levy would be put would be closely related to the interests of the persons responsible for paying. Having regard to the purposes of the levy, particularly vector control, Chisholm J found it must have been open to the Minister to conclude that benefits arising from vector control would be closely related to those paying.

*The Archives and Records Association of New Zealand v Blakeley* (CA 134/99 and CA 186/99, 17 December 1999, Richardson P, Gault, Keith, Blanchard and Tipping JJ)

The plaintiffs claimed the archives reorganisation was unlawful because, among other things, it unlawfully transferred functions from the Chief Archivist, who was a statu-

tory officer with statutory duties, unlawfully included the National Archives in the proposed reorganisation and had already involved the unlawful transfer of moneys, which Parliament voted for national archival services, to other purposes.

**Alleged unlawful reorganisation:** dismissing the first appeal, the Court of Appeal held: (1) that public functions can in general be contracted out so long as the public agency retains control over the delivery of the service or function and (2) that the Secretary had stated the Chief Archivist would have his full support in enforcing any service level "agreement" to ensure that she retains control over the custody, care, control and administration of the Archives. Whilst the Court appreciated something of the concerns of the plaintiffs, in the end it would not say that the plaintiffs had demonstrated that the reorganisation and related actions of the Secretary, Acting General Manager and others had breached the law.

**Alleged unlawful transfer of public funds:** the High Court reserved for further evidence and submissions the question of the legality of the alleged unlawful transfer of moneys, which Parliament voted for national archival services, to other purposes. That transfer, of up to \$111,000, the Court held unlawful as in breach of the Public Finance Act 1989, in its second judgment given on 23 June 1999. The Secretary for Internal Affairs and the Attorney-General appealed against that judgment.

Allowing the appeal, the Court of Appeal held that whatever the practical accounting situation may have been within the department in terms of the Cabinet decisions about funding the restructuring, the position of the government under the law was quite distinct. From 16 September 1997 through to 26 June 1998 it had a separate spending authority under the second Imprest Supply Act which it decided to exercise in December in relation to the restructuring. The fact that two powers were available left the government with a choice. There was no reason in the present context why, as a matter of law, it should use one rather than the other. On the one side, it exercised that additional power while, on the other, it left unspent some of the Archives Vote.

Under the Imprest Supply Acts, the government has an authority to spend or incur expenses and liabilities approved by the Appropriation Acts. It is not under any general duty to exercise that authority. When it made the financial decisions relating to the restructuring of the Department of Internal Affairs, the government was not, as a matter of law, exercising any power to transfer funds from one Vote to another.

## COMMERCIAL LAW

**Duncan Webb**

### Insurance

*Lumley v General Insurance (NZ) Ltd* (HC Whangarei, AP 45/99, 10 November 1999, Fisher J)

Fire had caused damage to the home of the insured. The contract provided that the insured was obliged to notify the insurer of any material alterations to the home. There had been alterations which involved gas cutting and welding work. On this basis the insurer declined cover. The insured sought to rely on s 11 of the Insurance Law Reform Act 1977 which provided that where the contract excludes cover in specified circumstances or on the occurrence of specified events which increase the risk of loss:

the insured shall not be disentitled to be indemnified by the insurer by reason only of such provisions of the contract of insurance if the insured proves on the balance of probability that the loss in respect of which the insured seeks to be indemnified was not caused or contributed to by the happening of such events or the existence of such circumstances.

Of interest in this case is the fact that, to obtain the benefit of the section, the onus to prove that the loss was not caused by the breach of the contractual conditions lies on the insured party. In this case the onus was not discharged and cover was refused.

*Rogers v HIH Casualty and General Insurance (NZ) Ltd* (HC Auckland, CP 423/99, 11 April 1999, Randerson J)

Here it was held that a skills testing demonstration amounted to a "race, time trial, rally, sprint or drag race, or similar motor sport event, demonstration or test" in terms of an exclusion clause and therefore cover for total loss of a 1988 Ferrari was refused.

### Banking

*Dovey v Bank of New Zealand* (CA 293/98, 17 December 1999, Richardson P, Gault and Tipping JJ)

The Court found that the use of a tested telex method of funds transfer, rather than the more recent SWIFT, was not causative of the loss of the customer's funds when the bank (BCCI), to which the funds were remitted, failed hours after the arrival of the funds. It was found that there was no significant difference in the time at which the funds would have arrived. Moreover, it was held that even though the BNZ had suspicions about the liquidity of the bank there was no implied duty to advise the customer of the financial frailty of the bank. It was held that in ordinary circumstances there is no obligation on a bank to question the wisdom of a customer's instructions.

## CONTRACT

**Maree Chetwin**

*Lang v Fox* (CA 49/99, 10 May 1999, Salmon, Gault, Thomas JJ)

In the District Court summary judgment was entered against the appellants for \$22,000 plus interest and costs. An appeal to the High Court failed. The Court of Appeal was left with no doubt, on the facts found in the District Court and affirmed in the High Court, that there was a novation. The appeal was dismissed.

The parties entered into two interdependent contracts. The respondents (plaintiffs in the District Court) agreed to sell a property under the first contract ("the land contract") to "P J Duncan or Nominee". The respondents, under the second contract ("the flat contract"), agreed to purchase from "P J Duncan or Nominee" a one-eighth share in that property together with a 999 year lease of one of the eight flats to be erected thereon. Clause 21 of the contract provided that the respondents would have the right at any time before the possession date to cancel the agreement and that the appellants would pay to the respondents \$6000 and would refund any purchase moneys paid.

The appellants were nominated to take title under the land contract. Initially the appellants denied nomination as vendor under the flat contract, but later conceded it was the case. The respondents paid a deposit of \$16,000 and later gave notice in terms of the contract cancelling the agreement and requiring the sum of \$6000 and the deposit of \$16,000 to be repaid.

Summary judgment proceedings were issued. The appellants lodged a notice of opposition on the basis that there was no privity of contract between the parties and no nomination had occurred.

Salmon J, delivering the judgment of the Court, cited, with approval, *Chitty on Contracts General Principles* (27th ed):

Novation takes place where the two contracting parties agree that a third who also agrees, shall stand in the relation of either of them to the other. There is a new contract and it is therefore essential that the consent of all parties shall be obtained. (para 19-050.)

Counsel for the appellants relied on the earlier Court of Appeal decision *Lambly v Silk Pemberton Ltd* [1967] 2 NZLR 427 which Salmon J stated "remains good law". It, however, covered a different situation:

There [in *Lambly*] the Court was concerned just with a nomination by a purchaser. As this Court made clear in that case a purchaser's right to nominate another party as transferee is independent

of the terms of the contract. The nomination does not affect in any way the contractual obligations between the vendor and the purchaser as parties to the contract. No consent is required of the vendor in relation to such a nomination. The nominated party does not, solely as a result of the nomination, enter into any sort of contractual relationship with the vendor.

It was held in the District Court, accepted in the High Court and confirmed in the Court of Appeal, that the two contracts were dependent on each other and formed the basis of a common intention, constituting in essence one arrangement. The appellants in accepting the nomination under the land contract accepted responsibility as the contracting party for the whole agreement. The element of consent was present. The Court of Appeal commented that it would have been possible and indeed preferable to have included the whole agreement between the parties in one document rather than having two separate agreements.

## EMPLOYMENT LAW

**Graham Rossiter**

### Personal Grievance: Reinstatement

Section 26(d) Employment Contracts Act 1991 provides that "the remedy for a proven personal grievance is determined in each case by the circumstances of the case". The previous Labour Relations Act stated that a grievance committee "shall, wherever practicable" order reinstatement. The pre-election Policy Statement on Employment Relations of the government included a commitment to restore reinstatement as the primary remedy in personal grievance cases.

In two cases that came before the Employment Court in late 1999, the scope and application of the remedy of reinstatement was addressed. (Reinstatement is only ordered in a very small proportion of the cases in which a personal grievance is sustained.) In the first of these cases, three years had elapsed since the date of the grievant's dismissal and in the second matter, ten months. In both cases, the Court commented on the importance of considering the practical implications of the remedy of reinstatement and the arrangements for the implementation of that process when any such order is made. This is especially so where a significant time has elapsed since dismissal.

*Port of Tauranga v Youard* (EC, AC 82/99, 22 October 1999, Judge Colgan)

The employee had been dismissed because of contended incompetence. The Employment Tribunal found the dismissal to be unjustified and ordered reimbursement of

lost wages, compensation for humiliation etc and reinstatement. The employer sought a stay of the reinstatement order (pending appeal) which application was refused by the Court. Judge Colgan held that the company would not lose the benefits of a successful appeal if the stay in respect of reinstatement was not granted. At worst, it would have employed the respondent in a training capacity for up to six months. This would involve some inconvenience and cost but granting the stay would disadvantage the respondent disproportionately.

*Green v Telecom (NZ) Ltd* (EC, AC 85/99, 28 October 1999, Judge Colgan)

The Employment Tribunal found the dismissal of the appellant to have been unjustified but considered the grievant to have contributed to his dismissal and so declined reinstatement. The Tribunal awarded \$10,000 compensation for humiliation etc. On appeal, the Employment Court found that Telecom had no good or sufficient reason to conclude that a loss of trust and confidence had occurred and that there was no adequate ground for refusing reinstatement, particularly as the evidence disclosed disparity of treatment as between the appellant and certain other Telecom staff. Accordingly, reinstatement was ordered but the compensation for humiliation award reduced to \$5000.

## FAMILY LAW

**John Caldwell**

*Re P* (FC Christchurch, 14 December 1999, Judge Callaghan)

An application to adopt a four-year-old child, of Tainui descent, was made by the child's paternal grandmother, aged 59, and her husband, aged 64. With the consent of the parents, the child had been in the applicants' care since she was seven days old, and had been well cared for. A social worker who had prepared a report pursuant to s 10 of the Adoption Act 1955 opposed the adoption, on the grounds of the applicants' ages, the possible erosion of cultural and sibling ties, and the existence of other placement alternatives under the Guardianship Act 1968. However, another social worker, of Tainui descent, who had been commissioned by the Children, Young Persons and Their Families Agency to report on cultural perspectives, favoured adoption. This latter report, made after extensive consultation with elders, iwi, hapu, and whanau, was also received by the Judge under s 10.

Judge Callaghan ruled that each case must be considered on its own facts. There was no absolute rule against grandparent adoptions, and cultural considerations must be taken into account. In Maori cultural

terms, the Judge ruled, the severing of legal ties would not have the same societal repercussions as in the case of a European adoption. In this case alternative orders under the Guardianship Act would be against the wishes of the applicants, the parents, and the Tainui people. Moreover, the child's tribal beneficial interests had been protected by enrolment with the Tainui Maori Trust board. The age of the applicants, His Honour said, must be weighed in the balance, but could not be used as a discriminatory factor against them. An interim adoption order was accordingly made.

## MEDICAL LAW

**Nicola Peart**

*B v Residual Health Management Unit* (HC Timaru, CP 12/97, 8 September 1999, Rodney Hansen J)

This is the first nervous shock case in New Zealand following a medical misadventure. Mr B and Mrs B unsuccessfully claimed \$2.5 million damages for nervous shock after the discovery of their newborn son's severe disability caused by negligent monitoring of his blood sugar levels. The plaintiffs alleged that they had suffered a mental injury when they discovered their son's disability and learned that the disability was the result of medical negligence. Nervous shock actions are possible since the Court of Appeal's decision in *Queenstown Lakes DC v Palmer* [1999] 1 NZLR 549.

The defendant accepted that the boy's condition was occasioned by the negligence of one of its doctors, but the Court found that there were no discrete traumatic events amounting to shock and that neither claimant suffered from a recognised psychiatric disorder.

The parents alleged that there were two significant traumatic events: the first was the discovery of their son's disability seven months after his birth and the second was the discovery of medical negligence when they learned of the Medical Disciplinary Committee's decision. The Court found that neither discovery came as a shock. They were not discrete events but ongoing processes. The discovery of the child's disability was not sudden. It occurred over a period of months as tests were done and diagnoses made. Nor did the MDC's finding of negligence come as a shock. The parents had initiated the disciplinary proceedings, sought expert evidence and during the hearing heard the admission of error and apology from the doctor. The possibility of negligence must have been in their minds well before the MDC made its findings known.

The Court reviewed the Australian and New Zealand case law on the requirement of proximity in nervous shock actions.

While the parents clearly met the close relational tie to the primary victim, they had not established the necessary temporal and spatial proximity to found liability.

The second factual dispute was also resolved in the defendant's favour. It concerned the mental state of the parents and whether their mental state was caused by the two discoveries. English and Australian cases require evidence of a recognisable psychiatric harm, not merely emotional grief. (*White v Chief Constable of the South Yorkshire Police* [1999] 1 All ER 1 (HL); *Jaensch v Coffey* (1984) 155 CLR 549 (HCA)) Both parents alleged that they were suffering from post-traumatic stress disorder, but they failed to convince the Court. Hansen J preferred the evidence of defendant's expert witnesses that Mrs B was suffering from mild depression. That is not a recognised psychiatric illness as defined in the nervous shock cases. Nor did His Honour accept that Mrs B's depression was caused by shock or by the defendant's negligence. It was the result of the ongoing issues surrounding her son's disability and the difficulties of caring for him.

Finally, His Honour intimated that any award for damages in a successful claim was unlikely to be of the magnitude the plaintiffs were seeking. While there was a range of awards depending on the varying individual circumstances of each case, none of the cases reviewed came close to the millions Mr and Mrs B were claiming.

While His Honour acknowledged the tragedy of this case, a successful outcome for the plaintiffs would have necessitated a significant widening of both the proximity and the mental injury requirements. This would have opened the floodgates. It was for this reason that the English and Australian Courts developed the existing control mechanisms on claims by secondary victims, and their policy concerns are equally applicable in New Zealand.

## INSOLVENCY

### Lynne Taylor

*Gay v Bruns* (CA 193/98, 17 June 1999, Tipping, Gallen and Doogue JJ), *Edmonds Judd v Official Assignee* (CA 30/99, 1 December 1999, Richardson P, Gault and Keith JJ)

*Gay v Bruns*. The respondent on discharge from bankruptcy sought and was granted an order by the High Court under s 75(4) Insolvency Act 1967, vesting in the respondent's name a cause of action against the appellants that had previously been disclaimed by the Official Assignee as onerous property. The appellants played no part in the proceedings relating to the initial grant-

ing of the vesting order but on becoming aware of its existence sought to bring an appeal against its making relying on s 8(2) of the Act. Section 8(2) provides that an appeal shall lie to the Court of Appeal for any person aggrieved by a decision of the High Court or any Judge thereof. Tipping J held that "aggrieved" in this context meant one whose position was affected in some legally detrimental way in the sense that the person was "legally worse off in some substantive or procedural way as a result of the decision". Gallen and Doogue JJ concurred. It was noted that the appellants' substantive rights after the vesting order were unchanged as they could take the same steps as against the respondent to strike out the proceedings as they could have done against the Official Assignee. The best point made by the appellants, said Tipping J, was that they were not heard by the High Court at the time the vesting order was made. In the end this did not assist the appellants as they had no right to be heard in terms of s 75 and so it could not be said that any procedural right had been infringed.

*Edmonds Judd v Official Assignee*. It was conceded that the appellant, a creditor who had filed a proof of debt and received a dividend in the administration of a debtor's estate, was a person aggrieved for the purposes of s 8(2). The appellants claimed to be aggrieved by a decision of the Official Assignee to abandon a cause of action against them to a former bankrupt. Richardson P indicated it was unnecessary to express a firm view on the correctness of *Gay v Bruns*. Nevertheless, Richardson P referred to a line of administrative law cases, including *Arsenal Football Club Ltd v Smith (Valuation Officer)* [1979] AC 1 and *AG of the Gambia v N'Jie* [1961] AC 167, where a broader view of the term "aggrieved" had been adopted. Richardson P concluded that there was nothing to warrant giving the term anything other than its natural meaning which was that the person must be affected by the matter of which he or she complains – a somewhat easier test to satisfy than that adopted in *Gay v Bruns*.

*Edmonds Judd* also focuses on the circumstances in which the Court will interfere with the Official Assignee's administration of an estate in bankruptcy on an application under s 86. This provides that the bankrupt or any creditor or person aggrieved by an act or decision of the Official Assignee may apply to the Court and the Court may confirm, reverse or modify the act or decision and make any other order. Richardson P confirmed that the test to be applied by the Court was whether the decision of the Official Assignee was reasonable having regard to the material before the Court.

*CIR v Smith* (CA 118/99, 8 December 1999, Tipping, McGechan and Paterson JJ)

The liquidators of an insolvent company sought to set aside PAYE payments made by an employer company to the IRD in the specified period prior to the company's liquidation as a transaction having a preferential effect pursuant to s 292 Companies Act 1993. The liquidators succeeded in the High Court (*Smith v CIR* (1999) 8 NZCLC 261,966) but this was overturned on appeal. The Court of Appeal accepted that s 167 Tax Administration Act 1994 created a trust in favour of the Commissioner in respect of PAYE deductions retained by an employer but that there was no statutory requirement for an employer to pay retained PAYE deductions into a separate bank account or otherwise segregate them. The correct position was that a portion of the assets of the employer was impressed with a trust to the value of the unpaid deductions. If PAYE deductions were mixed with the employer's own funds the usual rules of tracing would give the Commissioner a charge over the entire mixed fund. Conversely, if, as was likely, PAYE deductions were paid into an overdrawn bank account then in an ordinary situation the right to trace would be lost. Nevertheless the Court went on to state that, as the present trust was a statutory creation, the purpose of the Tax Administration Act would be not be achieved if the ordinary rules of tracing were applied so as to defeat the Commissioner's claim. The end result was a finding that s 292 Companies Act 1993 had no application to PAYE deductions paid by the company to the Commissioner in the period prior to commencement of liquidation: the company was paying to the Commissioner the Commissioner's own moneys rather than company moneys.

In respect of the same employer company, the Commissioner had applied a GST credit held on behalf of the company in payment of an outstanding GST obligation of the company. In the High Court the liquidator successfully argued that a payment of money within s 292(1)(c) Companies Act 1993 had taken place and that, as the other elements within s 292 were also met, a transaction having a preferential effect had occurred. The CIR argued in the Court of Appeal that s 46(6) Goods and Services Tax Act 1985 created a statutory right of set off that took effect as a code outside the ambit of s 292 Companies Act 1993. The Court accepted this argument noting that the result that followed would maintain the integrity of the GST system and was consistent with the statutory set off permitted by s 310 Companies Act 1993 after commencement of liquidation. □

# IN THE DISTRICT COURTS

*Judge Kerr, Editor of the District Court Reports*

*with a review of District Court and appeal judgments*

**D**uring 1999 there were a number of interesting judgments delivered in the District Court. I will refer to some of those. In addition, the High Court made determinations which affected the workings of the District Court, and I will mention three judgments, which whilst unreported, are worthy of note.

## **Section 18 – SPA – where should information be filed?**

Penlington J on an appeal by way of case stated had to determine the question whether the filing of an information in the Hamilton District Court within the seven days required by the then Transport Act 1962 with subsequent transfer to the Morrinsville District Court on the 8th day complied with ss 18(1) and 19B of the Summary Proceedings Act 1957: *Police v Miller* (High Court, Hamilton, AP 147/98, 12 May 1999).

The learned Judge drew attention to two alternatives under s 18(1). Either the information was to be filed in the office of the District Court which was nearest by the most practicable route to the place where the offence was alleged to have been committed, or the office closest to where the informant believed that the defendant might be found.

However, if there was a failure to comply with the provisions of s 18(1) there was a proviso that such failure should not be deemed to invalidate any proceedings.

Under s 19B where a person underwent an evidential breath test and did not wish to undergo a blood test or the test was carried out by a conclusive evidential breath test device and the result exceeded 600 micrograms of alcohol per litre of breath then an enforcement officer might sign and serve on that person a particular form of summons. Once the summons was served then an information must be laid and filed not later than seven days after the day the test was administered. Penlington J considered that s 19B(3) was entirely temporal. His Honour found that there was compliance with s 19B(3) as to the time of filing but not a strict compliance with s 18(1) as to the place of filing. The proviso however was available to save the information and the incorrect place of filing did not invalidate it. It was an irregularity only. The answer to the question was “No” and the information was reinstated and remitted to the District Court for hearing.

## **Summary offences in the District Court**

In *Haskett v Thames District Court* (High Court, Hamilton, M 358/98, 17 March 1999) Hammond J was dealing with an application for review in relation to the hearing of an information alleging dangerous driving.

The information was called on 27 August 1998 Mr Haskett appearing and entering a plea of not guilty. The Registrar adjourned the proceeding to 15 September 1998

for a status hearing, Mr Haskett objecting that the Registrar had no power to do so.

Hammond J set out the current District Court practice when dealing with matters in the summary jurisdiction. He found it comprised, a first call when a plea was entered. If a not guilty plea was entered that could be done without the need for a personal appearance by the defendant, that being pursuant to s 41(a) Summary Proceedings Act 1957. If a not guilty plea was entered the case was adjourned to a status hearing, which hearings were provided to prevent cases going to a defended hearing if they could be resolved in another way. From a status hearing the information was adjourned to a defended hearing before a Judge, if the charge remained unresolved.

Hammond J emphasised that because he mentioned status hearings, it did not imply any judicial holding on his part that the particular practice (which might include an indication of likely sentence) received his sanction.

His Honour went on to say that he did not accept that the three stage system used in the District Court was inconsistent with the Summary Proceedings regime. He emphasised that the District Court, although a creature of statute, must have an inherent power to regulate its proceedings in such a way as to attain the object of the legislation, and do justice to the parties.

Mr Haskett contended that the matter should have proceeded to a defended hearing at first call but as the learned Judge pointed out even in the late 1950s and 1960s it was very unusual for defended hearings in summary jurisdiction to be conducted on the day of first call. It would be absurd, he suggested, if the initial call of the matter must be a defended hearing because the police would need to have all their witnesses ready on the day even if a guilty plea was likely and was eventually entered.

Accordingly, His Honour concluded that the three stage process was sound and lawful.

The judgment does raise though, the difficulty of status hearings arising from inherent power as opposed to having a statutory recognition and blessing.

## **Appeal from the Disputes Tribunal**

An application was made to the High Court under the Judicature Amendment Act 1972 to review a decision of the District Court at Whangarei where it had ordered a rehearing of a claim which had been barred by the Disputes Tribunal.

Smellie J in *Inland Holdings Ltd v The District Court at Whangarei* (High Court, Whangarei, CP 47/98 – 26 May 1999) was dealing with a dispute where Inland Holdings had entered into an agreement to sell a dairy farm to the Bellamys. The transaction included a parcel of dairy company shares and bonus shares.



It seems that the shares had \$6,083 owing on them. That was to be paid by instalments of \$3,563 and \$2,520.

The Bellamys issued proceedings in the Disputes Tribunal claiming \$3,000 (being the first share instalment reduced to the maximum Disputes Tribunal jurisdiction). The Referee found Inland Holdings liable and ordered it to pay the Bellamys that sum.

The amount was paid but a contention that the payment was in full and final settlement of all dairy company share liability was rejected by the Bellamys.

In July 1998 the Bellamys made a further claim for the balance of \$2,520 said to be owing, the Referee striking it out on the grounds that it contravened s 15 of the Disputes Tribunal Act 1998.

Section 15 provided that a claim "shall not be divided into two or more claims for the purpose of bringing it within the jurisdiction of a Tribunal".

The Bellamys appealed to the District Court which found (inter alia) that there was no evidence before the Tribunal which would enable a conclusion to be made that the Bellamys had divided the claim into two parts.

Smellie J discussed two judgments of the High Court *NZI Insurance New Zealand Ltd v Auckland District Court* [1993] 3 NZLR 453 and *Hertz New Zealand Ltd v Disputes Tribunal* (High Court, Wellington, CP 423/93, 16 December 1994 – Greig J). In effect those judgments concluded that the 1998 Act did not give the right of appeal for error of law and did not require a Referee to know all the law. An appeal therefore could only be advanced on the basis of procedural unfairness.

The learned Judge observed that a Referee who failed to have regard to s 15 could properly be overturned on appeal because that would be an issue of jurisdiction not procedural fairness or error of law.

His Honour concluded that it was clear the Referee had s 15 very much in mind and that s 15 acted as a bar to a second claim depending upon the view of the facts taken by the fact finder as to dividing a claim. The Referee's finding was that the shares should have been transferred fully paid up and that as a consequence there was a breach of contract at that point giving rise to one cause of action.

On appeal to the District Court, the District Court Judge wrongly substituted his own view of the facts for those of the fact finder and therefore exceeded his jurisdiction and purported to uphold the appeal for error of law.

Accordingly, Inland Holdings' application was granted, and the bar reinstated.

### **Applying to extend time for filing an indictment – s 345B Crimes Act 1961**

IN *R v B* [1999] DCR 235, Judge T M Abbott had to deal with an application to extend the time for filing an indictment, which was filed late because of an inadvertent oversight on the part of the Crown Solicitor.

Judge Abbott decided the issue was whether it was in the interests of justice to extend the prescribed period. He noted that the law provided an exception to the provision for the filing of an indictment within a certain time-frame. A delay of fifteen days was totally neutral and did not demonstrate prejudice to the accused. The seriousness of the allegations against the accused was a relevant factor to take into account in the interests of justice. That was because considerations had to be exercised so as to strike a just balance between the interests of the complainant, the interests of an accused and

the interests of the general public or the community at large which had a real concern in ensuring that allegations of criminal offending of a serious nature were properly tried and determined.

The learned Judge granted the sought for leave.

### **Evidence (Witness Anonymity) Amendment Act 1997**

In *Police v Robertson* [1999] DCR 268, Judge J A Walker was faced with an application for an anonymity order after a preliminary hearing relating to a charge of aggravated robbery had commenced. Counsel for Robertson submitted there was no jurisdiction for the Court to consider the application because depositions had commenced but His Honour found there was jurisdiction because of the words used in the section, namely, "at any time after a person is charged" an application may be made.

His Honour pointed out that the District Court was required to be satisfied that the making of an anonymity order would not be contrary to the interests of justice, whereas the High Court could only make an order if satisfied that the making of the order would not deprive an accused of a fair trial. The interests of justice were a much more general consideration and was not accused-centred. Accordingly an order was made.

Judge J R Callander in *Police v Kelly* [1999] DCR 634 was also dealing with an application for an anonymity order. He concluded that before the order could be made a Court must answer two questions in the affirmative, namely –

- (1) Either was the safety of a witness likely to be endangered, or was there likely to be serious damage to property, if the witnesses' identity was disclosed prior to trial? and
- (2) Would withholding the witnesses' identity until the trial be contrary to the interests of justice?

The use by the legislature of the words "exceptional circumstances" meant that Parliament intended the grant of an anonymity order was justified only if the circumstances were unusual or out of the ordinary.

His Honour stated, that a Court must consider whether it was practical for a witness to be protected prior to trial by means other than by the use of anonymity or allied orders. The word "practical" used in the applicable section had not been the subject of any judicial consideration, and therefore must be afforded its ordinary and natural meaning. Whether a certain course of action was practical was necessarily a question of degree, comparison and circumstance. The word connoted a commonsense, realistic and convenient approach to a given problem or issue. An order was made.

### **Marine masters' certificates**

Judge F W M McElrea in *Sinclair v Director of Maritime Safety* [1999] DCR 282 dealt with an appeal whereby the appellant sought reinstatement of his commercial launch master's certificate of competency under the Maritime Transport Act 1994.

Judge McElrea found that while a Court would always treat with respect the decisions of specialist bodies, on appeal, the onus of proof rested with the Director of Maritime Safety to show on the balance of probabilities that the appellant's certificate should have been revoked.

His Honour said that the crucial question was under s 50(1) of the Maritime Transport Act 1994, namely, whether the appellant was a fit and proper person to hold a

certificate, the criteria being set out in the section. The appeal was allowed.

### Prison discipline

Kennard appealed the finding of a prison disciplinary hearing holding him liable for cannabis being found in his urine on two separate occasions two months apart. The urine was analysed by an analyst at a laboratory.

The issue was whether a certificate which established cannabis in the urine complied with regulations 15(b) or 15(c) of the Penal Institutions (Drug and Alcohol Testing) Regulations 1997.

Judge S G Erber decided that the disciplinary hearing was invalid. In, *Re Kennard* [1999] DCR 308 His Honour found that the person who carried out the analysis should sign the certificate not simply someone from the laboratory where the analysis was carried out. The certificate not signed by the analyst was inadmissible.

The inmate's 21 days period to seek independent analysis of the urine sample could not run from the date of providing the sample. It was only when the result of the analysis was communicated to him or her that an inmate would have any intelligent basis for acquiring an independent analysis.

A disciplinary hearing ought not to take place until either 21 days had gone by from and excluding the day on which an inmate was given a certificate of analysis or an inmate in writing had stated that he waived the right to an independent analysis.

In the events that happened Judge Erber allowed the appeal.

### The death of McLaren Maycroft

On an application to dismiss an amended third party notice Judge J Cadenhead had to determine whether the third party owed the plaintiff and/or its agent a concurrent duty in tort and in contract. This raised the applicability of *McLaren Maycroft & Co v Fletcher Development Ltd* [1973] 2 NZLR 100. Judge Cadenhead referred to what he described as the implicit overruling of the rule in his judgment *Strata Developments Ltd v Rothwell* [1999] DCR 415. At pp 418-419 His Honour referred to *Riddell v Porteous* [1999] 1 NZLR 1, *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, *Rowlands v Collow* [1992] 1 NZLR 178, *Bloxham v Robinson* (1996) 5 NZBLC 104, and concluded that the Court of Appeal and High Court had implicitly overruled *McLaren Maycroft*, without necessarily saying that was the case.

### Official information

In *Police v Karena* [1999] DCR 365 Judge G V Hubble had to determine whether or not the police should be called upon to disclose a "use of force report" which was an internal memorandum police officers were required to fill out when on active duty some force was used by them.

Karena was charged with obstructing the police and wished to rely on self-defence. His Honour determined that the "use of force report" contained or bore on the evidence of the offence charged rather than prejudicing the maintenance of the law, the latter preventing discovery of the report. He went on to say that disclosure of what force was used must be a relevant consideration to the charge itself where self-defence was raised, and therefore the report should be disclosed.

Although s 6 of the Official Information Act 1982 was intended to protect the investigatory stage of police inquiries once charges had been laid the maintenance of law and the

right to a fair trial pointed generally to disclosure of personal information contained in briefs of evidence, witness statements or notes of interview but each case must be considered individually.

### Mental competency of witness

Judge G A Rea in *R v T* [1999] DCR 626 dealt with an application by the Crown to determine whether the evidence of a clinical psychologist was admissible at the accused's trial. The Court also had to determine whether the complainant was competent to give evidence. The Crown sought to call the psychologist to give evidence as to the intellectual attainment, mental capability and emotional maturity of the complainant. The matter in issue was whether the failure by Parliament to refer to mentally handicapped people in ss 23D to 23I of the Evidence Act 1908 meant that the provisions as to experts in s 23G were unavailable where a witness was mentally handicapped. Judge Rea held that because s 23C was amended to include mentally handicapped persons, ss 23D to 23I must apply equally to mentally handicapped complainants as they did to child complainants.

His Honour also found that the competency of the complainant to give evidence was a matter for the trial Judge to assess in the presence of the jury. While the Judge was entitled to make an assessment as to competency, the jury was also entitled to see the process by which the decision was arrived at and take into account the level of competency in assessing evidence to be given by the witness in question.

### Suspension of driver's licence

In *Meyer v Land Transport Safety Authority* [1999] DCR 715, Meyer after failing a breath test, gave a sample of blood which read 187 micrograms of alcohol per 100 millilitres of blood. The appellant was served with a copy of the certificate of blood analysis and was also served with a notice under s 95 of the Land Transport Act 1998 suspending his licence for 28 days because his blood alcohol concentration exceeded 160 micrograms of alcohol per 100 millilitres of blood. Meyer appealed under s 101 of the Act to the Director of Land Transport Safety. The director dismissed his appeal and Meyer then appealed to the District Court.

Meyer contended that the failed breath test was carried out with a faulty device which rendered the blood test a nullity which could not be saved by the reasonable compliance provisions.

Judge G V Hubble dismissed the appeal finding it was clear from s 95 of the Act that the operation of the suspension was in no way dependent upon the District Court being satisfied that a charge would ultimately be proved. Section 95(3) provided that the suspension began immediately after notice was served, and would cease to have effect only if the police decided not to prosecute or the charge was subsequently dismissed. In terms of s 109(2) of the Act the only ground upon which the suspension could be reviewed was an inquiry into whether or not the enforcement officer had reasonable grounds to believe the appellant had a concentration of blood which exceeded 160 micrograms of alcohol per 100 millilitres of blood. No other matters however personal to the appellant and however apparently unjust could be taken into account.

### Databank compulsion order

Judge E W Unwin in *Police v Riddiford* [1999] DCR 720 was dealing with an application for a databank compulsion

order under the Criminal Investigations (Blood Samples) Act 1995. The applicant relied on a conviction for aggravated robbery but the certificate of conviction before the Court showed that the respondent was convicted of "assaults, intent to rob (manually) Crimes Act 1961, s 235(1)(b)".

The Crown accepted that the respondent had not been convicted of an offence involving an assault with intent to rob.

His Honour held that in every application for a databank compulsion order the police must prove that the respondent was convicted of the relevant offence the subject of the application.

The certified copy of conviction included an offence which was one of the two offences contained within s 235(1)(b). Each offence under that section though was quite different. Both offences had different elements which must be proved. Accordingly it was the part of s 235(1)(b) which created the relevant offence, not the entire provision which mattered and as the respondent had never been charged with and convicted of the offence of "assaults with intent to rob" the application failed and no blood sample was ordered to be taken.

### IS A ROCK A WEAPON?

*One of Sir William Wade's proudest boasts was that at the 1968 anti-Vietnam War demonstration in Grosvenor Square, London, a student was charged with possession of an offensive weapon, namely a copy of Wade on Administrative Law - Ed.*

#### Is a rock a weapon?

That question had to be answered by Judge P J Keane in *R v Kerr* [1999] DCR 787. The accused in order to gain entry into his wife's house broke a glass panel in a ranch slider door. He used a rock which he picked up from the garden. The rock went through the window to the centre of the lounge. He entered the lounge and confronted his wife and a friend, he picking up the rock while the confrontation was taking place. He held the rock as one might a shotgun above the shoulder at a level with his face.

The accused was charged with breaking and entering with a weapon.

The Crown submitted that pursuant to s 240A a rock was a weapon.

His Honour noted that "weapon" was not defined in the Crimes Act. Sections 240A, 198B and 202C of the Crimes Act were all introduced into the law in 1986. They appeared on the same statute page in sequence. They were to be treated as a coherent and considered response by the legislature to the use of weapons in the commission of crimes.

Section 240A used the word "weapon" without defining it, weapon being a word more limited in common speech than "article" used in s 202A, "thing" used in s 202C, and "instrument" used in s 235(c). When the legislature enacted s 240A, it intended that where possession was the aggravating feature, "weapon" should have its more limited common speech meaning. A stone was a natural object not designed for any use. Although it could be used to inflict injury and thus become a weapon in terms of s 240A(b)(ii) it was not a "weapon" for the purposes of s 240A(a), that provision requiring something like a knife, sword or firearm.

#### Restricted driver's licence

The appellant would turn 16 on 30 September 1999. He obtained his restricted motor driver's licence on 24 June 1999. The restrictions lasted for at least a year. He was not

able to carry passengers unless accompanied by the holder of a full licence. He applied for exemption so that he might drive his intellectually impaired sister to various activities. Other members of the appellant's family were not available to transport her.

Judge P J Keane in *Sampson v Director of Land Transport Safety* [1999] DCR 813 had to determine whether the decision of the director not to grant an exemption should be overturned. His Honour found that the appeal was by way

of rehearing with the appellant carrying an onus only in the case where the scales were evenly balanced there being no presumption in favour of the decision on appeal. Although the underlying policy of the new legislation (Land Transport Act 1998 and Land Transport (Driver Licensing) Rules 1999) was highly important because young people were frequently at risk and caused risks to others on the road, the director had a power to exempt from restrictions where there was hardship. Hardship could clearly go to what was reasonable or appropriate when measured against risk. It was at most a factor. To require that the hardship be undue was to elevate it in significance and to reintroduce a test which had been abandoned. The appeal was allowed.

#### Section 16 SPA

Judge P A Moran in *Police v N* [1999] DCR 927 discussed the applicability of the above provision which requires the consent of a defendant before more than one information was heard against him or her by a District Court Judge at the same time. His Honour referred to the current work of a District Court Judge and to both New Zealand and English authority on the point.

His Honour commented that there could be no doubt that the principle that consent was necessary to the joint hearing of two or more charges in the District Court was of long standing. Whether more than one information might be heard at a time without consent was a question of practice and procedure. It was not a question of jurisdiction. Such rules were properly amenable to adaptation and development to meet contemporary needs. If it be the case that there was still extant a rule of practice and procedure that District Court Judges might not hear more than one charge at a time without the defendant's consent, then it was high time the rule was changed and brought into line with the rules concerning the joint trial of charges in an indictment. Given the longevity of the rule it was seemly that its demise should be announced by an appellate Court, but, where in the light of modern developments, continued observance of an obsolete rule of practice produced manifest absurdity, any Court was bound to regulate its procedure in a manner that avoided absurd results. (See *Winchester v Fleming* [1958] 1 QB 259.)

Accordingly, although the defendant did not consent and submitted he should not be called upon to stand trial on all charges at the same time, His Honour ruled that there should be only one hearing of six charges rather than as the defendant contended a hearing comprising four charges and another hearing comprising two charges.

His Honour also made rulings on the admissibility of similar fact evidence. □

# INTERNATIONAL MASTER FRANCHISE AGREEMENTS

*Frank Zumbo, The University of New South Wales,*

*explores inward and outward franchising*

As franchise systems become established within their national borders, there is a natural inclination to explore the possibility of exporting the system to new markets. With a proven name and system, franchisors increasingly see the benefits of either directly franchising in a new market or entering into an arrangement with a local investor in that market. While direct entry into the new market may initially be more enticing, there is a growing awareness of the advantages associated with selecting a well placed and capitalised local investor.

New Zealand franchisors are increasingly looking to overseas markets. It has become important for them to carefully identify and weigh up the many risks and rewards of global expansion. A great deal of preliminary work needs to be undertaken, particularly in the selection of suitable markets and local investors. Needless to say, there are clear challenges that await any globally minded franchisor.

In view of the challenges faced by New Zealand franchisors wishing to export their system to new markets, it is timely for international organisations such as Unidroit – the International Institute for the Unification of Private Law – to examine ways of facilitating the global expansion of national franchise systems. In doing so, such organisations can bring together international expertise and work towards not only identifying international best practice, but also ensuring that it is adopted as widely and as speedily as possible. By providing an international forum, Unidroit is well placed to assist the rapid expansion of franchising systems beyond national boundaries.

Indeed, with a dramatic increase in the number and types of franchising legislation being enacted around the world, it is vital that franchisors expanding internationally are not stifled by a multitude of inconsistent regulations. Such inconsistencies not only raise compliance costs for the franchise system, but may also mean that franchisees within the system are given a different disclosure document depending upon the jurisdiction in which they operate a franchise. Needless to say, therefore, any work towards identifying and dealing with inconsistencies in franchising legislation is to be welcomed as benefiting both franchisors and franchisees.

## **Unidroit and international franchising**

Having been involved in or associated with the development of numerous conventions relating to international business transactions, Unidroit has in recent years turned its attention to the rapidly expanding area of international franchising.

In particular, Unidroit has embarked upon a programme intended to assist interested parties with the many issues arising from the use, operation and termination of international master franchising arrangements. This programme has already led to the publication of the *Unidroit Guide to International Master Franchise Arrangements*.

This *Guide* represents an important first step in Unidroit's international franchising programme. The *Guide* provides franchisors and their advisers with readily accessible information on the problems that may arise within an international context, the legal and regulatory systems of other countries and the various challenges faced by parties to a master franchise arrangement.

In publishing the *Guide*, Unidroit has fulfilled the first phase of its programme regarding international franchising. The next phase will involve the preparation of a model law on disclosure. Having laid the groundwork with the *Guide*, Unidroit is proceeding to identify benchmarks for disclosure. The identification and adoption of such benchmarks offers numerous benefits including uniformity of international disclosure documents, lower compliance costs associated with having one disclosure document for use in all jurisdictions and minimising the risks of disputes through more informed decision making by franchisees.

A model franchisor disclosure law is to be prepared for eventual circulation to Unidroit's member countries. The model law is to be drafted with the assistance of an International Study Group made up of franchising experts from around the world. With such input, it is hoped to formulate a model law based on international best practice. By identifying the key areas of importance to potential franchisees and their advisers, the model law can provide a clear guide to any country wishing to adopt new disclosure laws or modify existing laws to ensure international consistency.

## **Unidroit Guide to international master franchise arrangements**

The *Guide* provides a detailed examination of a master franchise arrangement from its negotiation and drafting through to its termination. Fundamental issues such as the choice of the most appropriate vehicle for international expansion and the nature of the master franchising relationship are dealt with, as well as the many ongoing issues faced by franchisors and sub-franchisors.

Each major phase of an international master franchise arrangement is carefully scrutinised with considerable guidance being provided. In doing so, the *Guide* aims to put the many aspects of deciding to expand globally into context.

The risks, challenges and rewards associated with undertaking an international franchising programme are identified and explored. Ongoing aspects of the master franchise agreement are examined in depth. Such matters as the respective roles of the parties, financial matters, training programmes, advertising issues, the supply of equipment, products and services are considered, as well as managing system changes and protecting intellectual property. Finally, the *Guide* explores the all important issues of dispute resolution, and the enforcement and termination of master franchise agreements.

While primarily concerned with the position of franchisors and sub-franchisors, the *Guide* does in appropriate circumstances consider the position of such other parties as sub-franchisees. The *Guide* is comprehensively indexed, greatly assisting those franchising participants and their advisers seeking guidance on a specific issue.

The *Guide* is divided into the following chapters:

- Fundamental concepts and elements;
- Nature and extent of rights granted and relationship of the parties;
- Term of the agreement and conditions of renewal;
- Financial matters;
- The role of the franchisor;
- The role of the sub-franchisor;
- The sub-franchise agreement;
- Advertising and control of advertising;
- Supply of equipment, products and services;
- Intellectual property and Know-how and trade secrets;
- System changes;
- Sale, Assignment and transfer;
- Vicarious liability, indemnification and insurance;
- Remedies for non-performance;
- The end of the relationship and its consequences;
- Applicable law and dispute resolution;
- Other generally used clauses;
- Ancillary documents; and
- Regulatory requirements.

In view of the breadth of coverage, the *Guide* will be of benefit to all parties interested in international master franchising irrespective of their level of experience in the area. Indeed, while a person coming to master franchising for the first time is methodically taken through the whole relationship, an experienced party has the advantage of going directly to the area of particular interest.

### **Fundamental concepts and elements**

An understanding of the alternative vehicles for expanding a franchise system on an international level is essential to an informed choice as to the vehicle that best suits the franchise system. While a range of vehicles is available, the use of master agreements is becoming increasingly popular with franchisors. Under such agreements, a franchisor will grant the local party or "sub-franchisor" the right to sell and/or operate franchises within a particular country. The sub-franchisor effectively acts as the franchisor in the particular country and, accordingly, is responsible for expanding the system within the country. Operating its own outlets, recruiting and training potential franchisees, and enforcing agreements with local franchisees – "sub-franchisees" – are all part of the sub-franchisor's Brief within the particular country.

Within this context, the *Guide* considers the range of commercial vehicles for international expansion, and outlines the many aspects of selecting an appropriate vehicle and negotiating the necessary agreement. Areas of risk in expanding internationally are discussed as well as drafting issues associated with putting together the agreement.

### **Nature and extent of rights granted and relationship of the parties**

Both franchisor and sub-franchisor will need to appreciate the nature and scope of the legal relationship that arises when they enter into a master franchise agreement. The rights that a franchisor will grant to the sub-franchisor and the territory and the circumstances in which those rights can be utilised are key aspects of the relationship and need to be carefully identified. The agreement will need to define the system being franchised and the intellectual property rights being granted. Since a proven system and an established name are essential ingredients for a successful franchise, it is clear that they are to be protected by the franchisor and appropriately used by the sub-franchisor.

The *Guide* emphasises this view and, in doing so, highlights the need for the parties to pay particular regard to any limitations on the use of the rights granted under the agreement. Needless to say, the exclusivity or otherwise of any rights granted is to be clearly defined. The *Guide* also considers the three-tiered structure of master franchise arrangements with specific reference to how the agreement between the franchisor and sub-franchisor can impact on the rights and obligations of sub-franchisees. This issue is particularly relevant to the franchisor's ability to enforce its intellectual property rights.

### **Term of the agreement and conditions of renewal**

The term of the agreement and the conditions of renewal are crucial issues for both franchisors and sub-franchisors. While the franchisor will need to ensure that there is sufficient commitment by the sub-franchisor to expanding the system in the particular country, the sub-franchisor will need to be able to gain an adequate rate of return on its investment. As noted by the *Guide*, the length of the relationship requires careful consideration, particularly as the franchisor's flexibility in being able to update its system or to remove poor sub-franchisors is to be weighed against the need to attract and retain good sub-franchisors.

### **Financial matters**

Turning to the operational aspects of master franchise arrangements, the *Guide* takes the parties through the sources of income associated with such arrangements. While the possibility of initial master franchise fees and continuing franchise fees is canvassed from a franchisor perspective, the potential for initial and continuing fees, product mark ups and payments from suppliers are explored from the sub-franchisor's point of view. Brief comments are also made regarding selected taxation implications concerning the various payments. Clearly, specific taxation advice will need to be sought by the parties to a master franchise agreement.

### **The role of the franchisor**

While the sub-franchisor will be responsible for introducing and expanding the franchise system in the particular country, the franchisor has a vital role in ensuring that the sub-franchisor is well equipped for its responsibilities. With this in

mind, the *Guide* outlines the importance of providing the sub-franchisor with initial information, training, system manuals and ongoing assistance.

### **The role of the sub-franchisor**

Having been assisted by the franchisor in understanding the system, the sub-franchisor will be required to develop and maintain that system within the particular country. In doing so, the sub-franchisor will benefit from the experience gained from pilot operations and its adherence to a realistic development schedule. Indeed, the sub-franchisor will need to devise an appropriate plan of action for the country and ensure that plan is updated to meet changing circumstances. Growth targets are to be set and the integrity of the system protected within the country. Sub-franchisees are to be recruited, trained and overseen to ensure the orderly development of the system.

### **The sub-franchise agreement**

The type of agreement to be entered into by the sub-franchisor and the sub-franchisees is an issue on which the franchisor will want to take a position, especially if it wishes to have control over changes to the system to meet local conditions. The *Guide* discusses the alternative types of sub-franchise agreements that a franchisor can choose from and provides a number of practical insights into the implications associated with each type of agreement. Enforcement issues concerning sub-franchise agreements are also explored.

### **Advertising and control of advertising**

As an awareness of the system's name is vital to its success in a new market, thought will need to be given to the advertising strategy for that market. The *Guide* deals with such issues as the approval and use of advertising material, translations of material to suit the new market and the importance of funding the strategy.

### **Supply of equipment, products and services**

Given the level of control that a franchisor will typically seek to exercise over the equipment to be used in the franchised business and the products and/or services to be supplied through that business, regard needs to be had to the related contractual and trade practices issues. Such issues are identified and discussed by the *Guide*. Importantly, the *Guide* offers useful strategies for addressing the issues.

### **IP, know-how and trade secrets**

The identification, use and protection of the system's intellectual property rights is another key ingredient to the success of a franchise system, particularly in new markets. As the level of protection varies between jurisdictions, the protection of the system's intellectual property rights becomes a priority area for the franchisor. The *Guide* goes to considerable lengths to not only bring these issues to the franchisor's attention, but also in exploring alternative approaches to safeguarding intellectual property rights.

### **System changes**

The evolution of the system over time is an obvious challenge to those involved in the system. As the franchisor develops, modifies, varies or revamps the system, it becomes necessary from a planning perspective to have regard to the impact of the changes on the sub-franchisor and sub-franchisees. The

adoption of appropriate management strategies becomes relevant to ensuring the smooth adoption of the changes throughout the system. The many dimensions of implementing system changes are detailed in the *Guide*, together with insights on how best to implement the changes.

### **Sale, assignment and transfer**

While master franchise agreements are invariably long-term relationships, there will be circumstances in which a party will wish to assign or transfer its interests under the agreement. Such circumstances may include an internal restructuring, disability, death or a desire to terminate the agreement. Since franchisors will wish to include restrictions on the sub-franchisor's ability to assign or transfer their interest, care must be taken to ensure that those restrictions do not fall foul of the particular jurisdiction's laws or regulations. The *Guide* takes the parties through the kinds of conditions that may be imposed by the franchisor, including the right of first refusal on the same terms and conditions as those offered by a proposed transferee.

### **Vicarious liability, indemnification and insurance**

The potential issue of liability to third parties is one that needs to be addressed in any master franchise agreement. In turn, this raises questions relating to the need for indemnification and insurance. These matters are discussed at length in the *Guide* with insights into how best to deal with them in the agreement.

### **Remedies for non-performance**

Given the considerable damage that a rogue sub-franchisor or sub-franchisee can cause to the system, it goes without saying that the agreement will need to deal with non-complying franchisees. Similarly, the franchisor will be concerned to ensure that the sub-franchisor lives up to its commitment to developing the system in the new market. Accordingly, it would be advantageous to specify the circumstances in which the master franchise agreement can be terminated. The *Guide* outlines the various termination categories, taking the franchisor through a number of scenarios. As the integrity of the system may at times require the removal of rogue or non-complying franchisees, the *Guide* acts to alert franchisors of the importance of the termination provisions.

### **The end of the relationship and its consequences**

The termination of an agreement and its aftermath will need to be carefully managed by the franchisor. The enforcement of its legal rights and the protection of the system's integrity will be issues foremost in the mind of the franchisor. The various ways that a master franchise arrangement can come to an end are detailed in the *Guide*, together with a discussion of the related consequences.

### **Applicable law and dispute resolution**

Choice of law and dispute resolution are two areas to be considered when entering into any new legal relationship in another jurisdiction. The impact of the jurisdiction's laws is to be assessed and thought to be given to the possible inclusion of a choice of law clause. More importantly, thought should also be given to the inclusion of a clause outlining the dispute resolution process to be followed by the parties. Such a process could include a series of steps to

be taken in the event of a dispute. These steps could require the parties to at first undertake informal negotiations to be followed by a more structured approach such as mediation. Where such processes fail to resolve the dispute, the agreement may rely on more binding dispute resolution processes such as arbitration.

In view of the importance of dispute resolution processes to the preservation of the relationship, the *Guide* includes a thorough discussion of the processes that can be incorporated into the agreement. Negotiation, mediation, conciliation, and arbitration are all considered in the *Guide*.

With the increasing cost of litigation prompting the rapid growth of alternative dispute resolution processes, it is clear that all franchise systems need to consider the process or the range of processes to be followed in the event of a dispute. Thought also needs to be given to the way, if any, that the pursuit of an alternative dispute resolution process affects the right of the parties to commence legal proceedings. Indeed, it is not surprising to find agreements being drafted so that legal proceedings (other than possibly urgent interlocutory relief) cannot be commenced before the alternative dispute process has been pursued.

### Other generally used clauses

The *Guide* identifies and explains a number of other clauses typically found in master franchise agreements. These include clauses relating to severability, entire agreement clauses, waivers, force majeure and hardship clauses, cumulative rights clauses, notice provisions, and damages clauses.

### Ancillary documents

Given that a franchise relationship typically encapsulates other specific legal relationships such as that between a buyer and seller, lender and borrower, and landlord and tenant, regard must be given to documenting the various relationships. The following ancillary agreements may be used in connection with a master franchise agreement:

- confidentiality agreement;
- restrictive covenants;
- guarantee and indemnity;
- supply agreement;
- lease agreement;
- licensing agreement.

Where used such agreements will form an integral part of the master franchise arrangement and care is to be taken in ensuring the enforceability of the agreements in the particular jurisdiction. By identifying the agreements, the *Guide* alerts the parties to the role of such agreements and, in doing so, makes them realise that a master franchise arrangement is a relationship with a set of inter-related obligations.

The inter-related nature of master franchise arrangements needs to be particularly noted when drafting the termination provisions of such arrangements. Indeed, the protection of a system's intellectual property in the aftermath of a terminated master franchise arrangement may depend on carefully/appropriately drafted confidentiality agreements, licensing agreements and restrictive covenants.

### Regulatory requirements

There will be a range of regulatory approvals that will need to be obtained to operate the franchise system in a particular jurisdiction. Examples of the types of licences and permits that may be required are examined.

Identifying a jurisdiction's regulatory requirements in relation to the particular industry in which the franchise is to operate may be challenging in some instances. This reinforces the importance of not only choosing an experienced and well resourced sub-franchisor, but also the value of securing good legal and business advice in the new market.

It is anticipated that the annexe will be updated, with the commentary on each jurisdiction being expanded over time. By bringing this information together on one Internet site, Unidroit is well placed to continue its work of assisting in bringing about a better understanding of international franchising. Unidroit's website will also provide an excellent vehicle for disseminating information on the proposed model franchisor disclosure law.

### Additional information

A significant amount of additional information has been provided in the following annexes:

#### *Franchising: General Notions*

This annexe describes the different forms of franchising with particular reference to business format franchising. The basic elements of this increasingly popular form of franchising are outlined as well as the advantages and disadvantages of franchising from both a franchisee and franchisor perspective. This annexe is particularly useful for any first time participant in the area of franchising.

#### *Franchising in the economy*

This annexe offers a number of insights into the significant benefits of franchising to its participants and the economy generally. Some interesting statistics are included on the extent of franchising activities and their impact around the world.

#### *Legislation and regulations relevant to franchising*

This annexe provides not only a useful checklist of the many areas of law that are relevant to franchising, but also a concise outline of the regulatory position in various jurisdictions. These jurisdictions include the United States, Canada, France, Spain, Brazil, Mexico, Japan, Russia, Australia, and the European Union.

Reference is also made to the role and intended operation of codes of ethics adopted by various franchising associations around the world. This annexe has been included on Unidroit's website (<http://www.unidroit.org>).

It is anticipated that the annexe will be updated, with the commentary on each jurisdiction being expanded over time. By bringing this information together on one internet site, Unidroit is well placed to continue its work of assisting in bringing about a better understanding of international franchising. Unidroit's website will also provide an excellent vehicle for disseminating information on the proposed model franchisor disclosure law.

### CONCLUSION

The work of the Unidroit in the area of international master franchising provides valuable insights for all New Zealand franchisors wishing to expand internationally. The complexity of and challenges associated with international franchising means that considerable work has to be put into developing a programme of expansion that can maximise the chances of success. By appreciating the many facets of international master franchising, the franchisor will be well placed successfully to export its system to new markets. □



# DEFENDANT'S FAILURE TO TESTIFY

*Susan Nash, University of Westminster, London*

*reviews experience in England since the introduction by s 35 Criminal Justice and Public Order Act 1994 of "drawing inferences from failure to give evidence"*

Whilst expressly preserving the defendant's right not to testify, s 35 of the Criminal Justice and Public Order Act 1994 permits Courts in England and Wales to draw "such inferences as appear proper" from the failure of the accused to give evidence. Although this development is less contentious than s 34 of the 1994 Act, which permits inferences to be drawn from the accused's pre-trial silence, it raises similar fair trial issues. The Court of Appeal has been reluctant to accept that changes to the law and practice brought about by this development represent a fundamental shift in established principles. This article examines the provisions of s 35 and questions whether they necessarily deprive the accused of a fair trial or merely allow commonsense implications to play an open role in the assessment of evidence.

## HISTORICAL POSITION

The compulsory interrogation of witnesses in England was abandoned in the seventeenth century and, at common law, the accused has never been a competent witness for the prosecution. Prior to the introduction of the Criminal Evidence Act 1898, the accused was also disqualified from giving evidence for the defence. To mitigate the harshness of this rule a practice developed whereby the accused was permitted to make an unsworn statement from the dock, a right expressly preserved by s 1(h) of the 1989 Act, and now abolished by s 72 of the Criminal Justice Act 1982 [and abolished in New Zealand by the Crimes Amendment Act 1966]. Following the enactment of s 1 of the 1898 Act, [and, in New Zealand, s 5 of the Evidence Act 1908] the accused became a competent but not compellable witness for the defence at any stage during the trial but the prosecution was expressly prohibited from commenting on the accused's failure to testify. Although in England there was no equivalent statutory prohibition preventing judicial comment, the practice at common law prevented the Judge from inviting the jury to draw adverse inferences from the accused's silence at trial. The direction recommended by the Judicial Studies Board required the Judge to remind the jury that the accused was under no obligation to give evidence. Although reference could be made to the fact that failure to testify deprived the jury of hearing the accused's account of events tested in cross-examination, it did nothing to establish guilt. Absence from the witness box may have required some explanation, but it proved nothing one way or another. The situation in New Zealand is today broadly similar after the amendment in 1966 of s 366 of the Crimes Act 1961 which permitted judicial comment for the first time and the ensuing cases such as *R v Wheatley and Gallagher* [1968] NZLR 1135.

## BACKGROUND TO CHANGES

The current legislation is in line with recommendations made by the Criminal Law Revision Committee in 1972 which suggested that once the prosecution established a *prima facie* case against the accused, "it should be regarded as incumbent on him to give evidence in all ordinary cases"; failure to do so should entitle the Court to draw such adverse inferences as common sense dictates (Cmnd 4991, para 110). This proposal was considered at the time to be too controversial to be implemented and was subsequently rejected by two Royal Commissions. In 1981, the Royal Commission on Criminal Procedure (Cmnd 8092) considered it sufficient for the Judge to comment "on the lines at present allowed" for the jury to assess the significance of failure to testify. Similarly, the Royal Commission on Criminal Justice, which reported in 1993, recommended that "neither the prosecution nor the Judge should invite the jury to draw from the defendant's failure to give evidence the inference that his or her explanation is less deserving of being believed". (Cmnd 2263, para 27) The Bar Council, the Criminal Bar Association and the Law Society all expressed views opposing changes to the traditional position. Nevertheless, Michael Howard, the then Home Secretary, announced that the government intended to introduce legislation, similar to that already in force in Northern Ireland, which would permit inferences to be drawn from the accused's silence.

## PROVISIONS OF SECTION 35

Section 35(3) provides that, in determining whether the accused is guilty of the offence charged, the Court is permitted to draw such inferences as appear proper from their failure to give evidence. This provision does not apply if the defendants' mental or physical condition makes it undesirable for them to give evidence. Once the accused has elected to give evidence, the Court can draw inferences from a refusal to answer questions without "good cause". Section 35(5) provides that a refusal shall be taken to be without good cause unless the accused is entitled to refuse on the grounds of privilege or there is a specific statutory right to refuse. The Judge also retains a general discretion to allow the accused to decline to answer unfair or oppressive questions. In *R v Ackinlose* [1996] Crim LR 747 the accused elected to give evidence but refused to reveal the name of an associate. The Judge told him he had no choice but to answer the question. He appealed on the basis that this line of questioning was oppressive and in breach of s 35(4) and (5). In dismissing his appeal, the Court confirmed that having been sworn, the accused risked inferences being drawn from

his refusal to answer questions, unless it could be established that he had good cause to do so within the meaning of s 35(5). Section 35(4) only applied to the accused who declined to go into the witness box.

Section 35(2) provides that at the conclusion of the evidence for the prosecution, the Court must be satisfied that the accused is aware of the right to give evidence and knows that inferences may be drawn from a failure to give evidence or answer questions without good cause. When the accused is represented the burden of explaining the consequences of remaining silent rests with the lawyer but the Judge is required, in the presence of the jury, to inquire whether the representative has advised the accused. In *R v Price* [1996] Crim LR 738 the Court of Appeal was of the opinion that a failure by the trial Judge to determine whether the accused was aware of the consequences of remaining silent was a material irregularity, which resulted in the need for a retrial. If the accused is not legally represented the Judge must, in the presence of the jury, invite the accused to give evidence. The form of words to be used by the Judge is set out in the *Practice Direction (Crown Court: Defendant's Evidence)* [1995] 1 WLR 657.

The absence of an obligation upon the accused to testify has been a common factor in common law jurisdictions and is thought to derive from the nature of accusatorial proceedings. This right is retained by virtue of s 35(4), which provides that the accused shall not be compellable to give evidence and shall not be held in contempt of Court for exercising the right not to testify. Choosing to exercise the right not to give evidence will be of no significance unless the prosecution can produce sufficient evidence to establish that there is a case for the accused to answer. Section 38(3) provides that a Court or jury is expressly prohibited from convicting the defendant solely on the basis of an inference from a failure to give evidence or a refusal to answer questions. In *R v Cowan* [1995] 3 WLR 818, the Court of Appeal referred to these provisions when it rejected a suggestion that s 35 "watered down" some of the traditional procedural protections for the accused. In the opinion of the Court, the effect of s 35 was to allow a failure to testify as a further evidential factor to justify a conviction; this did not alter the burden of proof which remained on the prosecution throughout the trial.

### Judicial discretion

Section 38(6) of the 1994 Act provides that nothing in the new developments should prejudice the power of the Court to exclude evidence or prevent questions being asked in the exercise of its general discretion. In England and Wales, in addition to a general common law power, s 78 of the Police and Criminal Evidence Act 1984 provides the trial Judge with a statutory discretion to exclude prosecution evidence if its admission would have an adverse effect on the fairness of the proceedings. Further, the use of the phrase "as appears proper" in s 35(3) indicates that the Judge has a discretion as to when the jury should be advised against drawing adverse inferences. However, the Court of Appeal has given a clear indication that provided the Judge gives the jury adequate directions of law and leaves the decision whether to draw an inference to them, it will be reluctant to interfere with the exercise of discretion. Other changes to the traditional position brought about by the 1994 Act include permitting the prosecution to make suitable comment on the defendant's absence from the witness box. Section 168(3) and Sch 11 of the 1994 Act repealed s 1(b) of the 1898 Act which prohibited any comment by the prosecution.

### Appropriate direction to jury

In *R v Cowan* [1995] 3 WLR 818, the first appeal to be heard under the 1994 Act, the Court of Appeal was satisfied that s 35 altered, and was intended by Parliament to alter, the law and practice applicable when an accused in a criminal trial exercises the right to remain silent. Failure to testify could now be regarded as an *evidential factor* in support of the prosecution's case. Provided "certain essentials" were highlighted, the jury could properly arrive at the conclusion that silence could only "sensibly be attributed to the accused having no answer or none that would stand up to cross-examination". The Court considered it "essential" that the Judge should remind the jury that the burden of proof remains on the prosecution; emphasise that the defendant is entitled to remain silent; explain that an inference from failure to give evidence cannot on its own prove guilt and make it clear that it must be satisfied that the prosecution has established a case to answer before drawing inferences from silence. Their Lordships approved a specimen direction proposed by the Judicial Studies Board which they considered may need some adapting, depending upon the particular circumstances of the case. The Court of Appeal has become increasingly concerned to ensure that the trial Judge adheres to the four essential elements of the *Cowan* direction.

Whilst acknowledging that the jury would not be invited to draw inferences from every refusal to testify, Their Lordships in *Cowan* declined to give guidance on the circumstances when it would be inappropriate for the jury to draw inferences. Lord Taylor considered that it was impossible to anticipate all the circumstances in which a Judge might think it right to direct or advise a jury against drawing inferences. However, in his view there would need to be "some evidential basis for doing so or some exceptional factors in the case making that a fair course to take". It would not be considered proper for defence counsel to give the jury reasons for his client's silence at trial in the absence of evidence to support these reasons. In *R v Napper* [1996] Crim LR 592, for example, the appellant argued that failure by the police to interview him deprived him of an opportunity to give an account of events whilst his memory was fresh. By the time of the trial he could not be expected to remember details. Following his refusal to testify, the trial Judge gave the standard direction approved by the Judicial Studies Board. He submitted that the Judge should have exercised his discretion and advised the jury against drawing inferences. His appeal was rejected. Whilst accepting that it was always open for the trial Judge to direct against drawing an inference, the Court of Appeal considered that there would need to be some exceptional factors before such a course was justified.

In *Cowan*, the Court rejected the argument that failure to testify through fear of revealing previous convictions to the jury was sufficient reason for avoiding the provisions of s 35. In *R v Taylor* [1999] Crim LR 77 the accused refused to answer police questions during interview and failed to testify to prevent the jury hearing about his previous convictions for firearms offences. The trial Judge, in line with the mandatory procedure set out in s 35(2), established in the jury's presence that the defendant was aware of the consequences of remaining silent. He was convicted of murder, robbery and various firearms offences. On appeal, it was argued that no direction should have been given regarding his failure to testify. Dismissing the appeal, the Court was of the opinion that as a result of the s 35(2) procedure, the jury was aware of the consequences of remaining silent; to

tell the jury not to draw inferences without explaining the reasons why would lead to confusion.

From the outset, the Court of Appeal has acknowledged that the drawing of inferences from silence is a "particularly sensitive area" requiring the trial Judge to give carefully framed directions to the jury. Whilst reluctant to confine the Judge to "the mouthing of a number of mandatory formulae", the Court of Appeal in *R v Birchall* [1999] Crim LR 311, held that a failure to give the full *Cowan* direction rendered the appellant's conviction for murder unsafe. In the opinion of the Court, it was essential for the Judge to direct the jury that it could not start to consider whether to draw inferences from the defendant's failure to give evidence unless satisfied that the prosecution had established a case to answer. Similarly, in *R v Ilhan Doldur* 1999 *The Times* 7 December, the Court of Appeal stressed the need to outline to the jury that the accused's failure to testify could not by itself support a finding of guilt, the jury must be made aware that a conviction could not rest on an adverse inference alone. It is apparent that Their Lordships are becoming increasingly concerned that unless Judges exercise considerable care in directing the jury on the provisions of art 35, the United Kingdom will find itself in violation of art 6 of the European Convention on Human Rights.

#### EUROPEAN CONVENTION ON HUMAN RIGHTS

A provision similar to s 35 of the 1994 Act was introduced in Northern Ireland in 1988 (art 4 of the Criminal Evidence (Northern Ireland) Order 1988). In *Murray v Director of Public Prosecutions* (1994) 97 Cr App R 151, the House of Lords was satisfied that this legislation did not deprive the accused of a fair trial, it found that it was acceptable to permit a trial Judge, sitting without a jury, to draw adverse inferences from a failure to give evidence. The defendant had been arrested under the United Kingdom's Prevention of Terrorism (Temporary Provisions) Act 1989 for aiding and abetting false imprisonment and was deprived of access to a solicitor during police interrogation. The trial Judge drew adverse inferences from his failure to give evidence.

When this case was eventually heard by the European Court of Human Rights, (*Murray v United Kingdom* (1996) 22 EHRR 29) it found that there had been no violation of the applicant's right to a fair trial as guaranteed by art 6(1) of the European Convention on Human Rights. In the Court's view, there was no absolute rule that the accused's silence could not under any circumstances be used against him at trial. Whether the drawing of inferences from the defendant's silence infringes the right to a fair trial is a matter

to be determined in the light of all the circumstances of the case. Provided procedural safeguards to protect the rights of the defence exist, the manner in which the accused conducts his defence, including the decision not to testify, can play a role in the assessment of the evidence without violating the right to a fair trial.

The European Court of Human Rights was satisfied that art 4 of the 1988 Order contained provisions limiting the extent to which reliance could be placed on inferences. Accordingly, given the weight of the evidence against the applicant, drawing an adverse inference was reasonable. Whether the Court will arrive at the same conclusion in relation to the provisions of s 35 of the 1994 is a matter of some speculation. In *Murray* the tribunal of fact was an experienced Judge who was required to explain the reasons for his decision to draw inferences and the weight attached to them. As a consequence, the appellate Courts could review the exercise of discretion in relation to the drawing of inferences. In England and Wales the jury is not required to articulate reasons for its decision or to indicate the weight given to any specific element in the case. However, the jury will not be called upon to reach a verdict unless the trial Judge is satisfied that the prosecution has established a *prima facie* case against the accused. Furthermore, the jury must be satisfied that the Crown's case is sufficiently compelling to call for an answer from the defendant before considering drawing an adverse inference. The Court of Appeal is conscious of the risk that the silence provisions could generate an adverse ruling by the European Court of Human Rights unless they are applied with caution.

#### CONCLUSION

Whilst the concept of a fair trial requires that the accused should not be compelled to give evidence, there is no absolute rule that exercising the right to remain silent cannot under any circumstances be used as evidence at trial. To base a conviction solely on the defendant's silence would be to exert undue pressure on the accused to testify and would be incompatible with the privilege against self-incrimination. However, if the situation calls for an explanation, it may be contrary to common sense to expect the jury to completely overlook the defendant's silence. In many jurisdictions, the manner in which the accused behaves or conducts the defence is considered to be a relevant factor when evaluating the evidence in the case. The European Court of Human Rights is satisfied that provided the drawing of inferences is regulated by sufficient safeguards which protect the rights of the defence, the accused will not be denied a fair trial. Whether the safeguards in the 1994 Act provide sufficient protection to satisfy the Court remains to be seen. □

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# "ABOLISHING" THE RIGHT TO SILENCE

*Ed Cape, The University of the West of England*

*analyses the experience of "abolition" in England and Wales in a revised version of a paper presented to the 12th Commonwealth Law Conference, Kuala Lumpur, September 1999*

In a number of Commonwealth jurisdictions, including New Zealand, the common law approach to the evidential significance of "silence" is the subject of controversy. The issue appears to have caught the political imagination in common law countries around the world. The right to silence, it is argued, favours criminals, especially professional criminals, and interferes with the process of holding them to account for their crimes. This view was forcefully espoused by Michael Howard, the then British Home Secretary, in a speech to his party conference in October 1993. Announcing his intention to introduce legislation he pronounced,

As I talk to people up and down the country, there is one part of our law in particular that makes their blood boil ... It's the so-called right of silence ... The so-called right to silence is ruthlessly exploited by terrorists. What fools they must think we are. It's time to call a halt to this charade. The so-called right to silence will be abolished.

The fact that the Royal Commission on Criminal Justice in its report published just three months earlier had not only found no evidence that the right to silence was "exploited" by experienced criminals or terrorists, but had also found that those who exercised the right were no less likely to be charged or convicted, was not allowed to get in the way of his populist appeal. Indeed, the Royal Commission, fearing that abolition of the right to silence at the pre-charge stage would result in more innocent people being convicted, had recommended that the common law approach to pre-charge silence should be preserved (*Report of the Royal Commission on Criminal Justice*, London: HMSO, p 54).

In the event, however, this recommendation was ignored, and the right to silence both pre-charge and at trial was abolished in England and Wales by the Criminal Justice and Public Order Act 1994 (CJPOA). Shortly afterwards legislation was introduced that would also impose an obligation on the accused to reveal the nature of their defence prior to trial (Criminal Procedure and Investigations Act 1996). Whilst permitting a Court to draw inferences from failure or refusal of a defendant to give evidence is not uncontroversial, the purpose of this article is to explore the English experience of permitting evidential consequences to follow from an accused's silence in the face of police questioning.

## THE "SILENCE" PROVISIONS

Section 34 of the Criminal Justice and Public Order Act 1994 permits "proper inferences" to be drawn where an accused

relies on facts at trial which he or she did not tell the police about on being questioned under caution or on being charged, provided that it is reasonable to expect the accused to have mentioned those facts. In the leading case on s 34, *R v Argent* (1997) 2 Cr App R 27, it was held that in order for inferences to be drawn six conditions must be satisfied:

- (i) there must be proceedings for a criminal offence;
- (ii) the failure to mention facts must occur before charge;
- (iii) the failure to mention facts must occur during questions under caution or at charge;
- (iv) the questioning must be directed to trying to discover whether or by whom the alleged offence was committed;
- (v) the fact not mentioned is relied on by the defence at trial; and
- (vi) the accused could reasonably have been expected to mention the fact.

The power to draw inferences is permissive. Provided the first five conditions are satisfied, it is for the jury (or Magistrates) to decide whether it is reasonable to expect the defendant to have mentioned the relevant facts and, if so, whether and what inferences to draw. The Court of Appeal, in the first case on the section, *R v Condron* [1997] 1 WLR 827, held that the question of inferences must normally be left to the jury, and that it is not normally appropriate for the Judge to rule on admissibility of "no comment" interviews before conclusion of the evidence.

Section 36 of the CJPOA permits a Court to draw inferences where an arrested person, having been required to account and warned of the consequences of refusal, fails to account to a police officer for any object, substance or mark on their person, clothing or possessions, or in any place in which they were at the time of arrest. Section 37 similarly provides for inferences to be drawn where an arrested person fails to account for their presence at the place where they were when they were arrested.

There are a number of factors common to all three sections. In particular, whilst a person cannot be convicted on the basis of inferences alone (s 38(3)), inferences can be taken into account not only in determining guilt, but also in determining whether there is a case to answer. This has created difficulty in respect of inferences under s 34 since it clearly implies that an accused may be treated as relying on facts in their defence even before they have had an opportunity to give or call evidence. There are also a number of significant differences between the sections. Since ss 36 and

37 permit inferences from mere failure to account, without reference to any facts relied upon in the accused's defence, the prosecution can lead evidence of failure to account. Arguably, therefore, these two sections undermine the presumption of innocence in a way that s 34 does not since the mere failure to provide an account to the police may amount, in effect, to evidence of guilt. Furthermore, there is no reasonableness requirement in ss 36 and 37 – failure to account may lead to inferences whatever the reason.

It should be noted that, quite apart from the silence provisions of the CJPOA, a number of statutes criminalise failure to answer questions, particularly in investigations of company fraud and other white collar crimes, and also enable answers to such questions to be used against the person at a subsequent criminal trial (see, for example, s 434 of the Companies Act 1985). This, the European Court of Human Rights has decided (see *Saunders v UK* (1997) 23 EHRR 313), is contrary to the right to fair trial under art 6 of the European Convention on Human Rights (ECHR), and as a result the UK has had to legislate to prevent answers obtained in such circumstances from being used against the accused (Youth Justice and Criminal Evidence Act 1999 s 59 and Sch 3). As will be seen, the ECHR may yet further undermine the "silence" legislation.

### A FIELD DAY FOR LAWYERS?

Section 34 of the CJPOA, in particular, has led to a phenomenal number of cases being appealed to the Court of Appeal in the short period of its existence. It has also required the Court of Appeal to issue a practice direction setting out how the question of inferences must be approached, and how juries must be directed. This has led one of the UK's leading academic lawyers to call for a reversion to the common law because s 34 "consumes too much judicial time both at trial and on appeal", is too complicated for many juries to understand, and because "the gains in terms of cogent evidence are likely to be slight" (D Birch, "Suffering in Silence: A Cost-Benefit Analysis of s 34 of the Criminal Justice and Public Order Act 1994" [1999] Crim LR 769). In short, abolishing the right to silence is simply not worth the effort. So what have been the problems?

### The power to detain and question suspects as an investigative strategy

Reversing a long established common law principle, the Police and Criminal Evidence Act 1984 (PACE) gave statutory power to the police to detain arrested suspects for the purpose of gathering evidence, whether by questioning the suspect or otherwise. Section 37 of PACE permits the police to detain a suspect without charge if detention is "necessary to secure or preserve evidence relating to an offence for which he is under arrest or to obtain such evidence by questioning him", but they must decide whether to charge the suspect once there is sufficient evidence to charge. Defence lawyers advising clients in police detention, anxious to avoid the possibility of inferences from silence, have argued that the police should have charged their client rather than detain the client for questioning. One of the conditions for drawing inferences under s 34(1)(a) is that police questioning must be directed to trying to discover whether or by whom the alleged offence was committed. Thus, quite apart from the issue of whether detention is unlawful in circumstances where the police detain a suspect despite having sufficient evidence to charge them, the question arises whether inferences can be drawn under s 34 (or ss 36 or 37)

from failure to answer questions (or failure to account) in an interview conducted in such circumstances. In *R v Pointer* [1997] Crim LR 676 the Court of Appeal held that the police were entitled to conduct a limited interview in order to ascertain whether the suspect had said all he or she wished to say. However, inferences could not be drawn in these circumstances because the interviewing officer would not be seeking to find out whether or by whom an offence had been committed – he or she would be treated as already knowing the answer.

However, *Pointer* was distinguished in *R v McGuinness* [1999] Crim LR 318. The Court was concerned that if an interview could not be conducted in such circumstances:

it would mean that in every case where the police had got together a prima facie case against a suspect they would be bound to charge and the opportunity would be lost not only for the police to question the suspect but for the suspect to put forward an explanation which might immediately dispose of any suspicion held against him.

The Court was, therefore, prepared to permit questioning to proceed to allow for consideration of any explanation or lack of explanation from the suspect. Thus whilst in *Pointer* the Court was prepared to permit an interview to establish that the suspect did not want to answer questions, in *McGuinness* it was prepared to permit an interview to establish not only whether the suspect had an explanation that he or she wanted to give, but what that explanation was.

The right to silence provisions have, therefore, prompted consideration of a fundamental question that one would have expected to have been settled many years ago – at what point must detention and investigation cease and a decision made as to charge. The fact that it was not is partly because of the changing perceptions of the police function and, perhaps, because of a reluctance to admit that the police, in carrying out an adversarial function – gathering evidence for the prosecution – have increasingly been granted inquisitorial powers. If the police are to be permitted powers to detain a suspect for investigation beyond the point when they are satisfied that there is a prima facie case, how long can they be permitted to go on using detention of a suspect to strengthen the prosecution case?

### The information deficit

One of the issues that concerned the Royal Commission on Criminal Justice was the information deficit as between prosecution and defence, particularly at the early stages of a case. It was this that prompted it to recommend retention of the right to silence at the police station, whilst arguing for defence disclosure in advance of trial:

it is when but only when the prosecution case has been fully disclosed that defendants should be required to offer an answer to the charges made against them at the risk of adverse comment at trial on any new defence they then disclose or departure from the defence which they previously disclosed. (p 55.)

However, the CJPOA has effectively imposed an obligation on the accused to disclose information to the police at the pre-charge stage without imposing any reciprocal obligation on the police. An argument that a necessary implication of the silence provisions of the CJPOA was that the police should have to disclose information about their case to the suspect prior to police interview was given short shrift by the Court of Appeal (*R v Imran and Hussain* [1997] Crim

LR 754). Furthermore, whilst any hint of trickery on the part of the accused is likely to lead to inferences being left to the jury, the Courts have endorsed certain kinds of trickery and deceptive behaviour on the part of the police (for example, "bugging" police cells: *R v Bailey* [1993] 3 All ER 513). Thus the suspect must be straight with the police, but the police do not have to be straight with the suspect.

### **Relying on facts not mentioned to the police**

For inferences to be drawn under s 34, the accused must rely on facts at trial which were not mentioned to the police on being questioned (s 34(1)(a)) or on being charged (s 34(1)(b)). This is central since one of the primary justifications for s 34 was the avoidance of "ambush" defences. This provision involves two questions of fact: (a) is there some fact that the accused has relied on in his or her defence; and (b) did the accused fail to mention it when being questioned? Clearly, a fact is relied on if the accused gives or calls evidence about that fact (although asserting a hypothesis – "it may have been because ..." – was held not to amount to an assertion of a fact in *R v N* [1999] Crim LR 61). It has been held, however, that an accused may be treated as relying on a fact even if they do not give or call evidence (see *R v Bowers* [1998] Crim LR 817 and *R v Moshaid* [1998] Crim LR 420). Merely putting the prosecution to proof is unlikely to be treated as reliance on a fact, but cross-examination of prosecution witnesses in a way that clearly implies the assertion of facts on behalf of the accused is likely to be treated as a reliance on facts (for a critical analysis, see S Seabrooke, "More caution needed on s 34 of the Criminal Justice and Public Order Act 1994" (1999) 3 *Int'l J of Evidence and Proof* 4).

Whether an accused should be treated as mentioning, or failing to mention, facts on being questioned by the police gave rise to much speculation as to defence strategies at the police station, although the attitude of the Courts appears, for the moment, to be settled. The Law Society of England and Wales (*Criminal Practitioners Newsletter*, July 1997), and the author (E Cape, (1999) *Defending Suspects at Police Stations*, London: LAG), took the view that a suspect may "mention" facts by handing in a statement rather than orally answering questions. This view has now been endorsed by the Court of Appeal in *R v McGarry* [1998] 3 All ER 805 in which it was accepted that the statement given to the police in interview amounted to a sufficient mentioning of the facts where it set out the "bare bones" of a defence of self-defence which was put more fully at trial. However, how far do the "bare bones" have to differ from the facts relied upon in Court by the accused for a Judge to decide that inferences should be left to the jury? Short of giving a full explanation in the police interview, the accused cannot be certain.

### **Reasonableness and legal advice**

Inferences under s 34 may only be drawn if the accused fails to mention relevant facts "which in the circumstances existing at the time the accused could reasonably have been expected to mention". Normally, as noted earlier, reasonableness will be for the jury to decide and it would seem that only in exceptional circumstances would a Judge direct that it could not be reasonable for inferences to be drawn. The test is subjective and, as the Court of Appeal in *Argent* put it, the Court or jury must have regard to "the actual accused with such qualities, apprehensions, knowledge and advice

as he is shown to have had at the time". Relevant circumstances might relate to the accused, for example, their age, experience, mental capacity, state of health, sobriety, tiredness or personality (*Argent*), or to the investigation (*R v Roble* [1997] Crim LR 449).

The factor that has caused the greatest concern in respect of the reasonableness condition has been the effect of legal advice. Suspects in police detention in England and Wales have a statutory right to legal advice (PACE s 58), a right treated as a human right guaranteed by art 6 of the ECHR (see *Murray v UK* (1996) 22 EHRR 29). The argument may be summarised as follows. On the one hand, how can it be right to penalise an accused by drawing adverse inferences from their silence when they remained silent as a result of advice given to them by their lawyer? A person arrested and held in custody is entitled to legal advice and, once they have requested it, cannot normally be interviewed by the police until they have received it. If they wish, they are entitled to insist that the solicitor remains with them during any interview by the police. On the other hand, if legal advice renders silence reasonable, a lawyer could always prevent inferences by advising silence.

Resolution of this argument entails, in part at least, a judgment as to the proper role of defence lawyers at the pre-charge stage. Is their role to advise clients, if necessary in strong terms, as to the appropriate course of action? If so, it would seem wrong to penalise the accused for relying on that advice. Otherwise, a suspect may need legal advice as to whether they should accept legal advice not to answer questions. If, however, the proper role of the defence lawyer is merely to provide information to a client about the possible courses of action open to them in any given circumstances, this should not inhibit the drawing of inferences since the client is given a choice. On this view, legal advice would be neutral in its effect on inferences. However, it represents a very limited view of the role of the lawyers and is at odds with how lawyers perform their role in many other contexts. It is also at odds with the description of the lawyer's role set out in PACE Code of Practice C, which provides that the "solicitor's only role in the police station is to protect and advance the legal rights of his client".

The solution put forward by the Court of Appeal to this problem has caused considerable problems for defence lawyers in knowing how to advise their clients, and has also opened up an attack on the important principle of legal professional privilege. In *Condron*, the Court dismissed the argument that legal advice not to answer questions should prevent inferences being left to the jury as being an "extreme position" that "would render s 34 wholly nugatory". If this was so, said the Court, any competent solicitor would be bound to advise his or her client to remain silent in police interviews.

In the Court's view, in determining reasonableness "it is not so much the advice given by the solicitor, as the reasons why the defendant chose not to answer questions that is important". However, the Court stated later in the judgment that in order to persuade a jury not to draw adverse inferences, it will usually be necessary for the defendant, or their solicitor, to give evidence of the basis or reasons for the advice. This approach is open to criticism. It is difficult to see why, if the primary issue is the reasonableness of the defendant's conduct, the reason or basis for the advice is relevant, at least in the majority of cases. The advice is, of course, that of the solicitor. The solicitor may, or may not, have explained the reason for the advice at the time it was



given. The client may, or may not, have understood the reasoning. The key issue is surely whether they relied on that advice, not why the advice was given.

In any event, the Court in *Condrón* stated that whilst the accused could simply explain in Court that they relied upon legal advice in not answering questions, that was unlikely to persuade a jury not to draw inferences unless it also heard evidence of the basis or reasons for the advice. However, as the Court in *Condrón* noted, telling the Court what the reason or basis for the advice was

... may well amount to a waiver of privilege so that the accused, or if his solicitor is also called, the solicitor, can be asked whether there were any other reasons for the advice, and the nature of the advice given, so as to explore whether the advice may also have been given for tactical reasons.

Whether this would present problems for the accused would, of course, depend on the particular circumstances of the case. Apart from anything else, it could cause considerable practical problems if the solicitor is still acting for the accused, and could encourage some defendants to change solicitor and then argue that they were given wrong, or even incompetent, advice but that they knew no better than to rely upon it.

In its original advice to solicitors, the Law Society had advised lawyers acting at the police station to explain at the beginning of the police interview whether the client is remaining silent on legal advice, and the reason why the advice was given. The purpose of doing so was partly driven by the desire to be courteous to the police in explaining how their client would react to questioning, but, more importantly, was designed to try to get the reasons for the advice before the Court without waiving privilege. The *Condrón* case led the Law Society to revise its guidelines, to distinguish between reasons for advice that may amount to waiver of privilege and reasons that would not. If the advice was based on information given to the lawyer by the client, giving the reasons to the police would waive privilege. If, on the other hand, the reason for advice did not arise from a privileged communication, for example, it was based on lack of information about the evidence from the police, giving reasons may not amount to waiver. This was a speculative distinction that, in the event, rapidly proved unsustainable.

Consternation was caused amongst defence lawyers by *R v Bowden* (1999) 2 Cr App R 176 in which the Court of Appeal held that disclosing the reasons for advice in the police interview amounted, from that point onwards, to a waiver of privilege. This would enable the prosecution to cross-examine the accused, and their lawyer if called to give evidence by the accused, not only on what was said during the private consultation at the police station, but also on what may not have been said. The prosecution case in *Bowden* was that the accused had robbed a McDonalds restaurant and gone abroad on holiday on the proceeds. Bowden gave evidence that he had paid for the holiday with money borrowed from his mother. The defence lawyer had explained in the police interview that he advised his client not to answer questions because of the weakness of the police evidence. This was treated as an implied waiver, which enabled the prosecution to ask Bowden whether he had told his solicitor how he had paid for his holiday. Waiver also raises the question of whether the prosecution could, itself, call the defence lawyer. There is, of course, no property in a witness but it would raise considerable ethical and practical questions if the defence lawyer was required to give evidence.

Thus the position has now been reached where, in order to seek to persuade a Court not to draw inferences where silence has resulted from legal advice, pressure is placed on the accused to adduce in evidence the reasons for that advice. However, all mechanisms for doing so are likely to lead to an implied waiver of privilege. It is only recently that the inviolability and importance of legal professional privilege has been confirmed (see *R v Derby Magistrates' Court ex p B* [1995] 4 All ER 526). Yet it has been put at risk for an entirely unnecessary reason. As argued above, the real issue in determining reasonableness is why the accused remained silent. In most cases the reason for the advice is irrelevant. The accused remained silent because they did what most people who pay for legal advice do – they relied on that advice because that is why a lawyer was consulted.

### What inferences may be drawn?

It was noted earlier that a person cannot be convicted on the basis of inferences alone – there must be some other evidence of guilt. One question that has remained unresolved is how strong that evidence must be before inferences can be relied upon. In the case of inferences under s 35 (silence at trial) the other evidence must be sufficient to establish a *prima facie* case, without inferences from silence coming into play. Given the reasoning, this should also be the case in respect of inferences from pre-charge silence, a view endorsed by the European Court of Human Rights in *Murray*. This would conflict, however, with the fact that inferences may be drawn in deciding whether there is a case to answer (ss 34(2)(c), 36(2)(c) and 37(2)(c)).

Given that in most cases the decision regarding inferences has to be made by people who are legally untrained, that is, jurors or lay Magistrates, it can be argued that they cannot be expected to indulge in the mental gymnastics apparently required of them. The complexity of the thought processes involved is illustrated by the recently reported case of *R v Mountford* [1999] Crim LR 575 in which, interestingly, the Court of Appeal decided that, despite all of the conditions enumerated in *Argent* being satisfied, the question of inferences under s 34 should not have been left to the jury. The defendant, who was accused of possessing a Class A drug with intent to supply, was seen by prosecution witnesses to have dropped a packet of heroin out of the window of a house as the police arrived to execute a search warrant. He said at trial that the other person present in the house, W, was the dealer and that as the police arrived W had thrown the packet to the accused who had then dropped it out of the window. He had remained silent on being questioned at the police station. The Court held that whether or not the fact not mentioned in interview but relied on at Court – that is, that W was the dealer who had thrown the drugs to the accused – was true was *the issue* in the case. It was difficult to see, said the Court, how a jury could have rejected the accused's reason for not mentioning the fact without also rejecting the truth of the fact. The truth of each depended on the other. In these circumstances, it would be wrong to permit the jury from using the inference from silence in deciding whether to believe the fact stated since, as there was no evidential basis for drawing a conclusion, a conclusion as to the inference to be drawn would be indistinguishable from a conclusion as to whether to believe the fact itself. Although the Court described it as a matter of common sense, it is by no means clear that a jury would have understood the issue and, in holding that inferences should not have been left to the jury, the Court presumably thought so too.

*continued on p 136*



# A BORDERLESS WORLD OF ELECTRONIC COMMERCE

*The Hon Justice W D Baragwanath*

*updates two recent addresses given to an APEC conference, Kuala Lumpur, October 1998 and an APEC/WTO seminar, Auckland September 1999*

## INTERNATIONAL CIVIL LAW REFORM

### Introduction

In October 1998 the New Zealand Law Commission issued its Report 50 *Electronic Commerce Part One: A Guide for the Legal and Business Community*. Since then I have attended two international conferences on aviation safety and an OECD ministerial conference on Electronic Commerce, and been to New York to visit UNCITRAL and the paperless world of the US Bankruptcy Court. I have come away with a double message.

The first is of a vision of a better future. There is general consensus that a borderless world of electronic commerce is both technically attainable and essential to the optimal social and economic development of the world. If properly managed, enhanced commerce and education, aviation safety and culture are among the benefits that can emerge, to the considerable advantage of the world community. Importantly, the needs of developing nations are emphasised; radical reduction in the cost of communications will, if properly managed, allow the developing world to take full advantage of the advanced systems, bringing opportunities for beneficial substantive results, both of which are at present largely closed to them.

The second message has a discordant note: of risk that the opportunity will be lost by our generation. That is because the legal systems of most of the 185 states are incompatible with one another and there are no adequate plans in place to deal with that problem. My thesis is that APEC should ensure that the opportunities the scientists and engineers now offer the world community are grasped, not lost because of lack of vision in dealing with the legal obstacles. I invite you to consider whether there should be established a group of experts to advise both APEC and its members and also the world community as to how the legal impediments to progress can be removed in a manner consistent with the proper protection of national interests.

### The first gap

The lesson of incompatible railway gauges in neighbouring states was painfully learned in the age of steam; the world's scientists and engineers have ensured that there is no such impediment to the free despatch and receipt through cyberspace of electronic messages in intelligible form. Yet in order to do business more is required: that both parties to an international transaction can use a common system of authentication; that confidentiality of their dealings can be preserved; and that there are clear rules and procedures for

enforcement of the deal. As was observed by Peter Bernstein in *Against the Gods*:

Only the foolhardy take risks when the rules are unclear, whether it be balla [a game referred to by the 15th century Italian thinker Paccioli], buying IBM stock, building a factory, or submitting to an appendectomy. (John Wiley & Sons 1998, p 68.)

The remark has particular force in the context of cross border transactions. There is a fundamental systemic gap in recognising the need for a single system and in planning to achieve it.

### The "dilemma"

The jurist Savigny recognised that the laws of nations would differ, responding to different conditions and perceptions of different societies. So there was developed within each domestic system a set of rules as to conflict of laws, to regulate how the Courts of that state would deal with cross border issues coming before them. Such differences remain. Moreover the ferment of technical development is still increasing. It has as such given rise to a responsible and widely held view that it would be unwise to impose any global regime that would prematurely confine the development of a system of communication that is at present in its infancy. There are calls for patience.

Yet concurrently each state is at this moment either moving fast, preparing to legislate to provide its own laws as to such essentials to global electronic commerce as signature authentication and encryption, or by default excluding its citizens from participation in the new world economy, by failing to do so.

Is there not a dilemma between calls for delay and need for prompt action?

### The answer to the "dilemma"

The answer is no. I share the concern about prematurely imposing a regime for control of the operation of the Internet. But that concern affords no justification for inertia.

The answer is to be found in a distinction between two quite different functions of the law: that of prohibition, and that of facilitation. The valid objections to premature stipulation by law of what may not be done, such as the criminal law, have no application to laws which show what may be done, such as laws which stipulate how parties can contract effectively.

As to the former – the law's role of prohibition – it is of course undesirable for states to legislate to freeze develop-

ment by prohibiting use of other than specific technology. Moreover all states will wish to consider the consequences of say, the exposure of children to electronic pornography, on which views differ quite radically from one part of the globe to another. There are both technical engineering questions and moral and legal issues as to how the competing interests of freedom of speech and expression and of protection of the young are to be reconciled. States should, as far as possible, seek consensus on the substantive questions and on procedures to give effect to agreed solutions. It is desirable that systems be put in place both within states and among nations; for example UNICEF, as well as institutions more specifically concerned with electronic communication may be expected to have significant interest.

### **The need for a common approach**

But there is no need to sort out what should and should not be prohibited either technically or for moral reasons before getting on with arrangements for facilitation of commerce. Rather they should proceed concurrently. And there should be a common approach to the work of facilitation. It is surely absurd to leave each state to devise its own part of what must be a seamless global whole; like builders of a transcontinental railway preparing their own plans and proceeding with construction without meeting to agree on uniform standards.

There is of course a great deal of valuable work already performed and in prospect, as by APEC with trade issues, OECD with tax, and WIPO with intellectual property, a useful summary is contained on the OECD web site [www.ottawaoecdconference.org](http://www.ottawaoecdconference.org). Last week at the United Nations, where the 6th Committee was considering UNCITRAL's report on the work of its 31st session, including electronic commerce, there was uniform praise for its achievements. There were speeches on behalf of Malaysia, which with the private sector has embarked on work on a Multimedia Project and has enacted IT legislation, including the Digital Signature Act 1997; China, which emphasised the importance of harmonising legal norms in the light of the change in the world economy and the need to pay regard to the needs of the developing countries; Vietnam; the EU and associated countries; and Germany. Our Law Commission's work has been greatly assisted by the work of others in APEC and beyond. In the EU's Hague Conference, the Australian (Federal) Electronic Commerce Experts' Group, the US National Commission on Uniform Law, and its work of scholars and governments there is much important activity.

But I have been unable to find any systematic arrangement to ensure that the major players are actually coordinating their activity with regard to legal impediments. The experience of the Y2K problem shows what can happen if planning is left to someone else. Whether failure to plan will lead to a similar problem we do not know; what is very plain is the colossal cost of the lost opportunity if those of us exercising public authority fail to attack the issues which are the common responsibility of us all, and to do so in a coordinated fashion.

### **A proposal for action**

I venture to offer for consideration the following proposal: that the major participants – APEC and OECD among them – should agree upon a common plan.

It might include the following elements:

First, that the members of APEC consider whether there are legal issues which should receive particular attention having regard to the needs of those within this region.

Secondly, adopting the policy that, subject to the proper interests of states as to consumer protection and other national interests, it is desirable that legal impediments to a seamless system of electronic commerce be removed.

Thirdly, that a small group of experts be appointed, to work with other major agencies, to:

- ensure coordination and avoid duplication of effort;
- identify legal impediments to a seamless system of electronic commerce;
- advise APEC and other agencies as to the issues and the optimum responses to them.

The other agencies would include UNCITRAL, which has already prepared a valuable draft concerning particular issues. Resources include the UNIDROIT Principles of International Commercial Contracts; work of the US National Commissioners on Uniform Law, of the Hague Conference and of the OECD.

Specific issues would be likely to include:

- what formalities would suffice to achieve an effective electronic contract;
- whether a contract has come into effect where an acceptance is distorted;
- jurisdiction;
- choice of law;
- liability of providers and limitations upon liability;
- the possibility of a convention.

### **An ultimate *lex mercatoria***

The lesson of the OECD conference was that the Internet will have a greater effect upon the world than the invention of the steam engine. It will allow small players and those at present seen as remote from centres of power to participate not only in commerce but in other activity, including education, influencing as well as being influenced by a greater flow of ideas, to the enrichment of all. As communication increases the need will more and more be perceived for a trader in any state to be able to deal with one in any other, familiar with and confident in the integrity and effectiveness of a uniform system of commercial law, enforced by authorities working in harmony according to the same principles. The result will be evolution of a common *lex mercatoria*.

There is no need to wait for agreement on all the elements of a new *lex mercatoria*, or the future patterns of the technical elements of the Internet, before moving. Those preparing for the November conference can prepare options for adoption there so that work can be under way before Christmas. Leaders can ensure that the lawyers emulate, rather than impede, the scientists, engineers, and traders, who are far ahead on the road to achieving a borderless world of economic commerce.

### **Subsequent events**

Following the 1998 conference APEC agreed to support the work of UNCITRAL. In February and October 1999 Paul Heath QC, a New Zealand Law Commissioner, visited Vienna to work with Dr Gerrold Herrmann and his colleagues on the next phase of the UNCITRAL Model Law. He will return to Vienna in February for the completion of the process.

In the meantime David Goddard has represented the Law Commission in the work of the Hague Conference on

Private International Law. The Law Commission has just published its second report NZLC 58 *Electronic Commerce Part Two*: a basic legal framework. A cross-sectoral group of government departments and the Law Commission has been working actively to ensure that New Zealand's planning and activities are both coordinated and effective.

And on 9 November 1999 Dr Herrmann was reported as proposing (*Australian Financial Review* AFR Net Services 9 November 1999):

A series of radical circuit breakers that would see international Internet arbitration bodies established to help overcome the complex legal problems surrounding Internet commerce.

... in an effort to delocalise the laws governing Internet transactions and make them manageable, companies buying and selling goods and services over the Internet could participate in a system of international arbitration underpinned by bank guarantees, to ensure that the one legal system applied to the Internet.

There is reason for optimism that the UN and its members will recognise the need for a joint approach to the issues of forum, jurisdiction, choice of law, substantive law and reciprocal enforcement that is essential to achieve a seamless civil system for the regulation and enforcement of electronic commerce.

## INTERNATIONAL CRIMINAL LAW REFORM

### A second gap

The October address was focused upon the creation of a seamless international legal regime of civil law to facilitate the seamless electronic regime that has removed all physical impediments to a borderless world of electronic commerce. It identified one major gap in planning: the absence of any systematic arrangement to ensure that major players are actually coordinating their activity to deal with legal impediments.

But a second major gap in planning has become apparent: the absence of any systematic arrangement to ensure that major players are actually coordinating their activity to deal with legal impediments in the criminal sphere.

Some may wonder – what has the criminal law to do with electronic commerce? Isn't it the civil law, and such items as agreement on Electronic Signatures, that really matter?

But civil law alone is inadequate to protect the community.

Within the societies with which I am familiar the civil law is invaluable for the law abiding – to provide rules that allow certainty in knowing how an effective contract is created, and what are the steps to take in the event of breach.

But every community has its villains – some pretending to be honest and others who make no pretence.

To deal with them the relatively gentle procedures of the civil law are inadequate: recourse must be had to the criminal law and its repertoire of:

- Police;
- Criminal Courts;
- Criminal sanctions, including fines and imprisonment.

Electronic commerce is not immune from such villains:

- In the USA alone more than US\$10 billion worth of data is stolen by thieves operating through computers every year;

- In 1995 banks and corporations lost US\$800 million from hackers;
- Moreover, it is necessary to ensure that computer systems are not used to cause harm to others. Computers are relied on to perform vital functions in many sectors of our society. They are used to administer banking and financial systems, transport control systems, communications systems, hospitals and a variety of other complex operations. A person who gains unauthorised access to a computer can cause major disruption. Computer misuse can cause extensive economic loss, not only to an individual company but also on a nation-wide scale; it can put lives in danger. Unauthorised interference with an airport control system or computers in a hospital are examples of the latter.

Until 1697 there was a sanctuary at White Friars in London for debtors and criminals: it was commonly known as Alsatia. In October 1998 we discovered an Alsatia in the centre of our banking system. The Court of Appeal held, as it was bound to do, that the 1961 Crimes Act did not catch theft of electronic credits: *R v Wilkinson* [1999] 1 NZLR 403. Accordingly the Law Commission proposed to update domestic criminal law to deal with computer hacking: report NZLC R54 *Computer Misuse*.

## Domestic responses to electronic commerce and crime

In that paper, we identified four distinct elements with which any criminal law concerning computer misuse must deal. These elements are unauthorised:

- interception of data stored on a computer;
- accessing of data stored on a computer;
- use of data stored on a computer; and
- damaging of data stored on a computer.

We have recommended the enactment of four new domestic criminal offences to deal with each of these elements. The precise form of the legislation has not yet been settled. Similar legislation has been required and has already been passed in the United Kingdom, Canada, Australia and Singapore.

The need for urgent response to a rapidly growing problem had become painfully apparent for two reasons. The first was the decision in *Wilkinson* that the deficiency in English criminal law exposed by the House of Lords in *R v Preddy* [1996] AC 815 existed also in New Zealand – that on the true construction of our Crimes Act electronic credits, as an intangible chose in action, are not capable of being "stolen". The Law Commission's response was NZLC 51 *Dishonestly Procuring Valuable Benefits* (December 1998). The second was the advice of the experts we consulted – that without effective laws against hacking there would be no effective sanction against abuse of the computer systems used to administer our systems of banking and finance, transport control, communication, hospitals and many others.

But the problem is too deep-seated to be adequately dealt with by traditional domestic law alone. The electron flows which govern access to and control of computers are themselves immune from border controls. So are the hackers who activate them from within a foreign jurisdiction. That is why Stephen Philippssohn in *Global Bans Needed To Police The Web* in *The Times* of 10 August 1999 made the forlorn observation, in relation to the regulation of pornographic material on the web:

Although a government can regulate the content of material accessed through [Internet Services Providers] in its own jurisdiction, undesirable material can still be accessed through a server based outside its jurisdiction. Such a server could belong to an ISP based in another country or to individuals abroad, operating from their homes.

What is required is international cooperation in the enforcement of the laws that are designed to regulate the content. However, given the differing attitudes to certain material in different nations and given the need for every country to enforce such laws vigorously, the achievement of such an objective seems to be near impossible. While loopholes exist to allow individuals access to such materials, there will always be someone ready to exploit them.

In so far as the remarks might relate to computer hacking, I agree with the diagnosis but not the prognosis. That is the subject of this address.

### International computer crime – the status quo

Until the computer age the existence of a further international Alsatia had not come to attention. International law has always recognised a criminal jurisdiction, but in a very restricted way. According to A G Karibi-Whyte, "The twin ad hoc tribunals and primacy over national Courts" (1999) 9 Crim L Forum 55, 67:

The universal recognition by states of certain crimes as *hostis humani generis* have existed from time immemorial. These crimes are regarded as universal crimes subject to the jurisdiction of all states. Every state asserts its claim to the exercise of jurisdiction to apprehend and punish perpetrators of crimes against mankind. Among the most common of such crimes are piracy *jure gentium*, slavery and war crimes. The obligation of states in this respect is therefore *erga omnes*. The necessity for international exercise of jurisdiction and the enforcement and prosecution of these crimes have been felt for a long time. The recalcitrant attitude of states towards the protection of their sovereignty and reluctance to yield any part of their jurisdictions has made discussion and agreement on a concerted, common, unified, international enforcement mechanism impossible.

But recently, criminal international law has been growing apace. In the final *Pinochet* decision *R v Bow Street Magistrate ex p Pinochet (No 3)* [1999] 2 WLR 827 at 905 Lord Millett stated the standard principle of state immunity:

The doctrine of state immunity is the product of the classical theory of international law. This taught that states were the only actors on the international plane; the rights of individuals were not the subject of international law. States were sovereign and equal: it followed that one state could not be impleaded in the national Courts of another; *part in parem non habet imperium*. States were obliged to abstain from interfering in the internal affairs of one another. International law was not concerned with the way in which a sovereign state treated its own nationals in its own territory. It is a cliché of modern international law that the classical theory no longer prevails in its unadulterated form.

The International Criminal Tribunals for the Former Yugoslavia (created in 1993) and for Rwanda (created in 1994) were ad hoc bodies and chronologically and geographically

limited. A more exciting development has been the creation of an International Criminal Court under the Treaty of Rome in 1998. The ICC will come into existence once the Rome Statute has been ratified by 60 countries. So far only two countries have ratified it, but 81 have signed it – including all EC countries, New Zealand and Australia, Canada, Japan and South Africa. Initially the ICC will have jurisdiction over war crimes, genocide and crimes against humanity, including forms of sexual violence such as rape, sexual slavery, enforced prostitution, enforced pregnancy and enforced sterilisation.

The crimes which have traditionally been dealt with by international law, and now by the new international tribunals, are crimes of serious violence which are universally morally condemned. Computer crimes appear primarily economic, but they may be much more than that; for example, a hacker could damage computer systems belonging to a hospital, or a large dam, or a defence facility, causing not only economic damage but injury or even death. The borderless nature of these crimes, and their potential for vast economic loss and physical damage, cry out for international measures to be taken against them.

There are a number of different ways to approach the practical measures to deal with computer crimes:

- a model criminal law, which would be available to be used by any country as a template for domestic legislation. It would respond to hacking whenever committed, recognising that international computer misuse is an affront to international order;
- a multilateral treaty under which each state would undertake to enact domestic legislation. This is a method already used in the commercial sphere (for example, the Vienna Convention on Contracts for the International Sale of Goods, which has been implemented in New Zealand by the Sale of Goods (United Nations Convention) Act 1994), and the criminal sphere (for example, the United Nations Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, which has been implemented in New Zealand by the Anti-Personnel Mines Prohibition Act 1998). Such a treaty could include the principle *aut judicare aut dedere* – so that any state in which an offence was committed would be required either to prosecute the offender or extradite them to a country that would prosecute them;
- ultimately the recognition of computer hacking as a crime at international law. To date the Rome Treaty embraces only genocide and like conduct. There are obvious difficulties in attaining a general international criminal law; a vast range of social and religious norms makes that impracticable. But the mutual interest of economies in ridding their citizens and institutions of exposure to off-shore hacking may lead to a general acceptance of a multilateral treaty of the kind discussed by Schacter *International Law in Theory and Practice* (1991) at p 74:

... [a] general multilateral treaty containing provisions which (to quote the International Court) "are of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law". Multilateral treaties of this type have been prepared under the aegis of the United Nations and other international organisations. The United Nations organs or conferences called by them have produced about 200 such treaties from 1946 to

1980; the other international organisations have concluded, in the aggregate, many more than that. These treaties are normally open to all states; their rules are general and, in a functional sense, they create law for the parties. They may also develop into general customary law, binding non-parties as well, by virtue of state practice of the non-parties.

I invite consideration of APEC's supporting an initiative to consider these crucial issues now, rather than after disaster has struck.

Other initiatives have been described by Dr Mahin Faghouri of UNCTAD in Geneva.

- (1) by the Commonwealth Secretariat following the meeting of Commonwealth Law Ministers at Port of Spain in May.
- (2) the discussion by the UNCTAD Experts Meeting, July 1999 expressing concerns as to the impact of computer crime on developing countries.

These and others need to be drawn together now.

### Subsequent initiatives

Since the September paper was prepared, some steps have been taken to recognise and respond to the second gap.

On 15 September 1999 the chairman of US Senate Committee responsible for dealing with the Y2K problem indicated that it is likely to remain in office to examine

the risks that US business and government computers face from electronic attacks and subterfuge by terrorists

and hostile foreign powers to deal with the problem of computer hacking.

At the recent Commonwealth Law Conference in Kuala Lumpur support was expressed by the Commonwealth Law Reform agencies for liaison in this sphere.

And the Law Commission has decided to propose to the incoming government that this topic be included in its forthcoming work plan.

### The opportunities of electronic commerce depend on continued confidence

The whole future of electronic commerce is ultimately dependent on confidence of its actual and potential users. As in the domestic sphere, so internationally, it is the task of the criminal law to deter and punish crime so effectively that the law-abiding may go about their business without apprehension. Electronic commerce offers benefits of an enormous scale: for example the *Australian Financial Review* 17 November 1999 reported that:

Electronic commerce will drive up Australia's Gross Domestic Product by 2.7 per cent over the next ten years, adding another year of income on to Australia's bottom line, a major government study is expected to find today.

But a single major act of terrorism or gross criminality could damage the public confidence on which rests the respect of such future benefits. Until a powerful international criminal law is in place there is distinct risk that the current euphoria about the opportunities of electronic commerce will dissipate. □

*continued from p 131*

What inferences may a jury draw? The legislation provides that the Court may draw "such inferences from the failure as appear proper" (s 34(2)). For a time it seemed that the Court of Appeal would limit proper inferences to circumstances where the jury was satisfied that the reason why the accused did not mention relevant facts to the police was because those facts had subsequently been fabricated (see *Condrón*). However, the Court has since held that a proper inference could be that the accused was unwilling to be subjected to further questioning by the police, or that he or she had not then thought out all of the facts, or that there was not an innocent explanation to be given (see *R v Daniel* [1998] Crim LR 818, *R v Taylor* [1999] Crim LR 77 and *R v Beckles* [1999] Crim LR 148). On the facts of any particular case, such inferences may not be very far from concluding that the reason for the silence is that the accused is guilty.

As explained earlier, an accused is presented with very real difficulties if he or she attempts to put the reasons for the silence before the Court, particularly where the decision not to mention relevant facts was made on legal advice. Thus in many cases, directing a jury that it may draw inferences amounts to encouraging it to speculate about the defendant's motives, frequently in the absence of any evidential basis to support a particular conclusion. There are many legitimate reasons why a suspect may not put forward relevant facts in a police interview – indignation at being arrested, a failure to understand the seriousness of their position, reaction to inappropriate or unfair police questioning, legal advice or, not least, because the police are under no obligation to, and do not, inform them of the evidence against them. Basing a conviction on surmise and speculation is inimical to producing a fair and just result.

### CONCLUSIONS

We have clearly not yet heard the last word on the right to silence. The British government has already had to amend the CJPOA to prevent inferences from being drawn unless the accused was offered the opportunity to consult a lawyer prior to being questioned by the police (Youth Justice and Criminal Evidence Act 1999 s 58). It was forced to do so as a result of the European Court of Human Rights decision in *Murray v UK* in which it was held that although almost identical Northern Ireland legislation did not, per se, contravene the right to fair trial under art 6 of the ECHR, art 6 does require a suspect to be permitted to consult a lawyer at the pre-charge stage if evidence obtained from police questioning can be used against them at trial. However, the *Murray* case was tried by a Judge sitting alone who had to give reasons for his decision, and the other evidence against the accused was strong. There is no guarantee that the Court will come to the same conclusion in a case currently before it, *Condrón v UK*, where, as it normally will be, the decision whether to draw inferences, and what inferences to draw, was left to the lay jury.

Professor Birch concludes that permitting inferences from silence results in trials where a "side-issue of doubtful relevance comes under the spotlight and the direct evidence is thrown into the shadow". The kind of cost-benefit analysis that she subjects the English legislation to should be a cautionary tale for any jurisdiction considering similar legislation. The experience in England and Wales demonstrates that the costs of ascribing evidential value to "silence" is high, both financially and in terms of the potential for miscarriage of justice. The benefits, if they exist at all, are meagre. □