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DRUGS, SPORT, SCHOOLS AND LAW

Schools may not search children at random for drugs and weapons in order to maintain discipline and protect their charges, but apparently there is no objection in principle to their calling in a state agency with coercive powers to test their top athletes for drugs.

If this is not recognised as topsy-turvy, then we have lost all grip on any concept of the proper role of law.

The starting point ought to be that which school one attends is essentially voluntary (on both sides) and that parents should have the right to send their children to schools where there are random searches for drugs and weapons, since this is the only way in which the presence of these items can be controlled. If other parents wish to send their children to schools where they are not subject to random search then that is fine too.

Parents have, however, been deprived of this right by a combination of the Commissioner for Children and judicial review. The state then intervenes further. In pursuit of social policies, the government now proposes to tell you to which school you must send your children.

Principles then break down. Some can validly claim that searching subjects them to a procedure they have not consented to. The result is that those who wish to send their children to schools where weapons are not routinely used for intimidation and where drugs are not openly sold are denied their wishes.

Then we turn to sport. Here, the starting point must be that sport is a private and voluntary activity in which the state has no interest. Unfortunately discussion is bedeviled by the decision of the Court of Appeal in *NZRFU v Finnigan* in which eight reasons were put up for allowing the action to go ahead, (in other words why it was a matter of public interest) no one of which stands up to a moment's scrutiny.

Communist, fascist and plain barmy third world regimes see sport as some sort of reflection of the achievement of their regime. As their people declined into poverty, the likes of East Germany, the Soviet Union and Cuba used sport to try to convince the world, and themselves, that their system worked. Hitler famously thought that the 1936 Olympic Games in Berlin would demonstrate the superiority of the Aryan race (yet another example of state action achieving the opposite of what was intended, thanks to Jesse Owens).

Plenty of this mentality was to be found in the minds of the architects of our sports drug testing regime cemented into an Act of Parliament. There are two insuperable arguments why such an Act is inappropriate.

The first is that there is legitimate difference of opinion over the role of drugs in sport. The arguments put forward against the use of performance enhancing drugs are just the same as the arguments put up against using professional coaches in the days of *Chariots of Fire*. The state has no interest in this argument. It is purely a matter for the sporting bodies and if one set of athletes is disgruntled with the attitude of their sporting body they are at liberty to leave and set up a rival.

The rhetorical consensus in the sporting world is that performance enhancing drugs should not be used, but those who watched *The Games* on 22 June will be left wondering just how much of a *Yes Ministerish* grain of truth there might be in the reaction to the supposed invention of a cheap and easy method of mass drug testing.

The second point is that even if there were complete consensus amongst sports people as to the place of performance enhancing drugs, it is no business of the state to use its coercive powers to enforce it. The arguments put forward for doing so were and remain entirely specious.

These arguments rested on the idea that New Zealand's reputation was somehow at stake in a way that justified public interest, if New Zealand athletes were found to be using performance enhancing drugs.

This argument, redolent of the Castro and Hitler attitude to sport, is just nonsense.

First, in a radio interview the then minister, Mr Banks, talked about the damage to Canada's reputation from the Ben Johnson affair. Your editor challenged him to find just one business person, investor or even tourist who severed links with Canada because of the Ben Johnson affair. Merely to make the point out loud shows how silly it is. We have discovered in recent months what causes business people and investors to reduce or cut their links with a country and it is not to do with the sports field.

The second is that even if this were accepted, the drugs legislation fails to achieve the object, because equal anger can be caused by arguing with umpires, underarm bowling and so forth. So why does the state not take an interest in the imposition of sports discipline generally?

Sports competitors should be subject to the same laws and the same coercive state processes as everyone else, no more and no less (which, of course, deals with the bribery point). What rules the private and voluntary sporting bodies make is entirely a matter for themselves.

And so to drugs. Few people with teenage children of their own will view any move to legalise cannabis with equanimity. No one proposes that there should be sales to children, so all we would achieve is to complicate enforcement, including in schools where some pupils are over 18. The feature which distinguishes cannabis from either tobacco or alcohol is the extent to which it saps energy and ambition and turns people into indolent willing recipients of welfare. And who would benefit from that? ❑

WORLD TRADE BULLETIN

Gavin McFarlane, Titmuss Sainer Dechert, London

finds some progress at last

After a depressing six months, it is starting to look as though there is some sunshine following the clouds to cheer up all those who have the interests of the World Trade Organisation at heart. There have been a few developments recently which point to a change in sentiment. At the end of May the US House of Representatives gave the thumbs up to permanent normal trade relations with the People's Republic of China. PNTR sets up the criteria which are to apply in international trade between Washington and Beijing. This is not the green light for the admission of China to the WTO, but put into the melting pot with other events seen in recent months, it is beginning to add up to a rosy outlook. For May saw an even more significant trade development involving the EU and China. Against all expectations these two parties signed up to an agreement which went some way further than the similar bilateral trade convention between the USA and China finalised shortly before. Excitement will have been aroused in the offices of the main international law firms in Europe, for a corner-stone of this agreement is that the restrictions on foreign firms practising in China are to be substantially lowered. In particular foreign firms are to be allowed to advise on Chinese law; this means in principle that they will be able to offer their consultancy services on the impact on Chinese commercial law and practice of the new situations which will develop if and when China signs up to the WTO. There has been disappointment though about some aspects of the new EU-China accord. There is to be no ending of the limitation on foreign ownership of the telecommunications industry, although the system of licensing for both mobile telephones and for life assurance is to be improved. But there is an important development in the retail sector. The former restrictions on foreign ownership of major department stores are to be moderated substantially, and joint ventures here are to be permitted. Restrictions which previously existed on the production of motor vehicles are also to be cut back. However this sector will not benefit from the major reductions in tariffs which are to be applied to 150 categories of goods, averaging 10.9 per cent overall. There will be particular opportunity for the cosmetic and drinks industries, which are among those to benefit from a 40 per cent duty reduction. But the really big winners will be the oil and fertiliser industries. Here the former domestic monopolies are to be opened up to foreign participation; the monopoly in the export of silk is also to be brought to an end. There is a benefit also for some agricultural products; tariffs are to be reduced and quotas cut back in a number of areas; here the dairy and fruit sectors will benefit. The agreement is a major advance for some European companies, and puts them ahead of what was achieved by the US negotiators in its earlier bilateral agreement with China. The way is now clear for China to come into the membership of the WTO, possibly before Bill Clinton leaves office in the autumn. If this happens, it will be very likely to provide the catalyst for resuming negotiations about starting the next round of GATT talks on further extensions of free trade.

CLAMPDOWN ON ILLEGAL TRADE

There is of course a good deal of illegal trade going on around the world, and a column which reports on international trade matters has by definition to look at criminal as well as civil aspects of the subject. Some estimates have suggested that the proceeds of the illicit drug trafficking which goes on all over the globe generates nearly as much funds as the whole of the legitimate economy of the United States of America. The truth of that assertion is rather difficult to check out, but the proceeds of drug dealing certainly exceeds the GDPs of most of the smaller and less developed states.

For years UK Customs have devoted their energies to the investigation and prosecution of those seeking to import illegal drugs, by going after those actually concerned with the goods. Quite apart from the fact that only a small part of the drugs illegally imported was being detected, particularly as the tactics of the criminals became more sophisticated, Customs were always at risk of losing cases in the criminal Courts. Even if they were successful, the costs of investigation to the criminal standard of proof beyond all reasonable doubt, and the action in Court is expensive. It now appears that there has been a complete change of tactic. Instead of concentrating on the goods and the persons carrying them, Customs are targeting the cash proceeds. Customs have in recent years been able to seek a confiscation order against any cash assets being carried at the time of arrest by anyone convicted of a serious drug offence. But now officers are scrutinising travellers leaving the UK for evidence that they are carrying large amounts of cash. The results of surveys in recent months on travellers leaving British airports for selected destinations has revealed that immense amounts of cash are being carried. The problem for the drugs cartels is very real. As the opportunities for money laundering are being closed up, so more and more they are being obliged to export banknotes. This involves the use of agencies which will handle it, the money of course being "dirty". The High Street banks will not handle large amounts of cash the source of which is unexplained, and the booths dealing in foreign exchange have come under suspicion. So the people who have been running the operation in the country in which the illegal importation took place, have somehow to get the money back to the leaders of the operation. As Customs turns the heat up on large unexplained sums of cash carried by passengers, the opportunities for getting the proceeds of drug smuggling back to the centre of operations are fast diminishing. ❑

LEGISLATIVE HISTORIES

Margaret Greville, The University of Canterbury

discusses a new development in the publication of legislation

Lawyers, law librarians and the public – or those who claim to speak for them – have for years complained about poor public access to legislation – and indeed official, state, and government information in general.

Availability (which has been improving) is only part of the access problem. Understandability is another. The Law Commission is required to "advise the Minister of Justice on ways in which the law of New Zealand can be made as understandable as is practicable". (Law Commission Act 1985 s 5(1)(d)) It has also a specific reference to examine and review the language of legislation in New Zealand. The terms of reference are:

- to propose ways of making legislation as understandable and accessible as practicable and of ensuring that it is kept under review in a systematic way;
- to ascertain what changes, if any, are necessary or desirable in the law relating to the interpretation of legislation.

Lawyers and law librarians routinely compile legislative histories themselves. This is not undertaken primarily to provide litigators with an armoury of extrinsic aids to interpretation for presentation in Court. It is often simply a matter of trying to make sense of a new Act in order to advise clients on how best to arrange their business affairs for the future. This reflects the "understandability" issue. Omnibus Bills have always been a mine-field. Worse, complex Bills have often been divided up and assented in fragments – frequently with new names that do not reflect that of the original Bill. Working backwards from the final Act through the parliamentary paper trail in search of clues as to meaning has been fraught with peril.

Other specific conundra are:

- Bills with deceptively similar titles;
- Bills whose names and dates change mid-Session;
- Bills amended in the Committee of the whole House without a corresponding supplementary order paper;
- supplementary order papers replacing earlier ones, or which are unnumbered, or defeated in the House, or not presented ....

The new legislative history notes refer to the Bill by number and print run (eg Bill 98-1) but not the title. Unfortunately, all published lists of Bills refer to them by title. Equally unfortunately, divided Bills have spawned some curiously dissimilarly intituled Acts. Law Reform (Miscellaneous Provisions) Bills are notorious in this respect. They are not alone. Sometimes when Bills are divided, fragments may be held back and finally passed or defeated in successive years.

For clues as to how this situation will be managed in future, there are so far only two examples available. There are the two Acts arising from the Accident Insurance (Transitional Provisions) Bill, and the Broadcasting Amendment Act. Of the first two, only one refers back to the Bill by name – the one bearing a different title from the parent Bill. So far, so good. In the case of the Broadcasting Act, however, the Bill was carried over from the previous Parliament. It changed its title along the way – from the Broadcasting Amendment Bill (No 2) 1998. Distinguishing this Act from one arising out of a No 1 (or 3) Bill would not necessarily be straightforward. All Acts should be referred back to the original Bill by name and date, even where this may seem self-evident at the time of printing. Supplementary order papers are not mentioned at all.

Sometimes two Bills before the House in a single year have had the same number (one having been carried over from a previous Session or Parliament). How will the new format deal with this phenomenon? Or will this confusing practice be abandoned?

The Law Commission has consistently argued for the inclusion in legislative history notes of all relevant documentation. See *A New Interpretation Act: to avoid "Proxility and Tautology"* (1990), para 115; *The Format of Legislation* (1993), para 37, and Appendix A p 50; and *Legislation manual: Structure & Style* (1996), para 122.

The select committee considering the Interpretation Bill recommended against legislative histories, claiming that "... if included, (they) may be used as an aid in the interpretation of legislation". However, since the mid-1980s, the practice of referring to these "extrinsic aids" to statutory interpretation has been permitted where Courts have deemed it appropriate (mainly in cases of ambiguity), and the new Act does not prohibit this practice.

It is unfortunate if fear of legislative histories being used in Court has caused a cautious attitude to prevail. Use in litigation is still a matter for the Courts to control. The public (and lawyers who advise them) would be better served if these histories were more complete. Ideally, legislative histories should include all documentation recommended by the Law Commission, together with a note of changes made by the Committee of the whole House (debates in Committees of the Whole not being published in *Hansard* before 1996). The PCO's clearer drafting language will reduce the need for their use in Court.

The Parliamentary Counsel Office must be congratulated for its initiative in printing legislative histories on the face of Acts as part of its new format. It will be interesting to see how they evolve over time, and whether in fact they answer the needs not only of Parliamentarians, but of legal practitioners, legal historians, law librarians, political scientists, public libraries, and the public at large. Though it seems niggardly to end with a complaint, it does seem that what we have at present is a record of parliamentary activities rather than a comprehensive paper trail. ❑

LANGE 2000

Bill Atkin and Steven Price, Victoria University of Wellington

ask whether Lange *has been amplified or reconstructed*

It took the Court of Appeal four months to release its second judgment in the now celebrated *Lange v Atkinson* defamation case (CA 52/97, 21 June 2000). The Privy Council, while curiously declining to formulate the parameters of qualified privilege when asked, had nevertheless invited the Court of Appeal to revisit its first decision in 1998. The ostensible reason was the opportunity which was provided for the Court of Appeal to take account of the major new House of Lords decision in *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609, decided at the same time as the Privy Council appeal.

It is our view that the Court of Appeal, although professing not to do so, has settled New Zealand law on a route broadly similar to that in *Reynolds*. Whether commentary on our political worthies is privileged will depend, in both New Zealand and England, on the circumstances. Privilege in the political context is therefore not to be taken for granted. But in New Zealand, most circumstances will be relevant only at a later stage in the inquiry, ie when the plaintiff attempts to defeat the privilege by showing that improper advantage has been taken of the occasion. Circumstances such as the adequacy of sources will in England help to decide whether the occasion is privileged, but in New Zealand will go to misuse of the occasion. Whether the latter approach is preferable is debatable.

It is also our view that, this time round, the Court of Appeal has on the whole achieved a better balance between the protection of reputation and freedom of expression.

PRIVILEGED OCCASIONS

In essence, *Reynolds* held that there is no "generic" or automatic privilege for political discussion. Each case is to be determined on conventional lines by an analysis of whether there was a duty to publish to persons with an interest to receive the information. Or to put it more simply as did Lord Nicholls, was the public entitled to know the particular information [*Reynolds* at 619]? While rejecting the notion of a generic privilege, the House of Lords nevertheless shifted the goal posts markedly in favour of freedom of expression. "The Court should be slow to conclude that a publication was not in the public interest and, therefore, the public had no right to know, especially when the information is in the field of political discussion" [626].

Now, the approach in *Reynolds* appeared to be in sharp contrast with that in the Court's first version of *Lange*. Then, the Court said "a proper interest does exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities" [*Lange v Atkinson* [1998] 3 NZLR 424, 468]. This statement, that a proper interest or privilege exists, was flanked by four other points, including the privilege being available even though the statement was published generally, in other words to a wide audience, for instance through nation-wide media.

The whole tenor of *Lange 1998* was, so it appeared to readers, that, as long as a statement fell within the right ambit, for example was about the public life of a parliamentarian, privilege existed. The privilege was automatic, or to use *Reynolds* language, it was "generic". This approach was not acceptable to the House of Lords.

In *Lange 2000*, our Court of Appeal felt "a need for amplification" of its earlier conclusions. The Judges accepted that their earlier judgment could and may have been read to mean that a relevant communication would "always" attract privilege. But now they have ruled that privilege may arise, but does not necessarily do so. "Does exist" in 1998 means "may exist" in 2000.

In a now crucial passage, presumably by way of amplification, we are told that the 1998 judgment "was not intended to remove from the assessment whether the occasion is privileged an inquiry into the circumstances or context of the publication ... Those circumstances will include such matters as the identity of the publisher, the context in which the publication occurs, and the likely audience, as well as the actual content of the information" [para 13].

At several points in *Lange 2000*, the Court of Appeal indicated that its decision was not intended to be a significant departure from *Lange 1998* and expressly rejected the *Reynolds* approach. With respect however, the Judges' amplification of the 1998 judgment is a major revision. When coupled with the expansion of "malice" (now s 19 of the Defamation Act 1992) which we discuss later, it is a backtrack of significant proportions, made in the interests of balancing vigorous political commentary and protection of personal character. It is broadly consistent with *Reynolds*.

Bona fide responsible journalism need not worry, according to the Court. It is very likely to attract privilege. On the other hand "a gratuitous slur upon a politician in a publication concerned with a quite different topic could not sensibly be regarded as having been made on an occasion of privilege" [para 21]. The Court thought it questionable whether a line about a politician appearing in a motoring magazine should receive protection. The same comment "in the course of a lengthy serious article on a coming election may justifiably attract the protection" [para 13].

This distinction we can perhaps appreciate. But there will be inevitable grey areas. What about a satirical article? What about an article in a tabloid paper, not purporting to be too serious? What about a statement made in the rough and tumble of politics by one politician about another? The Court's decision may raise more questions than it answers

but perhaps rightly so. Perhaps it was wrong to presume in advance that speech – which may include scurrilous journalism or petty political points scoring – would always merit protection from liability.

In the light of all this, the Court of Appeal has added a sixth point to its 1998 list of five: "To attract privilege the statement must be published on a qualifying occasion" [para 41]. Or in other words, do not presume that an occasion is privileged. That matter must be separately determined for each occasion, as *Reynolds* would require.

As already noted, the Court of Appeal parts company from *Reynolds* on the range of circumstances which should be considered when determining if an occasion is privileged. "We are not persuaded that in the New Zealand situation matters such as the steps taken to verify the information, the seeking of comment from the person defamed, and the status or source of the information, should fall within the ambit of the inquiry into whether the occasion is privileged" [para 38]. These points were ones which Lord Nicholls thought "illustrative" of the matters to be taken into account, ie there will be some situations where they are not relevant. In this regard, our Court of Appeal may have misinterpreted what Lord Nicholls was doing at this point. Despite this, the Court of Appeal acknowledges the merit of Lord Nicholls' points by allowing them to be considered in a more expansive approach to what constitutes misuse of the occasion – at common law "malice" but now in New Zealand s 19 of the Defamation Act.

MISUSE OF OCCASION

If the law concerning occasions of political-speech privilege has been "amplified", the law concerning political-speech malice has been exploded. What used to be a purely subjective test focusing on publishers' mental states and motives has been blown into a searching – and largely objective – inquiry into their information-gathering practices and degree of care. In contrast to the exhaustive analysis that accompanied the development of the political-speech privilege in *Lange 1998*, the reconfiguration of malice was achieved with very little reference to authority nor to freedom of expression in the Bill of Rights Act.

The malice change was prefigured by Tipping J in *Lange 1998*. Concerned that the new protection for political speech might be abused by those failing to take reasonable care with their statements, Tipping J suggested that s 19 of the Defamation Act might be called in aid. Section 19 prevents reliance on qualified privilege if the plaintiff proves that the defendant was "predominantly motivated by ill-will towards the plaintiff or otherwise took improper advantage of the occasion of publication".

Section 19 was designed to be effectively a codification of common law malice. As Sir Ian McKay, in the *Laws of New Zealand*, said, "the change appears to be one of terminology rather than substance". (*Defamation*, para 123.) He is well-placed to know: he chaired the Committee on Defamation which recommended the change and whose report – in this respect anyway – Parliament endorsed (491 NZPD 6370). The report makes it clear that the change was not intended to alter the substantive law. (Report of the Committee on Defamation *Recommendations on the Law of Defamation*, December 1977, paras 144-155, 269-278, 195-201.)

Shortly before s 19 took effect, the Court of Appeal had this to say about malice:

> It is not enough that the maker of the statement has jumped to conclusions which are irrational, reached without adequate inquiry, or based on insufficient evidence if the defendant nevertheless believes in the truth of the statement itself. (*Reeves v Saxon* CA 134/89, 17 December 1992, applying *Horrocks v Lowe* [1975] AC 135.)

In *Lange 1998*, Tipping J thought that there was no reason s 19 malice should not be developed it in common law fashion. "On an occasion such as that in issue", he wrote, "it seems to me that the circumstances in which the statement is made, and the amount of care which has been taken in establishing the facts, could well be relevant to whether the maker of the political statement has, or has not, misused the occasion" [*Lange v Atkinson* [1998] 3 NZLR 424, 475].

In *Lange 2000*, this approach was embraced – and taken further – by all five Judges.

Malice, which used to be notoriously difficult to prove, may now be established "if there has been a failure to give such responsible consideration to the truth or falsity of the statements as the jury considers should have been given in all the circumstances" [para 47].

What has happened to *Reeves v Saxon* and Lord Diplock's famous judgment in *Horrocks v Lowe*? Lord Diplock said that the privilege is only lost when the plaintiff shows the defendant has knowingly published a lie or been reckless or indifferent as to the statement's truth or falsity. Judges and juries should be slow to draw this inference, he insisted. Mere carelessness, impulsiveness or irrationality are not enough.

Carelessness is not enough? Under *Lange 2000*, carelessness "may well support an assertion by the plaintiff of a lack of belief or recklessness" [para 44].

Irrationality? "[I]n the context of political discussion", the Judges wrote, "an irrational belief in truth is seldom likely to feature" [para 44]. Talkback radio? Parliament?

Impulsiveness is not malicious? "[T]he concept of reasonable or responsible conduct on the part of a defendant in the particular circumstances becomes a legitimate consideration," said the Court [para 44]. And later: "to require the defendant to give such responsible consideration to the truth or falsity of the publication as is required by the nature of the allegation and the width of the intended dissemination, may in some circumstances come close to a need for the taking of reasonable care" [para 48].

Certainly there is nothing illegitimate about drawing inferences about mental states from facts and actions. But here, the Court is inviting Judges and juries to evaluate the reasonableness and responsibility of defendants' conduct in a way that may bypass the real question – defendants' motivations and bona fides.

This is precisely what has happened in the United States. There, a successful public-figure plaintiff must prove the defendant deliberately or recklessly disregarded the truth. The test for recklessness is a subjective one: *St Amant v Thompson* 390 US 727 (1968). The Supreme Court's rationale for this weighty burden was the need to encourage robust discussion of public matters.

But the Supreme Court's lofty aim has been undermined by lower Courts' application of these rules. "Courts are analysing a breathtaking array of journalistic conduct in the course of inquiring into state of mind", wrote the authors of one comprehensive study of US defamation cases (Murchison et al "Sullivan's Paradox: The Emergence of Judicial Standards of Journalism" 73 N Carolina Law Rev 6 (1994)). Did the journalist use an obviously unreliable or biased source? Was pertinent information omitted? Was the plain-

tiff given an opportunity to respond? Were the facts checked properly?

"Judges are creating a unique kind of regulatory system for the press," the authors concluded.

This looks remarkably like Lord Nicholls' list of factors for determining the question of occasion of privilege in *Reynolds*. The similarity does not end there. Although the plaintiff is supposed to bear the burden of proving malice, the Court of Appeal may have signalled a subtle shift of onus: "If the publisher is unable or unwilling to disclose any responsible basis for asserting a genuine belief in truth, the jury may well be entitled to draw the inference that no such belief existed" [para 43]. This begins to resemble a *Reynolds*-like onus on the defendant to make out the grounds of privilege. At the very least, it puts defendants under a tactical burden to provide evidence of reasonableness and honesty or risk losing the privilege.

Although the Court of Appeal insisted that it was not following *Reynolds*, and rejected a specific requirement of reasonableness, it has clearly invited Judges and juries to scrutinise news gathering practices and standards and punish defendants who do not measure up, by labelling their conduct reckless and removing their defence.

The defence is not restricted to the media, but they are surely the most common defamation defendants. In the nature of things, over time Judges will develop a set of journalistic standards that will become a de facto code of ethics – for a profession that has steadfastly refused to develop its own.

If this horrifies the media, perhaps they can take some comfort from the likelihood that the *Lange 2000* rule will much more readily be applied beyond its current ambit, which is restricted to criticism of past, current and aspiring Members of Parliament. The "responsibleness" standard provides a check on the media that should help disarm Judges' resistance to extending the new privilege to commentary on local body politicians, senior public servants, and perhaps even business and union leaders and others in positions of influence.

On the other hand, the reconfiguration of malice will no doubt inspire plaintiffs to hunt for evidence of irresponsibility by delving into the defendant's information-gathering process. Drafts, internal memos, out-takes, newsroom policy manuals, and the like, may now be make-or-break evidence in a defamation lawsuit. Here, too, the Court has given plaintiffs a hand, knocking some cracks in the obstacles that might have impeded this pursuit.

The first is the "newspaper rule", which allows the media to refuse to reveal sources in interlocutory proceedings. This dovetails with High Court Rule 285, which bans interrogatories designed to elicit sources. The absoluteness of these rules, the Court said, "may require reassessment" [para 55], opening up the possibility that journalists may in some circumstances be compelled to reveal their sources during discovery or through interrogatories. The Judges referred approvingly to developments in Australia where "inroads into the newspaper rule can be justified in the interests of achieving justice between plaintiff and defendant when qualified privilege is in issue" [57].

(There is, of course, nothing to prevent interrogatories concerning personal animosity, general newsroom policies, steps taken to verify allegations, information held before publication, editing, and the like, to the extent that these questions do not require disclosure of sources.)

Secondly, the Judges said the Courts will not be too fussy about the wording of s 41 of the Defamation Act, which requires plaintiffs alleging malice to specify the facts and circumstances they intend to rely on. This rule presented a problem for plaintiffs who had no information about the internal dynamics of the defendant and were confronted by the newspaper rule when seeking information. Without such particulars, they could be struck out. No longer, it seems. "In some situations, it may well be sufficient to plead that the statement was made recklessly, or that the defendant had no honest belief in the truth" [para 59].

Finally, s 35 of the Evidence Amendment Act (No 2) 1980 may also offer less protection to journalists than previously thought. The Judges hinted that the Courts may emphasise "the need to do justice in the individual case" over "the grounds for maintaining confidentiality" when deciding whether to excuse journalists from burning their sources in the witness box [para 55].

Nevertheless, plaintiffs will still need to plead s 19 to defeat the privilege, and will sometimes have to barrel ahead without much knowledge of facts that may support the plea. And while s 19 questions are quintessentially jury matters, the Judge will still have to be satisfied that there is some basis to leave them to the jury. Juries are famous for their unpredictability, but we think it will be a talentless plaintiff's lawyer who cannot find some way to stoke jury members' ire against a media defendant.

CONCLUSION

Together, the *Lange* decisions are a landmark advance in the protection of free speech, redressing a balance tipped too far in favour of reputation. This was a problem that politicians, as frequent plaintiffs, were disinclined to correct.

Most significantly, the *Lange* cases have opened up the defence of qualified privilege to statements made to the general public and have recognised the special importance of political speech. More ineffably, but perhaps as importantly, they have made the Zeitgeist of defamation law more media-friendly.

Still, *Lange 2000* is not the ringing triumph for free speech that *Lange 1998* was. Qualifications have appeared. Occasions of privilege depend on the circumstances of the publication. Privilege may be lost if the defendant is irresponsible. Technically, the media are not required to behave reasonably, as they are in New South Wales and probably under *Reynolds*, but the difference may be semantic. The Court has made it clear that in some circumstances a defendant who fails to take reasonable care will lose the privilege. (This may allay the concerns of the Law Commission, which fretted that unfairly defamed politicians may be left without a remedy: NZLC PP 33, Sept 1998.)

We think that the Court has effectively back-tracked from *Lange 1998*, which would have provided New Zealanders with broader political free speech protection than is enjoyed even in the United States. *Lange 2000* is less clear in its operation, more pliable in the hands of Judges and juries, more expensive to advise upon and litigate and more intrusive on editorial independence. But it brings New Zealand's defamation law roughly into line with Australia and Britain. And, most importantly, it contains a hefty disincentive to those who would abuse the new privilege. The legitimacy of the Court's reasoning may be questionable, its two-steps-forward-one-step-back approach odd, and the application of key tests problematic, but we think the balance between speech and reputation struck by the Judges in the end is about right. ❑

TAX UPDATE

Jan James and Paul Windeatt, Simpson Grierson, Auckland

discuss two Privy Council decisions

In June the Privy Council handed down two judgments in favour of Inland Revenue – *CIR v New Zealand Forest Research Institute Ltd*, (12 June 2000) and *Auckland Gas Co Ltd v CIR* (14 June 2000).

FOREST RESEARCH INSTITUTE

The New Zealand Forest Research Institute Ltd ("NZFRI") purchased a forestry research business from the Crown. The NZFRI agreed to take over certain liabilities including employees' contingent rights to holiday pay that had accrued in their service to the Crown. The NZFRI claimed a deduction for subsequent payments to employees for that accrued pay. Inland Revenue considered those payments were capital and non-deductible.

At first instance the High Court agreed with Inland Revenue, finding that the liability to make the accrued leave payments had been assumed as part of the consideration paid for the assets of the business and therefore the payments were a capital expense: (1998) 18 NZTC 13,928

Court of Appeal

The Court of Appeal disagreed (1999) 19 NZTC 15,211. In reaching this view the Court of Appeal, as did the High Court and the Privy Council, considered the effect of s 41(1) of the Crown Research Institutes Act 1992:

> Every employee of a government department who is transferred to a Crown Research Institute pursuant to s 39 of this Act shall, on the date of the transfer, become an employee of the Crown Research Institute, but, for the purposes of every enactment, law, determination, contract, and agreement relating to the employment of each such employee, the contract of employment of that employee shall be deemed to have been unbroken and that employee's period of service with that department ... shall be deemed to have been a period of service with the Crown Research Institute.

The Court of Appeal held that the effect of s 41(1) was that the employees must have been deemed always to have been employed by NZFRI. Therefore it considered the payments were deemed to be for services to NZFRI itself and so deductible as remuneration to an employee.

Privy Council

The Privy Council allowed the Commissioner's appeal.

The Privy Council first looked at the terms of the transfer agreement between the Crown and NZFRI. The agreement by NZFRI to discharge obligations which were attributable to the employees' previous service with the Crown was seen to be part payment for the acquisition of the business. Therefore, the Privy Council viewed payment for the accrued leave as a capital non-deductible expenditure.

The Privy Council held that s 41 did not change this conclusion. Their Lordships opined that the approach taken in the Court of Appeal gave too wide a meaning to s 41. In their view s 41 was limited to the rights of employees as against NZFRI and did not extend to the relationship between the NZFRI and the Crown. This narrower view, as Their Lordships saw it, is in accordance with the judgment of Eichelbaum CJ in *New Zealand Rail v Accident Rehabilitation & Compensation Insurance Corporation* (1995) TRNZ 790, 793.

Commentary

Given the facts of this case it might be wondered why Inland Revenue saw fit to appeal the Court of Appeal decision. This case was, after all, between two Crown entities so on its facts should have no impact on the tax base. However, Inland Revenue's Director of Litigation is reported as justifying the appeal because many had thought the Court of Appeal's decision also applied to the private sector, although it is strongly arguable that the decision could only apply where there was a statutory provision similar to s 41.

The case raises an issue which usually surfaces on the sale and purchase of a business – namely, the extent to which the consideration paid should be reduced by accrued leave liabilities taken over by the purchaser. The vendor may argue that the purchaser can deduct the subsequent payments and therefore the price should only be reduced by the after-tax expense of making those payments – this would leave the vendor in the same after-tax position as if it had not sold the business, but disadvantage the purchaser if the purchaser cannot deduct the payments. The purchaser will argue that the payments are an expense of acquiring the business (a capital item) and therefore non-deductible, so that the purchase price should be reduced by the full amount of the accrued leave liabilities – this will disadvantage the vendor, as it cannot claim a deduction for the accrued leave "discount" that it itself does not pay out.

The Privy Council offered a solution to this clearly unsatisfactory situation, albeit an unrealistic one. It imagined a situation where the purchaser agrees to take on the vendor's employees on the basis that it will honour all the accrued leave entitlements without being under any obligation to the vendor to do so. The Privy Council considered the accrued leave payments would then simply be additional remuneration for the services performed for the new employer and hence a revenue expense the purchaser could deduct. The problem with this "solution" is that in many cases the purchaser would not make payments when not obligated to do so, while the vendor would be taking the risk that it had assigned the liability (for which the purchase price was reduced). If the purchaser did pay, it can also be imagined that Inland Revenue would challenge any deduction by contending that an obligation was taken over as part of the purchase price.

Legislation should be enacted allowing one party a deduction when accrued leave liabilities (or indeed a liability for any otherwise deductible expenditure) are assumed on the sale of a business. A clear distinction should be made between benefits obtained from agreeing to assume a liability and expenditure incurred in actually satisfying that liability. The consideration obtained from assuming the liability may well constitute capital assets, but the consideration for which the liability originally arose remains employee service – a non-capital asset.

AUCKLAND GAS

Auckland Gas's low pressure network of underground gas pipes and steel services traditionally suffered from two main problems, gas leaks and entry of water into the pipes. As this system of pipes and services aged fractures and corrosion became common. Measurements were taken of the amount of gas lost through leakages. This was called "unaccounted for gas" or "UFG". As the pipes and services aged the UFG level rose. This problem worsened on the introduction of natural gas in the 1970s which was harsher on the pipes.

Previously, to fix the pipes was an expensive procedure that required digging to find the leak. In 1987 Auckland Gas began inserting polyethylene pipe into some of the existing pipes and services of the network. The gas now flowed through a smaller pipe but the capacity of the system was maintained due to the ability of the new polyethylene pipe to withstand higher pressures. Auckland Gas claimed a deduction for the polyethylene pipe expenditure, regarding it as repair and maintenance of the network.

High Court

Williams J considered the expense was deductible: (1997) 18 NZTC 13,408. He compared the network before and after the polyethylene insertion programme. He found that the altered system was neither more extensive nor longer lived than the old system, although it significantly reduced UFG, and held that the insertion of polyethylene pipes was a repair, not a replacement.

Court of Appeal

The Court of Appeal disagreed [1999] 2 NZLR 418, holding that the polyethylene insertion programme could not realistically be regarded as a repair of the network, due to its nature and scale. It compared a leaky cast iron and steel system to a system constructed of a new and different material operating at a much higher pressure. It considered that the old system had effectively been abandoned and the older pipes were relegated to the role of merely housing the new pipeline. Auckland Gas appealed.

Privy Council

In determining whether expenditure on the polyethylene insertion was deductible, the Privy Council opined that "repair and replacement" were words that bore an ordinary everyday meaning. The first step in establishing whether work was a repair or a replacement was to identify the asset on which the work had been performed. This was considered important by Auckland Gas because case law had suggested that the larger the asset, the more likely work on part of that asset would constitute repair even if there was replacement of a part of that asset.

The High Court and the Court of Appeal (with Gault J expressing some reservations) agreed with Auckland Gas that the entire distribution system was the relevant asset and the Privy Council was content to proceed on that footing but said it was necessary to be clear what that system was:

> Auckland Gas's distribution system is a reference to an assemblage of linked pipes whose function was to carry gas from one place to another. If a significant portion of this series of linked pipes is effectively abandoned and replaced wholesale with new pipes, the work may readily go beyond what would normally be regarded as repair of the existing system. This is especially so if the new pipes are made of materials which perform differently from the old ones. The work may be of such a nature and scale as to change the character of the existing system. This is to be contrasted with replacing or making good specific leaking pipes or joints. The latter would be repair, the former would do more than repair what was damaged.

In considering whether the work done constituted a repair or replacement the Privy Council looked at the proportion of the pipe system which was involved in the polyethylene insertion programme. When the programme began in 1987 the low pressure mains system represented about 70 per cent of the entire mains system. Over the five years in question polyethylene pipes were inserted into about 23 per cent of the total mains network and into 32 per cent of the steel services. This meant that in these portions it was now the polyethylene pipe carrying the gas rather than the old cast iron mains or steel services. The Privy Council considered that this level of change constituted a substantial portion of the distribution system.

The Privy Council also considered relevant the differences in nature between the older pipes and the new polyethylene pipes. The new pipes were virtually leak free, they were better suited to natural gas, and they carried gas at a higher pressure than the older system. As a result the newer polyethylene pipes resulted in an improvement to the existing system.

Their Lordships considered that if these new polyethylene pipes had been laid wholly outside the old system then they would have constituted a whole new system and would clearly be considered capital expenditure. The insertion of the polyethylene pipes was not considered to be materially different from that situation.

A complicating factor considered by the Privy Council was that the existing pipes still served a useful function in that they provided support for the new pipes. Their Lordships did not consider this factor to be relevant. The function of the older pipes was as gas carriers. After the new polyethylene pipes were inserted they no longer discharged that function and became redundant as gas carriers. In effect the work was held to change the character of the existing pipe system.

Commentary

One contentious point about the decisions in the Court of Appeal and the Privy Council is that the expenditure incurred relative to the size of the entity was not large. As stated above polyethylene pipes were inserted into 23 per cent of the total mains network and 32 per cent of the steel services over five years. In each of those five years, on average only 4-6 per cent were inserted. Although this was acknowledged by the Court of Appeal, it remains difficult to believe that any Court would, looking at one year in isolation, have considered the insertion technique was anything other than a repair. It is arguable that the result should not have been different merely because five years' work was under scrutiny. ❑

PPSA – THE PRICE OF CERTAINTY

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asks whether the PPSA is all it is cracked up to be

The Personal Property Security Act 1999 (PPSA), enacted under urgency in the last session of Parliament, is the latest progeny of art 9 of the Uniform Commercial Code [UCC]. The PPSA will, we are told, drain the notorious quagmire of New Zealand's chattel security law. However, art 9 has been described as a "dung heap" ((1995) 79 U Minn L Rev 739) by Professor James White, a respected authority on the UCC. This article, cautions the business community not to expect too much from the PPSA. Most of the observations reflect experience and learning from the USA: *Symposium* (1995) 79 U Minn L Rev.

The PPSA replaces the currently fragmented law of chattel security with a unitary regime having three principal features:

- the scope of the new regime is set by a broad definition of "security interest" which catches traditional security devices such as floating charges and Romalpa clauses as well as true leases, consignments and sales of intangibles;
- the Act provides for registration of security interests; and
- it contains an extensive set of priority rules, many of which are keyed to the registration requirement. As the principal rule, s 66(b) provides that, as between competing security interests, the one first registered has priority.

Two threshold caveats concern the age and rationale of the statute. While generally described as a modern approach to chattel security, the PPSA embraces a regime which is by now half a century old. Article 9, part of the much larger UCC project, was finalised in 1950, and enacted in all States except Louisiana by 1968. The Canadian personal property security statutes are largely copies of art 9. The draft statute proposed by the Law Commission in 1989 (Report No 8) closely followed the 1988 British Columbia Bill and the PPSA adheres to the 1993 Saskatchewan statute. The latter, as in the other provinces, adopts the same general features and most priority rules of the art 9 model Act. Accordingly, the PPSA is the product of an age without fax machines, photocopiers, computers, the Internet, credit cards and certificateless securities, derivatives and securitisation. It is contemporaneous with the Companies Act 1955 and in vintage closer to the Chattels Transfer Act 1924 than to the Companies Act 1993 or FASTER.

As for its rationale, art 9 was the response to three problems facing the post-war banking system in the USA: a multiplicity of registration statutes, the lack of a reliable floating security and the increasingly interstate operation of borrowers and lenders. None of these factors exist in New Zealand. The floating charge has been well established here for almost a century. Registration of chattel securities is limited primarily to company charges and motor vehicles. While interstate transactions are not an issue in New Zealand, the enactment of the PPSA surely contravenes the spirit of CER, particularly in view of the cool reception of art 9 in Australia. In any event, as illustrated by the Companies Act 1993, there are dangers in adopting old overseas legislation designed for problems not present in the domestic market.

THE CENTRAL FEATURE

As a matter of both law and practice, registration is the central feature of the PPSA. As a legal matter, registration serves as the linchpin for the priority regime. As a practical matter, registration is the massively intrusive feature of legislation. It is probably safe to predict, in view of the predilection for debt and security, that most adults and personal property in New Zealand will become the subject of one or more registrations under the PPSA.

COSTS AND BENEFITS

Direct costs

The PPSA was recommended to Parliament as a measure that would reduce the cost of lending. This is not obvious. For most transactions, the PPSA will, as compared with existing law, require as an additional step, the filing of a financing statement. Afterwards, financing change statements must be filed for renewals, amendments and discharge. Due to the role of registration in the PPSA priority regime, lenders will not advance credit, secured or unsecured, without first searching the PPSA register. Thus, a personal property security transaction will entail multiple trips to the register. In the USA, filing and search fees vary from one State to the next and range from $5 to $25. Even if the fees are set at the lower end of the range, the hundreds of thousands of transactions within the scope of the PPSA will add millions of dollars to the cost of lending. In the USA, it was estimated in 1995 that art 9 filing generated annual revenues of nearly one billion dollars. (*Symposium* 725) Where the registration system is under the control of a single private or public sector provider, the opportunity for monopoly profits is obvious.

Indirect costs

The registration requirement entails three secondary costs likely to exceed the direct ones. First, as registration is web based, access to the register will often be through third party providers who will charge for their services. Secondly, registration will likely add to the costs of credit investigations as the information on the register must be processed in the due diligence exercise. Thirdly, registration will attract significant legal costs. Financing statements are legal documents affecting the rights of the parties to existing and

proposed transactions. Accordingly, the statements will frequently be drafted and reviewed by lawyers. In the due diligence exercise, legal advice will be required to assess the validity and scope of outstanding securities. Undertakings will be requested, provided and billed at the usual rates. In the USA, the legal costs associated with the registration requirements under art 9 are reported to comprise five per cent to ten per cent of the total transaction costs incurred in eight figure loan transactions. (*Symposium* 691) It is important to remember that these are just the costs associated with the registration requirement. There will be a significant one-off expense for the review and revision of existing lending and security documentation for use under the PPSA.

Benefits

Legislation should not be enacted unless its benefits are demonstrably greater that its costs. There is little evidence of cost/benefit analysis in the decade of local discussion preceding adoption of the PPSA. This contrasts sharply with the intense cost/benefit debate surrounding the takeovers statute and draft takeovers code. The PPSA will palpably benefit those who provide services associated with registration. However, these benefits are the mirror image of the transaction costs identified above and do not count in a cost/benefit analysis. Also certain is that the PPSA will favour some lenders over others. Inventory suppliers who currently rely on Romalpa clauses will find it more difficult to obtain security under the PPSA due to the signature and registration requirements. On the other hand, parties who rely on floating security will prosper from the first-to-file rule as well as the provisions for instant crystallisation and future advances. However, these effects are also in the nature of wealth transfers and not relevant in a cost/benefit analysis.

Increased certainty

The cost effectiveness of the PPSA turns, almost entirely, on its ability to deliver an increased level of certainty and transparency which, by reducing the risks facing lenders, will lower the cost of credit. The increased certainty and transparency presumably follow as a consequence of the registration-based priority system which validates security interests by means of a public event. The PPSA will be cost effective if the savings resulting from increased certainty exceed the costs of registration and if a comparable degree of certainty cannot be obtained by a less expensive measure. Even without regard to the substance of the PPSA, there is good reason to doubt whether either of these conditions for efficiency are satisfied. On the one hand, the expensive PPSA registration system embraces information which is, for the large part, already available in financial statements, in company records and at credit reporting agencies. On the other hand, secured financing is flourishing in jurisdictions which have rejected the art 9 model in favour of registrationless regimes for personal property security.

Priority and registration

The case for cost effectiveness also suffers from the tenuous relationship between priority and registration under the PPSA. In contrast to registration under the Land Transfer Act 1952, registration under the PPSA does not establish indefeasibility of title. It is neither a necessary nor sufficient condition for priority. Registration provides no or only limited protection against upstream defects in a debtor's ownership rights, subsequent transfers to buyers or purchase money lenders, removal of the collateral from the jurisdiction, a change in name, or liens outside the Act such as those in favour of bankers. The advance notice function of registration is perverted by the appearance of registration as a requirement in the super priority afforded to subsequent purchase money security interests. The limited and inconsistent role of registration in the priority regime qualifies the anticipated increase in certainty on the one hand and significantly complicates the due diligence exercise on the other.

ALTERNATIVES

Even if registration drove the priority rules toward net certainty, this would not establish its cost efficiency. The issue is whether a comparable degree of certainty can be attained by other less expensive measures. In this regard, the recently concluded revision of art 9 clearly reflects the experience that registration is not a cost-effective priority referent in relation to financial assets such as deposit accounts, certificateless securities and trading account balances. For such financial assets, which play an ever increasing role in financing transactions, the recent amendments to art 9 establish control as a alternative and higher ranking form of perfection. It does not appear that these developments were considered by the drafters of the PPSA. Nor does it appear that serious consideration was given to the extent and operation of registrationless priority regimes.

Priority without registration

The priority regime in the PPSA can be largely duplicated without recourse to registration. Such a regime would comprise a first-in-time rule coupled with exceptions for buyers in ordinary course, purchase money security and intra-consumer sales except for motor vehicles. The special case of motor vehicles would be dealt with by an amendment to the present system for motor vehicle registration. The amendment would convert the registration document into a certificate of title with space for notation of liens. The result would replicate registrationless systems found in Germany and the Netherlands and, to a lesser extent, in the UK. As compared to the PPSA, this first-in-time regime would produce different results in relation to some secured parties, buyers not in ordinary course and execution creditors. However, on examination, the differences are either commercially trivial or unwarranted as a matter of policy.

Secured parties

As between competing security interests, s 66(b) of the PPSA awards priority to the first-registered interest. This rule expedites credit transactions in that it enables a prospective creditor to determine the priority of a proposed security by examining the register. Under a first-on-time-rule, the creditor runs the risk that the proposed security will be trumped by an earlier created one. However, the risk is a remote one. It will be realised only in the unlikely event that the debtor conceals the earlier encumbrance and the earlier transaction left no trace in the records of debtor or the credit reporting agencies. Debtor dishonesty is strongly deterred by civil and criminal sanctions. Today, credit transactions not coming to the attention of credit agencies are largely confined to those with insiders, eg personal associates of the debtor, which are often vulnerable to challenge in the case of insolvency. The residual risk associated with concealed earlier securities can be further reduced by well-established lending practices. It is the author's intuition that the expected losses associated with the residual risk, representing the possible gain from the certainty provided by a first-to-register regime, will fall far short of the costs of registration. In any event, the matter should not and need not be left to intuition. The incidence

of debtor dishonesty, the content of credit reports, the available countermeasures and the costs of registration system are all known or potentially knowable facts.

Buyers not in ordinary course

The first-in-time regime would also relegate certain buyers not in ordinary course to a lower priority than they enjoy under the PPSA. The most significant group comprises purchasers of collateralised equipment from the debtor. Under s 52 of the PPSA, such a purchaser takes subject to the security interest only if it is perfected. This registration-based priority rule obviously expedites the purchase transaction in much the same manner as s 66(b) expedites credit transactions. Under a first in time rule, the purchaser faces the risk of being surpassed by an outstanding security interest; however, the risk is minimal and entirely manageable. Collateral will be held as equipment only by a business debtor. Purchasers will be generally be other merchants who can be expected to make the inquiries required to uncover evidence of the outstanding security, generally in the records held by the credit reporting agency. Further, a person unwilling to bear the residual risk has the option of acquiring such property a buyer in ordinary course from a dealer in used goods. While this requires removal of the given by the seller limitation in s 53, the absence of such a limitation in s 54 and s 58 indicates the limitation is dispensable. The secured party remains protected by recourse against the used goods dealer and any intermediary.

Execution creditors

As compared to the PPSA, the registrationless regime will also disadvantage some execution creditors. Section 103 provides an execution creditor priority over an unperfected security interest. In a first-in-time regime, the creditor will be subordinate to any earlier security interest. Ignoring the windfall potential of the rule, the most defensible rationale for s 103 focuses on the judgment creditor who relies on ostensible ownership in undertaking execution process only to discover at the last minute that the property is subject to a security interest. However, in most all cases, under a first-in-time regime, the judgment creditor will, before proceeding with execution, discover the existence of outstanding securities either through post-judgment discovery or from a credit report. As in the case of competing secured parties and buyers not in ordinary course, there remains a residual risk of reliance losses. However, given the availability of information, the expected extent of those losses falls again far short of the sums required to finance operation of the registration system.

BLACK LETTER LAW

There is also a perception in some quarters that increased certainty will result from the substitution of black letter priority rules for a century of common law. However, on casual inspection, the amount of chattel security litigation in New Zealand seems, if anything, less than that in the USA and Canada. Further, the claim can be easily verified by test driving the facts of a few leading cases through the rules of the PPSA. The result are pretty much what one might expect. When the PPSA takes effect, it will unsettle well-established priority configurations, fail to resolve unsettled ones and give rise to new priority questions.

Helby v Matthews [1895] AC 471

This case established the priority between a vendor under a hire-purchase contract and a subsequent purchaser of the collateral from the debtor. The outcome turns on whether the contract requires the purchaser to pay for the goods or merely gives them an option. Whilst one can argue with the approach as a matter of policy, the result comprises a clear and workable rule, a fact of paramount importance to the commercial community. Under the PPSA, the outcome is anything but certain. It turns on whether an agreement along the lines of that in *Helby* creates a security interest; whether a pawnbroker qualifies as buyer or secured party; if the pawn is structured as secured transaction, whether the pawnbroker can invoke the rule in s 73; if the pawnbroker on-sells the goods, whether s 66 applies only to intra-consumer sales; and, if the vendor has not perfected its security interest, on resolution of the tensions between s 52 of the PPSA and s 27(2) of the Sale of Goods Act 1908. The outcome will remain uncertain until these issues are resolved by litigation and/or amendments to the statute.

Len Vidgen [1986] 1 NZLR 349

This dispute between a Romalpa supplier and debenture holder focused on the recurrent issue whether an extended Romalpa clause constitutes a charge. Whilst s 74 of PPSA affords the title retention supplier priority over the earlier-registered floating security, it does not put to rest the underlying issue in *Ski and Leisure*. Under the PPSA, the issue becomes how far can a title retention clause be extended without ceasing to qualify as purchase money security interest. In *Southtrust Bank v Borg-Warner Acceptance Corp*, 760 F 2d 1240 (11th Cir 1985), the Court held that an extended title retention clause did not qualify as a purchase money security interest as defined by a provision similar to that in the PPSA. It is certain that a receiver will, rather sooner than later, bring a similar challenge before the Court in New Zealand. The PPSA does not adopt the revisions to art 9 which attempt to clarify the law in this area.

IRC v Agnew (Brumark case) [2000] 1 NZLR 223

The PPSA largely obviates the distinction between fixed and floating charges. However, the PPSA also reverses current law in that ss 73 to 75 include proceeds generally in the super priority afforded the title retention creditor. This is a significant deviation from model version of art 9 which limits the priority to cash proceeds. This local deviation will, of course, come as a surprise to those engaged in factoring book debts. After a careful perusal of the relevant provisions of the PPSA, advisers of factors and debenture holders will identify a number of possible strategies to circumvent the extension of the purchase money priority to book debts. These strategies will be the fodder for years of litigation in an area which would otherwise be settled by the forthcoming decision by the Privy Council.

CONCLUSION

On the whole, there is little reason to believe that the PPSA will lower the cost of credit. Registration will increase out of pocket costs of lenders and borrowers by millions of dollars annually. As the PPSA does not significantly increase the amount of relevant credit information, it seems highly unlikely that the statute will make lending relationships more transparent. If North American experience is any guide, the PPSA will create a new quagmire for the next generation of lawyers. Instead of looking for solutions suited to current reporting practices and emerging forms of personal property, we have opted again for an overseas relic. ❑

CENSORSHIP, DISCRIMINATION AND THE BILL OF RIGHTS

Ursula Cheer, The University of Canterbury

reviews the latest decision on censorship and censors

In *Living Word Distributors Ltd v Human Rights Action Group (Wellington)* (HC Wellington, 1 March 2000, AP 26/98) the High Court dealt with an important censorship issue involving two rights which apparently sit equally in the Bill of Rights (the Bill of Rights). Heron and Durie JJ, (judgment delivered by Heron J), refused to overturn a decision of the Film and Literature Board of Review (the Board) holding that freedom from discrimination predominates over freedom of expression for the purposes of s 3(3)(e) of the Films, Videos and Publications Classification Act (the Films Act). This is the first judicial pronouncement on the ability of our censors to ban material which "[r]epresents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in s 21(1) of the Human Rights Act 1993" (HRA). The High Court upheld a decision of the Board that found objectionable two videos discussing the rights of homosexuals in a negative context. Thus, these videos, which arguably presented social, political and moral (and, possibly, offensive and incorrect) points of view, have been banned.

The decision of the High Court is more accessible when read in conjunction with the decision of the Board (Decision 5/97, 19 December 1997). Essentially it boils down to two major findings – that the Board had acted well within its discretion as a tribunal charged with the task of applying the Films Act and had therefore made no error of law which could be the subject of an appeal; and that the Board had taken sufficient account of the (the Bill of Rights) and the Court of Appeal decision in *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9.

THE VIDEOS AND THE HIGH COURT

The two videos both discussed homosexuality. One, called *Gay Rights/Special Rights Inside the Homosexual Agenda*, presented a view which opposed the pursuit of equal rights by groups of gay, lesbian, bisexual and transgendered people. The other, entitled *AIDS: What You Haven't Been Told*, presented a view that homosexuality is the cause of HIV and AIDS. The Board heard during submissions that the videos were being used by some Christian organisations to give teenagers a perspective of the homosexual lifestyle. The Classification Office had classified the videos R18, reasoning that the gay and lesbian community could well defend itself against attack, but that the content of the videos required a mature audience. The Board of Review replaced this classification with one of objectionability. The High Court upheld that decision.

The Court first developed a jurisdictional point (at 6). A publication cannot be found to be objectionable under s 3(3)(e) unless it also falls within s 3(1). It must describe, depict, express or otherwise deal with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good (my paraphrase). In this case, although the videos' main agenda was homosexual politics, they did also deal with homosexual sex. The Court held it did not matter whether the latter was central or marginal to the discourse so long as it formed part of the discussion. Therefore, the videos did deal with the matter of sex. However, the Court went further and stated that the list in s 3(1) can be added to because of the words "such as". A topic not referred to specifically in the list can therefore be within jurisdiction. In this case the Court found the main topic of the videos was sexual orientation, which now fell within jurisdiction. The fact that the censorship legislation explicitly "reached across" to the Human Rights legislation to confirm the unlawful grounds used to suggest a person was inherently inferior supported this general jurisdictional approach, according to the Court.

The Court then went on to review the background law. It noted that the appellant had acknowledged the Bill of Rights is not supreme but is subject to such reasonable limits prescribed by law as may be demonstrably justified in a free and democratic society (s 5). The Court also examined the history of the right to be free from discrimination. Section 19(1) of the Bill of Rights originally read: "Everyone has the right to freedom from discrimination on the ground of colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief". However, in 1994 the section was amended to read: "Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993". The latter Act had been amended to include sexual orientation as a ground, among others. This amendment, the Court hinted (at 7), might be seen as a pointer as to how important the legislature regarded the discrimination right to be. It might, therefore, be more important than freedom of expression in the censorship exercise.

The Court next considered one of the main arguments of the appellant, that the decision of the Board had resulted in the banning of a legitimate religious opinion, and therefore breached freedom of expression (at 9-11). The Court appeared to regard this as a challenge to the censorship decision itself, rather than to the censorship legislation. This was important because the grounds of appeal can only be on a question of law, rather than fact (s 58 of the Films Act). Clearly the Court regarded this argument as being lost from the outset because it saw itself as being asked to substitute its interpretation of the videos for that of the Board, – a question of fact. It held that the interpretation put on the videos by the Board – that they did represent directly or indirectly that members of the class under consideration were inherently inferior to other members by reason of a characteristic which was a prohibited ground – was a view which was open to the Board. It was not a case where the only true and reasonable conclusion about the content of the videos would contradict the Board's determination. Otherwise, the Court concluded, it would be converted into "a Court of general appeal on censorship issues which has long since ceased to be the case" (at 11).

Finally, the Court considered the decision of the Court of Appeal in *Moonen*. This decision was issued after the hearing in *Living Word,* but prior to judgment. It required that the Bill of Rights be given full weight in the censorship process and in any classification made thereunder. It also suggested a five step approach, which it saw as helpful in such an exercise. These were:

- first, possible different interpretations of any Act which appears to abrogate a right in the Bill of Rights are to be identified;
- second, if only one presents itself, it must be adopted. If more than one is possible, the meaning which least limits the right in terms of s 5 of the Bill of Rights is to be adopted under s 6;
- third, the extent of the limits placed on the right by that meaning is to be identified;
- fourth, the s 5 question, whether that limitation can be demonstrably justified in a free and democratic society, must be answered. This is done by identifying the objective of the legislation and its importance and significance; whether the statute achieves the objective in a manner which is in proportion to this objective; whether these means are rationally related to the objective and interfere with the freedom as little as possible; and ultimately, whether they are justifiable in light of the objective;
- finally, the Court may indicate whether the limitation is or is not justified.

If these requirements are not satisfied, inconsistency with the Bill of Rights exists, but the legislation is saved and given effect by s 4 of the Bill of Rights.

The High Court appeared to do two things with this decision. First, it implied that the case was distinguishable because it dealt with s 3(2) publications, and not those which fell under s 3(3), as in this case (at 12). Second, the Court quoted the first three of the steps outlined above and, while not deciding they had to be applied in this case, concluded generally that the Board had paid plenty of attention to the Bill of Rights in reaching its decision. The Court accepted the Board's view that Bill of Rights considerations in this case involved two competing rights contained in the Bill of Rights – freedom of expression and freedom from discrimination. Section 6 of the Bill of Rights, which requires ambiguities in any legislation to be resolved in a manner consistent with rights in the Bill of Rights, was of no assistance where two rights compete with each other. Both rights must be subject to limitations as set out in s 5, and both rights must give way to contradictory statutes (s 6). The Board had concluded that the censorship legislation required particular weight to be given to criteria which contained prohibited grounds of discrimination in the HRA, and therefore freedom of expression was subordinate to freedom from discrimination in this case. The censorship legislation had been passed after the Bill of Rights and specifically linked to the HRA, and the Bill of Rights amended to take account of the same legislation. Freedom of expression would therefore be limited. The Board had also found the limit to be reasonable (therefore complying with s 5 of the Bill of Rights) and consistent with Parliament's intention in incorporating the grounds of discrimination in the HRA.

The High Court clearly affirmed this conclusion with obvious reluctance. It said: "The Court we must say has been troubled by the inroad into the free expression of opinions which this decision represents, particularly in this area of uncertain factual assumptions and premises, and a still evolving understanding of the phenomenon of homosexuality". It went on to say: "The legislature has left such assessments to a specialist tribunal. We are not as convinced as to the power of the video in these cases to raise concern to the level of the Board, but we do not see such assessment as part of our function". (at 14)

The remainder of the judgment dealt briefly with an argument that the Board assumed the publication was likely to be injurious to the public good without testing this properly. The Court opined that such a finding would generally be available when the factors in s 3(3)(e) are present, but in any event the Board had tested the issue sufficiently. Further, the Board had had sufficient regard to the extent, degree and manner requirements in s 3(3), and to the contextual requirements in s 3(4).

COMMENT

The jurisdictional issue is not as straightforward as first appears. It can be agreed that the list in s 3(1) is clearly not exhaustive and the use of the words "such as" ensures that the maxim expressio unius est exclusio alterius does not apply. This affirms the approach of the Board taken in June 1999, where it upheld a classification decision that a video made by a Mr Kane was objectionable (Decision 2/99). Mr Kane had covertly filmed the backstage activities of a ballet troupe of young women with a stationary camera. Most were in various stages of dress and undress and all were unaware of the filming. Mr Kane argued that since the video contained nothing listed in s 3(1) of the Films Act, the publication could not be objectionable. This was rejected by the Board. The words "such as" in the section meant it was not exhaustive, but in any event, the Board said, the video did deal with sex in that it showed a group of young women in various stages of dress and undress. The Board had also taken the same expansive view in *Living Word* itself (Decision 5/97, at 7).

However, the issue of whether the subject which falls within jurisdiction has to form the majority of the publication or only a proportion, large or small, of it, is more complex. If, as *Living Word* states, proportion is irrelevant to attract jurisdiction, the opportunity for argument about how restrictive the censorship decision is must exist at a later stage. If, for example, a video contains a very small part which breaches the legislation, a requirement of excision will

be proportionate to the harm and therefore a more reasonable limit than a complete ban. However, the Court in *Living Word* seemed very blithe about this aspect and did not even detail why the Board had found the limits of a complete ban to be reasonable as opposed to requiring an age restriction (at 14). This point is developed further below.

As to the main ground outlined by the Court for not interfering with the Board's decision – that it felt to do so would require investigating a finding of fact and not an error of law – it is difficult to argue with the principled distinction. The Court quoted what it described as a classical test of the difference from *Edwards v Bairstow* [1956] AC 36:

> If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But without any such conception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal ....

In fact this extract is not particularly helpful. In terms of censorship, it is clear that no Court should substitute its interpretation of the material in question for that of an "expert" tribunal unless that interpretation is one that such an expert tribunal could never reach on the facts. However, the legal meaning of any test used to reach that interpretation is a matter of law and can be the subject of an appeal. The test in *Living Word* is made up of a relationship between the censorship legislation, the HRA and the Bill of Rights.

The High Court examined the Board's treatment of the Bill of Rights issue in some detail but only in the sense of quoting extensively the Board's reasons as to why freedom from discrimination should prevail over freedom of expression in relation to s 3(3)(e) of the Films Act (at 13-14). The Court then simply stated that the Board had found its classification of objectionable to be a reasonable limit and consistent with Parliament's intention. However, it retreated from any further investigation into these matters by stating: "When that assessment is laid alongside s 4 of the Films Act [(which vests the classifying bodies with expertise for the purpose of classification)] it is difficult by virtue of s 58(1) of the same Act [(which provides for appeal to the High Court on a point of law)] to question the judgment as being wrong in law", (at 14).

It is submitted that this must be wrong. The interpretation of the Bill of Rights, in particular the interrelationship between ss 3, 4 and 5 and how they affect abrogating legislation such as the censorship legislation, is a matter of law, or at the very least, is a mixed question of law and fact, which continues to perplex our Courts daily. This is why in *Moonen* the Court of Appeal did not hesitate to investigate whether a lower Court had applied the sections properly in combination with another section in the censorship legislation. And it did not hesitate to investigate the actual classification decision in this context. The Court of Appeal stated: "... relevant provisions of the Bill of Rights must be given full weight in the construction of the Act, and in any classification made thereunder". Therefore, the Court in *Living Word* should not have treated the decision of the Board as unreviewable because it only involved questions of fact. It could and should have tested the interpretation of the three Acts involved as a matter of law.

That being the case, there are at least two arguments which the High Court could have considered in depth. The first is whether the operation of s 3(3)(e) really involves a clash of two competing rights. Section 19(1) of the Bill of Rights provides: "(1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the HRA". To equate this with s 3(3)(e) of the Films Act requires finding that a publication which represents that a person is inferior by reason of a characteristic which is a prohibited ground actually discriminates in some way rather than simply states an opinion. The Court ignored suggestions of this sort in *Living Word* but such arguments have never been accepted in the censorship context. The argument in *American Booksellers Association v Hudnut* (771 F 2d 323 (1985), aff'd 475 US 1001) that pornography was a form of discrimination against women because it caused men to treat women as subordinate, this was firmly rejected. This being so, it can be argued that all s 3(3)(e) does is borrow the grounds of discrimination set out in the HRA to determine what sort of depiction or representation can attract the attention of our censors. The Board of Review reasoned, and the Court appeared to accept, that the explicit incorporation of the prohibited grounds of discrimination in the censorship legislation was as criteria to be given "particular weight" (at 13-14).

This view needs to be tested. Arguably the section provides that particular weight shall be given to the extent and degree to which, and the manner in which, the publication makes a representation about a particular class of people, not to the particular prohibited grounds on which that representation is based. Therefore the wording of the section does not provide a reason for freedom from discrimination to predominate and freedom of expression must be taken account of as set out in the five steps in *Moonen* or by some equivalent process.

A second argument is that even if freedom from discrimination prevails, the question must still be asked whether a complete ban is really proportionate and reasonable in the light of the *Moonen* process. The High Court in *Living Word* thought that the matter of age restriction instead of a complete ban was also one to be left to the expertise of the Board (at 14-15). However, again, this cannot be so, since both are inextricably tied to the issue of Bill of Rights proportionality, which is a question of law. The Court of Appeal in *Moonen* was of the view that an enactment which limits the rights and freedoms contained in the Bill of Rights should be given such tenable meaning and application as constitutes the least possible limitation (at 233). It can be argued that a complete ban is disproportionate to the perceived harm, not rationally connected to the objective of the legislation, and not justified in the light of the objective because applying the Films Act to produce a finding of objectionable is not, in this case, the least possible limitation. Thus an R18 classification would be preferable.

This is not to argue that had the Court in *Living Word* applied a *Moonen* – like approach to the relevant legislation as it should have it would have automatically reached a different conclusion. The point is we do not know because the Court made a fundamental error of law about what constitutes an error of law in this context. However, in a country where the state already punishes and controls acts of discrimination and specified forms of hate-speech under a separate human rights jurisdiction which must take account of freedom of expression, it would be very worrying if our censors were discovered to have been given absolute powers to censor on the basis of the same perceived harms, without the need to consider freedom of expression at all. The decision in *Living Word* is before the Court of Appeal in July. ❑

TRANSACTIONS

ROMALPA CLAUSES REVISITED

with

Jane Anderson

The Court of Appeal decision of *Kiwi Packaging v Isaac* on an "all money's" Romalpa clause was considered in the last Transactions section [2000] NZLJ 158.

A Romalpa clause features again in the High Court of Australia decision *Associated Alloys Pty Ltd v CAN 001 452 106 Pty Ltd* (2000) 171 ALR 568. This concerned the efficacy of a clause which stated, as relevant:

> In the event that the [buyer] uses the goods/product in some manufacturing or construction process of its own or some third party, then the [buyer] shall hold such part of the proceeds of such manufacturing or construction process as relates to the goods/product in trust for the [seller]. Such part shall be deemed to equal in dollar terms the amount owing by the [buyer] to the [seller] at the time of the receipt of such proceeds.

The buyer had used steel supplied to it under terms containing this clause in the fabrication of various products for the purpose of supplying a third party. At a time when the seller had not been paid but when some (though not all) of the products had been shipped to the third party, the buyer went into receivership and liquidation. The New South Wales Court of Appeal had found that the clause created a charge that was void against the liquidator.

Having determined that on its true construction, the "proceeds" referred to in the clause were the moneys received in payment for the steel products (rather than referring to book debts or the products themselves), the majority turned to the question of what equitable rights were created by the clause.

Note that the Court was not concerned here with the seller's retention of title to steel sold by it. Tracing the steel had become impossible when it was used in the fabrication of product made by the buyer. The case was concerned instead with whether an express trust had been constituted under the clause, the seller being the beneficiary of the buyer settlor/trustee. Such a trust has to comply with all the technical requirements of such an institution.

The majority considered it to be no objection to the creation of the trust that the property to be subjected to it was identified to be a proportion of the proceeds received by the buyer, such proportion being referable to moneys from time to time owing but unpaid to the seller (at para 30). It is not clear that such a subject matter is sufficiently certain to satisfy the certainty of subject requirements of an express trust (see Hayton, [1994] LQR 110 cf *Hunter v Moss* [1994] 3 All ER 215 (CA)).

Moreover, effect was given to the trust created on the face of the clause even though there was no express obligation to set aside the trust property in a separate account (this feature was said to be the hallmark of a trust in any event). The expressed intention to create the trust prevailed, there being no suggestion that the arrangement was a sham, nor that the parties did not mean what they said in the contract.

Having found that an express trust had been intended, the majority held that there was no room for the contention that what had been created was a charge and therefore void against the liquidator. The Courts have rejected that a charge has been created in the context of Romalpa clauses on the basis that a charge requires the buyer to confer an interest in the goods on the seller whereas a Romalpa seller has reserved title to the property hence there can be no charge (*Kiwi Packaging*; *Armour v Thyssen Edelstahlwerke AG* [1990] 3 All ER 481, 485 (HL)).

In the present case, no reservation of title element was present and the rejection of a charge rested on intention alone. As to intention, while the parties did use the word "trust" in the clause, it has to be said that the "deemed" subject matter of the "trust" (refer the final sentence of the clause above) does look suspiciously similar to creation of a charge. A key characteristic of a charge is that the interest in the subject matter is limited to that necessary to discharge the debt.

The majority went on to consider the effect of credit terms in the contract. Prima facie this would be inconsistent with the trust created as to proceeds, given that proceeds might be received during the period of credit. The New Zealand Courts have not addressed the inconsistency created by credit head on, instead they have simply viewed a provision as to credit as one of the factors tending against the efficacy of the clause (see *Len Vidgen Ski & Leisure Ltd v Timaru Marine Supplies (1982) Ltd* [1986] 1 NZLR 349; *Peerless Carpets Ltd v Moorhouse Carpet Market Ltd* (1992) 4 NZBLC 102,747).

The majority in the *Associated Alloys* case was more rigorous in its analysis. It reconciled the credit terms with the trust by the implication of a term into the contract that the buyer's debt obligation was discharged by performance when the trust become constituted under the proceeds clause. In other words, the buyer had two ways of discharging the debt, one by payment and the second by the creation of a trust by receipt of proceeds of sales of product made with the steel supplied, whichever occurred the earlier. In this way the majority demonstrated the

interrelationship between the debtor/creditor relationship and the trust relationship, both created by the contract. In principle, the reasoning seems sound. However, on the facts, it is difficult to see how the buyer could on any view have been regarded as having discharged the debt by performance, because he had failed to set aside the trust property, his essential obligation as trustee.

What was shaping up to be a triumph for freedom of contract failed at the last hurdle in the case because of a deficiency in the seller's evidence. It was unable to identify whether any payments received by the buyer from the third party were in fact related to the steel supplied by the seller under any particular invoice. That is, the seller could not establish receipt of the subject of the trust (being the part of the proceeds equal to the sums owed on the invoices).

Kirby J, in his dissenting judgment, concluded that the most that the clause could amount to was an unregistered charge on the buyer's book debts (owed by the third party) arising under the contract which was voidable against the liquidator. He came to this conclusion by elevating the substance of the arrangement over the form and by reference to the purpose of the Corporations Law provisions as to registration of charges.

It is submitted that the Courts should always be commended for seeking to give effect to what the commercial parties were trying to achieve. However, with respect, the orthodox constructs such as the express trust and implied terms did not in fact support the conclusion the majority reached having regard to the various technical issues identified above.

In New Zealand, the Personal Properties and Securities Act 1999 is likely to largely diminish the hard questions that arise from Romalpa clauses. The benefits to the commercial world and the commercial practitioner in certainty and functionality are great. There is a detriment however. The *Associated Alloys* case demonstrates that grappling with the hard questions does facilitate the scrutiny and development of orthodox legal doctrine in areas such as the interrelationship of trust and contract, the differences between trust and charge, and the constituents of the express trust. While intangible, development of these areas of law also benefit commerce and the commercial practitioner.

BINDING RULINGS BY THE SECURITIES COMMISSION

On 7 June 2000, the Securities Commission issued a discussion paper seeking public submissions on whether its functions ought to be extended to include a power to make binding rulings on questions of interpretation of securities law generally. At present, its function to express authoritative opinions binding on the parties, exists only in relation to the exercise of its enforcement or compliance powers such as suspension and prohibition of investment statements, suspension and cancellation of registered prospectuses, granting exemptions and determining appeals from the Registrar of Companies ("the Registrar").

Under the scheme proposed by the Commission, the rulings, which would be framed by reference to an assumed set of facts, would bind the parties to the decision, including the Commission. They would also bind the Registrar, and investors would be bound by contract to the extent that a ruling affected the nature and terms of offer documents. Offerors acting in reliance on a ruling could also avail themselves of "safe harbour" provisions and protect themselves from liability from investors. There is, of course, an established regime for obtaining rulings from the IRD. However, there is an important difference in the securities context, being that IRD rulings only affect the taxpayer and the IRD. Rulings in the context of securities matters will affect the investing public.

In the paper, the Commission contrasts its position in New Zealand, where the Registrar is the primary enforcer of securities law, with that of Australia and the US. In those countries, "no-action" letters are issued which while not binding, have greater force than they could have here, given that the regulatory body there has a primary enforcement role.

The Commission notes that it is presently possible to seek a declaration from the Court that a proposed action will not be in breach of securities law, but rightly draws attention to the impracticability of Court proceedings given the delay factor and commercial sensitivity of issues involved.

It also draws attention to the limits to use of exemption notices where a party seeks exemption due to doubt whether a proposed action can be taken without breaching securities laws. Issue of an exemption in such circumstances suggests that the transaction proposed would, if proceeded with, be in breach, when that may not be the case.

To date, it has been difficult to gauge the Commission's approach or policy viewpoint in advance of a transaction. That, combined with the fact that there are relatively few Court decisions to assist in interpretation of the securities laws mean that we are at present left without guidance and in doubt as to the applicability of the statute and regulations. Thus, the primary benefit to be gained from a binding rulings regime is greater certainty and hence reduced regulatory and compliance costs to parties to securities transactions.

It will be necessary for the success of any regime for binding rulings that the process adopted by the Commission has the confidence of the public. In particular, the rulings would obviously need to be available in a cost and time effective way in advance of the transaction. The lengthy delays experienced in obtaining binding rulings from the IRD has rendered that process inefficient and impractical in the context of commercial practice.

An important question identified in the paper is whether the Commission is competent to make binding rulings on interpretation, given that the body is not comprised solely, or even primarily of lawyers. The Commission notes that in most instances a legal opinion would be sought on issues of interpretation. To maintain confidence in a rulings regime, it is submitted that the Commission ought to have a formal panel of expert legal advisers established from whom it seeks advice in interpretation issues, leaving issues of discretion for the Commission members.

Another principal policy issue raised in the paper is the relationship between the Commission and the Courts. One example is the effect of subsequent Court determinations on matters related to a Commission ruling on actions taken in reliance on those rulings. The paper suggests "safe harbour" provisions that give immunity to suit to those who have relied on the rulings. However, if the Court determines that, contrary to a Commission ruling, an offer of securities was in breach of securities law, prima facie investors are left with an invalid allotment of securities with no recourse.

The paper proposes that the Illegal Contracts Act 1970 could be used to validate such transactions. Leaving in-

vestors to depend upon the discretion of the Judge to validate the transaction under the Act seems inappropriate in the context of an Act intended to protect investors' interests. There is also the prospect of an action in negligence by investors in a situation where the Securities Commission has come to a clearly incorrect conclusion that is subsequently overruled by the Court.

The Commission posits an alternative to binding rulings, being an expansion of the exemption notice regime to situations where the law is in doubt, either by confirming that the law does not apply or stating that the law is in doubt but granting an exemption. As the paper highlights, while this option would be the least radical, the Commission would then be seen to be making statements that the law was in doubt in particular cases, which would hardly be constructive.

The paper is a positive step towards increasing certainty for those structuring securities transactions. Binding rulings would only work in practice if the process by which they are made is fair, cost and time effective and transparent in the decision making process. Submissions close on 4 August 2000.

IMPLIED DEDICATION OF LAND

Peter Brown

Auckland CC v Man O'War Station Ltd [2000] 2 NZLR 267

When is a public road not a public road, but rather private land? Whatever the answer may be, it is not when the owner of the land occupied by the road agrees to vest it in a local authority for the purposes of it becoming a public road, and that decision of the landowner is affirmed or accepted by or on behalf of the public. This will be the case even should the register maintained under the Land Transfer Act 1952 fail for one reason or another to disclose any transfer of that interest to the local authority, and thus on the face of the register the land in question remains privately owned.

This was the view of both the High Court and the Court of Appeal in *Man O' War*. Both Courts have confirmed the assertion of the Auckland City Council ("the council") that in such circumstances the land concerned is vested in the local authority by virtue of the common law doctrine of implied dedication of land, and that other considerations such as the status of the Land Register and the indefeasibility of title conferred by the registration of transfer documents do not prevail.

This is a 20 year saga of the closure of roads previously formed by the council, to deny public access, and public protests. It became the focus of extensive media attention. The degree of feeling generated can be gauged by the fact that the legal proceedings have been going on for over 17 years.

They began when the council (in its earlier role as a Roads Board) decided to construct a road around the eastern end of the island. In September 1970 Mr H agreed to transfer to the council the land required to build a road through his property, as well as a side road to the boundary of his neighbour's property, subject to certain conditions. The neighbour had given consent to the council to continue this road across his property.

In 1972 construction of these roads across Mr H's property was completed and they were opened for public use. However for one reason or another the council did not register its acquisition of the land upon which the roads were built. The register did not reveal the existence of any roads other than certain long-standing Crown Grant roads that were paper only.

By 1980 both Mr H and his neighbour had sold their properties to Mr S. Mr S then took the view that although the council had outlaid considerable sums of public money in constructing the roads (including significant subsidies from central government) and that they had been in use by the public for some eight years, the council had not in fact acquired any title. He claimed title to that land by asserting the protection and indefeasibility of his registered title. Mr S closed the roads by erecting gates and locking them.

In 1983 the council brought proceedings against Mr S and certain other defendants. The council asserted that it had by the doctrine of implied dedication acquired title to the land occupied by the roads well before Mr S purchased them. It said this invoked s 77 LTA – no title to a public road can be acquired unless authorised by law. Mr S counterclaimed against the council for damages.

In both the High Court and the Court of Appeal the council succeeded on the major part of its claim. Mr S was awarded $5000 in damages relating to one section of road which was found not to have been vested in the council.

Express dedication of land to be used for public works such as roads arises when formal documents are registered identifying the land in question and the public authority in whom it is vested. Implied dedication arises when the landowner sets aside (or dedicates) land for public usage and that arrangement is accepted by the public or on its behalf. Whether there has been implied dedication and acceptance is in every case a question of fact. The intention to dedicate must be openly expressed but may be in words or writing, or inferred from the acts and behaviour of the landowner. Acceptance requires no formal act by the local authority and it may be inferred from public use of the land in question.

The doctrine is hardly new or novel. Both Courts referred to a 1950 article by E C Adams, a former Registrar-General of Land – *The Doctrine of Implied Dedication of Land as a Public Highway* [1950] NZLJ 315. There the "authoritative voice" of Mr Adams (Court of Appeal at p 26) said that "the doctrine of implied dedication of a highway *prevails even over a Land Transfer title*". (Emphasis added.)

Mr Adams was on firm ground. In 1893 Richmond J said that "the dedication to the public is not affected by the provisions of the Land Transfer Act. A highway is a right of passage for the public in general, not an easement nor any kind of incorporeal hereditament". *Martin v Cameron* (1893) 12 NZLR 769 at 771.

The Court of Appeal cited particular Australian judgments which make the point that the indefeasibility of title provisions in (for New Zealand, the Land Transfer Act) are not wide enough to cover public rights in highways. "The interests referred to refer to those capable of existing in an individual and do not refer to public rights of user. ... public highways lie wholly outside the Torrens system." *Trieste Investments Pty Ltd v Watson* (1963) 64 SR (NSW) 98 at 103.

While invocation of the doctrine of implied dedication is uncommon, there is a continuing line of authority in New Zealand back to at least 1893 confirming its application in this jurisdiction. Mr S argued that these authorities were "historical curiosities". Anderson J agreed they were indeed curious, but that was because of their rarity – not because of their obsolescence. The doctrine had never been extinguished. The Court of Appeal agreed and noted the Public Works Act from 1928 forward

expressly provided that the procedures governing roads included land over which right of way *had in any manner* been granted or dedicated to the public by a person entitled to make such grant or dedication.

Accordingly neither Court was able to find anything in the LTA or in any other statute referred to by the appellants which expressly or impliedly repealed the common law rule of implied dedication.

The conclusion of both Courts was that the roads as formed across the property originally owned by Mr H had been validly vested in the council and were not protected by the indefeasibility provisions of the LTA notwithstanding the subsequent registration of the transfer to Man O' War Station Ltd.

The apparent tension between the interests of a registered proprietor and those of the local authority acting on behalf of its constituents (the public) was commented on as follows:

> Certain situations have been recognised in [the Land Transfer Act] as importing a public interest greater than the public interest in the essentiality of indefeasibility. The public interest in pre-empting fraud and the public interest in public highways and reserves are the notable exceptions for obvious reasons (Anderson J).
>
> It may rarely be necessary nowadays for a local authority to rely upon the doctrine of implied dedication but in our view it continues to apply in New Zealand, even in relation to Torrens system land. Nor is that at all surprising. The integrity of the roading infrastructure is of such importance to the economic and social welfare of any society that it is to be anticipated that the public right to the use of the roads will be given a measure of priority when it comes in conflict with private claims (Court of Appeal).

LIQUIDATORS' LITIGATION

Brian Keene

The art of the commercial lawyer includes a strong focus on risk management. The lawyer's armoury includes an array of secured and unsecured lending devices, corporate and unincorporated structures. He selects the balance of weapons most likely to enhance the profit of the commercial enterprise yet manage the risk should it fail. A new risk has recently become more prevalent. It is a new breed of investor who, for a substantial reward is prepared to fund and profit from litigation which is essentially the property of others. The conventional wisdom that such an arrangements were likely to be illegal and therefore unenforceable requires re-examination in light of the recent decision of Anderson J in *Montgomerie v Davison* HC Auckland, M 1285/99, 14 April 2000.

The plaintiff was liquidator of Nautilus Developments Ltd. The defendants were that company's directors. Following liquidation Montgomerie sued on behalf of Nautilus' creditors for $2.175 million alleging defaults by the defendant directors in trading recklessly and failing to keep adequate records. Unsurprisingly there was a substantial deficiency to secured creditors. Unsecured creditors were likely to get nothing.

Typically these creditors would be advised by a liquidator of their rights and encouraged to participate in funding an action. Often such approaches by professionals are viewed with some cynicism by the potential contributors who see themselves as being encouraged to throw good money after bad to the comfort of the professionals but not the creditors. For this reason few cases are brought. Those that are started are run often with a high degree of cost consciousness and on very limited funding. Such realities are well known to the wider business community and act as a comfort to those who trade on the basis that corporate limited liability means what it says.

In *Nautilus* a white knight called Litigation Lending Services Partnership ("LLSP"), an entity wholly unrelated to Nautilus, agreed to fund the litigation by payment of the liquidator's costs, legal expenses, enforcement costs and any security for costs sought by the defendants. In return the liquidator agreed to repay from the judgment all advances plus a share of the money recovered on a sliding scale between 15 per cent and 25 per cent depending upon the time taken to conclude the litigation. LLSP had the right to nominate counsel and to require consultation before the proceedings were settled or otherwise concluded. Beyond that the right to direct, conduct and conclude the proceeding remained with the liquidator.

This unwelcome intervention prompted the defendant directors to apply to the Court for an order to strike the funding agreement down as infringing the common-law prohibitions against maintenance and champerty, ie the promotion and conduct of litigations by persons without any proper interest therein.

Anderson J upheld the agreement. He carefully articulated that the application under s 301 Companies Act 1993 was conceded to be procedural and not substantive in the sense that it created a separate cause of action. This in his view distinguished it from the earlier English Court of Appeal decision *re Oasis Merchandising Services Ltd (In Liquidation)* [1997] 1 All ER 1009. That case held the fruits of litigation under s 214 of the English Companies Act could not be disposed of by the liquidator. It cited with apparent approval the distinction between assets of a company and rights conferred upon a liquidator in relation to the conduct of the liquidation. The former was said to be assignable by sale, the latter not because they are incident of the office of liquidator. In the present case the liquidator's standing to bring the action comes as an incident of his office under s 301. One therefore wonders whether the procedural – substantive dichotomy relied upon by Anderson J really bears scrutiny.

In finding the funding agreement was not champertous Anderson J took particular care to stress the role of a liquidator as officer of the Court and subject to its supervision. He added that the proceeding before him did not admit of his forming a view about the merits of the action. It would be prudent for liquidators and litigation funders contemplating this sort of arrangement to obtain a Court's assessment by way of application by the liquidator for direction.

The result underscores a trend in New Zealand liberalising arrangements under which non-interested parties may promote and thereby profit from litigation rights of other parties. Although seen as an access to justice issue it is quite probable that it will ultimately benefit only the "investor" and not much enrich the original owner of the litigation right at all. The trend is likely to sharpen the risks to directors of this sort of litigation. That in turn will provide an added challenge to their commercial advisers to structure their affairs and trading to defeat or minimise such risks. It may also promote an unwelcome additional premium on directors' Professional Indemnity Insurance with added cost to the NZ commercial community ❑

CASENOTE – *ON LINE INTERNATIONAL LTD v ON LINE LTD*

ALTERNATIVE DISPUTE RESOLUTION

edited by Carol Powell

This case (Master Venning, HC Christchurch, 11 April 2000 CP 2/00) deals with the enforceability under the Arbitration Act 1996 of an arbitration provision and demonstrates the Court's willingness to uphold contractual agreements on how disputes are to be dealt with.

The parties to the case were On Line International Ltd, Mr Hong (second plaintiff) who was a director of OLI and a shareholder in On Line Korea Ltd which in turn was also a shareholder in OLI.

On Line Ltd was a software promotion company, which was also a shareholder in the first plaintiff company. Mr Kay (second defendant) who was at various times a director of the first defendant and was a director of OLI.

The relevant facts of the case are the plaintiffs alleged that the first defendant represented to the plaintiffs that:

- it owned software;
- it was able to provide a licence for the use of the software; and
- the software was operational and functional.

As a result of the alleged representations Mr Hong invested some money and incorporated On Line Korea Ltd to exploit the software.

On Line Korea and On Line Ltd entered into a joint venture agreement for the purpose of exploiting the software and pursuant to that agreement OLI was incorporated.

On Line Ltd and OLI entered into a licence agreement to use certain intellectual property rights including the software. The plaintiffs alleged that On Line Ltd engaged in misleading and/or deceptive conduct in breach of the Fair Trading Act 1986 and sought damages.

The licence agreement contained an arbitration clause:

> **20.1** It is agreed that in case any controversy or claim arises out of or in relation to this agreement or with respect to breach thereof, the parties shall seek to have the matter amicably settled through discussions between the parties. Only if the parties fail to resolve such controversy, claim or breach within 30 days by amicable arrangement and compromise, may the aggrieved party seek arbitration. Such arbitration shall be carried out in accordance with the provisions of the New Zealand Arbitration Act 1908 or any then subsisting statutory provisions relating to arbitration.

There were three main issues to be determined by the Court:

1. was there a valid arbitration agreement?
2. what was the effect of the involvement of other parties to the proceedings? and
3. did the matters in dispute in the proceedings fall within the arbitration agreement?

Valid arbitration agreement?

The argument was that the words "Only if the parties fail to resolve such controversy, claim or breach within 30 days by amicable arrangement and compromise, may the aggrieved party seek arbitration", were permissive not prescriptive.

The Court found that the word "may" must be read in context. The clause provided a mechanism for resolution of disputes. Its meaning was that the parties were required to try to determine the matter amicably and could not go straight to arbitration. If the dispute is not amicably resolved then the aggrieved party can insist on mediation. The parties submitted to arbitration, but there was a precondition that they had to meet.

Effect of the involvement of other parties?

The arbitration agreement was between OLI and On Line Ltd, the other two parties Pi Sun Hong (second plaintiff) and Roy Kay (second defendant), were not parties to that arbitration agreement.

The Court referred to a decision of the Alberta Court of Appeal *Kaverit Steel & Crane Ltd v Kone Corp* 87 DLR (4th) 129. This decision distinguished Canada's law from that in England because of the absence of any provision in the arbitration legislation which permitted a reference of those claiming "through or under" a party to the submission to arbitration. The New Zealand legislation is similar to that in Canada in that regard.

The Court found that where there is a mandatory direction supporting arbitration except in limited circumstances, the Court must refer the parties who have agreed to submit to arbitration to arbitration. The fact that there were other parties to the litigation that may have been affected by such a direction was not of itself sufficient to prevent the reference. The effect may well have been that there were two sets of proceedings, but this of itself was not grounds for avoiding the effect of the arbitration agreement.

Dispute within agreement?

The Court considered the meaning of the words "in case any controversy or

claim arises out of or in relation to this agreement or with respect to breach thereof" in the clause and found that the reference to arbitration contemplated three situations. First, a dispute arising our of the dispute itself, second, a dispute arising in relation to the agreement and third a dispute arising with respect of a breach of the agreement.

The Court found that the conduct and misrepresentations complained of were not just part of the background to the agreement, but because of the particular circumstances of the case were fundamental to the licence agreement between the parties.

CO-MEDIATION: A PRACTICAL GUIDE

Paul Hutcheson, Palmerston North

Although used extensively overseas the practice of co-mediation for whatever reason has not been embraced by the mediation community here in New Zealand. This could be for a variety of reasons, not the least of which is the novelty of the notion: Its hard enough often to sell the concept of mediation to the somewhat reluctant party and when we as mediators introduce the idea that there might be two of us ...!

There are some practical issues relating to co-mediators working together, such as coordinating appointments, whether the mediator fee ought to be doubled or shared and the big issue of synchronising two possibly quite different mediating styles. It is this latter challenge that this article focuses upon by providing some practical guidelines as to how two mediators can work together.

Co-mediation involves two mediators working together, and the key here is the goal of functioning as a team. Through appropriate preparation and by being self-aware of your own mediating style, mediators can offer parties to mediation the immeasurable benefits of a mediator team. Some of the numerous advantages of co-mediation include the opportunity of sharing tasks, the variety of skills and backgrounds that two people can offer and most importantly, the invaluable opportunity of improving mediating skills. It is this third consideration above all that ought to elevate the practice of co-mediation.

The nature of mediation means that most mediators have little or no contact with parties subsequent to the mediation. Therefore, feedback on performance is non-existent and of course confidentiality ensures the process is "within camera". The junior solicitor's work obviously can be scrutinised by more senior colleagues and the counselling profession has established protocols of professional supervision. The rookie mediator fresh from "how to mediate course" may well have a good understanding of the theory, but applying this knowledge in the absence of any guidance or feedback is a big ask.

Co-mediation offers an excellent framework within which both the experienced mediator and the inexperienced rookie can monitor, supervise and develop professional skills. Advanced seminars and day-long workshops on practical skills may well all have their value, but from observing the development of mediation both here and in the States over the past ten years, no other investment can rate with co-mediation in providing as much as in terms of professional learning as by simply pairing up with a suitable co-mediator. Sitting down with a honest and insightful co-mediator offers arguably the best model of meaningful and practical learning.

Co-mediators inevitably bring differing approaches and styles. This is both the attraction of co-mediation and its challenge. Sometimes it just will not work co-mediating with a particular person.

Some strategies for mediators working together

Be open minded as to the experience of your co-mediator

Within the mediation fraternity we naturally tend to equate mediating experience with quality of skills. This may well be a valid assumption but it should not blind us to the opportunity of utilising the insight and freshness of approach which often comes with the supposed inexperienced minded. This is why I prefer to avoid designating a senior and junior role. An equal level of participation ought to be the goal for both mediators.

Agree on broad mediating strategies rather than specifics

In your preparing to co-mediate, rather than concentrating on real specifics in your co-planning (such as who should ask what questions), reiterate general strategies of mediation, for example, eliciting perspectives, managed ventilation, searching for underlying interests, enhancing communication, etc. There are so many variables that can arise within mediation, it is more effective to focus on the broader approaches with which you can work.

Co-mediation is about "cutting some slack"

Good co-mediation teams do not fret over minutia. The reality is that parties attending a mediation are overwhelmingly focused on their own conflict. The occasional treading on toes of your co-mediator will go unobserved. Therefore co-mediators ought to be relaxed over polite interruptions of one another and so on. For example, if my co-mediator suggested entering caucus or private session and I felt the timing was not appropriate, I might say, "I feel we should leave caucus for the moment as I would like to follow up on something that was just referred to".

Agree on direct communication between co-mediators

When preparing I do not bother talking to my co-mediator about our respective styles. The reason is that self-assessment is rarely accurate and rather I prefer to agree on using direct communication between the co-mediators during the mediation process. Some of the problems that a mediator new to co-mediation may foresee could include the other co-mediator dominating the process, directing the process down a wrong path or generally moving too quickly. In my preparation with my co-mediator I will agree to alert her to these types of difficulties in a direct but effective manner.

For example, dealing respectively with each of these three situations I might say:

"Carroll, if you have finished with that issue I need to ask some questions of my own."

"Carroll, rather than moving down that path at this point I believe it would be helpful for us to return to the issue of compensation."

"Carroll, let's just back-track and revisit several of those issues."

Be aware

Awareness is a double-sided plate: on one hand be aware of your self and alert to hints conveyed in such questions as those just described. These should be clear messages that your style may need some modification. On the other hand, be aware of your co-mediator: how much opportunity are you providing

for that co-mediator to come in with questions?

Use graduated intercessions

In working with your co-mediator, if the co-mediator is doing something you don't like, use a sequence from a mild question, to a more assertive comment, to a clear interruption.

Specific suggestions on working together

Regularly consult with your co-mediator throughout the process either during caucuses, coffee breaks or maybe if appropriate in front of the parties.

Share mediator's opening monologue – take two items. I suggest two rather than one at a time so as to avoid seesaw effect. This gets both mediators doing some talking and being heard by the parties. Significantly for the less experienced mediator this achieves voice legitimacy.

Inoculate in your opening monologue, preparing parties for the occasional glitch in the co-mediation communication.

Co-mediators should remain together when caucusing – avoid pairing off say in family mediation male with male and female with female. This ensures that both mediators hear all that is said to a mediator and also avoids any perception of bias – siding with the party with whom the mediator has caucused.

The observer is important. If you find yourself in observing mode as a co-mediator, watch the dynamics, as your insights will be invaluable when suggesting ways forward.

Share overall duties and in so doing aim at some overall equal participation. However, be mindful of the value of the "quiet observer" and we all have patterns of high and low participation in communication so co-mediators may oscillate between talking and being quiet.

"Create space and pass the ball" – bring in your quiet co-mediator by using pauses, turn to or actually invite your co-mediator to participate. Monitor the amount of talking you are doing,

Avoid relying on gestures and signals to communicate with your co-mediator – these can be distracting and are capable of misinterpretation.

Trouble shooting – there are a number of ways in which you can assist when it appears that your co-mediator is in difficulty, these include:

- being prepared to intercede if your co-mediator begins to lock horns with a party;
- interceding and rephrasing when your co-mediator asks an unclear or unhelpful question;
- when your co-mediator is talking too much, try saying, "If that particular line of questioning is finished I would like to ask ...".

In conclusion, be respectful of your co-mediator and be open to an approach, which may be effective, and at the same time new to you. Communicate openly and avoid rigid structure, but negotiate to ensure that each of you has speaking time and time to observe.

The co-mediators' debrief

As mentioned earlier the value of co-mediation apart from the other benefits is the obvious learning opportunities for both co-mediators. In order to capitalise on this the co-mediators ought to follow some structured debrief following the conclusion of the mediation. Each co-mediator should provide specific and succinct feedback to the other. This should be as positive as possible as well as including suggestions for any improvement. Comments could be invited on aspects of the co-mediation that worked well and those that could have been performed differently. As the insights come from a discussion with a fellow participant in the mediation, the learnings tend to be much more meaningful than those proffered by an outside observer.

AMINZ UPDATE

Arbitrators' and Mediators' Institute of New Zealand appoints new executive officer.

AMINZ is undergoing a few changes this year firstly with the appointment of Penny Mudford as its new executive officer. Ms Mudford has been a member of AMINZ since 1998 and has recently passed her Arbitration Fellowship examinations. She comes from a background in agribusiness and ran a small dispute resolution practice in Manawatu specialising in commercial and employment disputes in the farming sector.

The election of Hon Sir Ian Barker QC as President heralds another change when he takes up his position after the AGM in July. He was elected unopposed, as was Mr David Williams QC and Assocociate Professor Roger Pitchforth for the two positions of vice-presidents. An election is being held to select the four council members with the results of this to be announced at the AGM.

The AMINZ Annual General Meeting will be held on Friday 28 July 2000 at the Duxton Hotel in Wellington. The meeting will be followed by the President's Reception and the Annual Institute Dinner. The Saturday seminar programme includes workshops on Dispute Resolution Management and Audit in Large Corporations by Bill McLaughlin FCIArbI and Inquisitorial Powers in Arbitration by Professor Yves-Louis Sage.

AMINZ has sold its current premises in Palmer Street, Wellington, and is about to move "downtown" where the office will be more accessible for its local members. A successful luncheon seminar was held at the office in May and more such events are planned for the future. A Preliminary Meeting and Award Writing workshop was recently held in Auckland and another is planned for Christchurch in August. AMINZ also holds regular breakfast or evening meetings around the country.

Further information about AMINZ or registration forms for the AGM/ Seminar Weekend can be obtained by contacting the office on telephone 04-385 4178 or

institute@aminz.org.nz.

FISHY BUSINESS

Retrieving moanapacific.Com

Kim McLeod, A J Park

New Zealand company Moana Pacific Fisheries Ltd was recently successful in retrieving the Internet domain name moanapacific.com from a New Zealand competitor. Moana Pacific was able to secure a transfer of the moanapacific.com domain name using the Uniform Domain Name Dispute Resolution Policy ("the Policy") recently introduced by ICANN (the Internet Corporation for Assign Names and Numbers) which is the body charged with administering domain names at an international level. These include all .com, .org and .net registrations but, at the present time, excludes .nz domain names.

The policy offers a quick, relatively inexpensive, means of resolving domain name disputes. This is effected by requiring all accredited Registrars to include in their terms and conditions of

domain name registration provision whereby the applicant submits to the jurisdiction of one of the three arbitrators appointed by ICANN. The applicant for any domain name is therefore bound in contract by these terms and conditions. In addition, the relevant Registrar is able to give effect to any decision by transferring a domain name even where the applicant refuses to take appropriate steps to do so.

In order to initiate a complaint under the policy the complainant files a written complaint setting out the background to the dispute, its rights to the domain name and requesting a transfer of the domain name to it. The respondent then has 20 days to file a response. Both the complaint and response can be filed electronically. The complaint and response are then transmitted to a panel appointed by the arbitrator who must render a decision within 45 days of the complaint being filed.

The costs of filing a complaint vary between US$750 and US$2500.

The complainant must establish:

1. that the domain name is identical or confusingly similar to a trade mark or service mark in which the complainant has rights;
2. the registrant has no rights or legitimate interest in the domain name; and
3. the domain name was registered and is being used in bad faith.

Bad faith may be shown by the respondent offering to sell the domain name to the complainant for more than the cost of registration, or the domain name was registered in order to prevent the complainant from using its trade mark or for the purpose of otherwise obstructing or interfering with the complainant's business.

Moana Pacific was able to satisfy all of the above and the respondent was ordered to transfer the moanapacific.com domain name to Moana Pacific.

Since the inception of the policy, more than 800 complaints have been filed including complaints involving the right to the juliaroberts.com domain name as well as the domain name dodialfayed.com. In the Alfayed dispute our own Sir Ian Barker, a former High Court Judge, acted as arbitrator and found that the registrant of the dodialfayed.com domain name, Robert Boyd of Dayton, Ohio who had offered to sell the domain name for US$400,000 to Mohammed Alfayed, had no right or legitimate interest in respect of the domain name and it had been registered in a blatant attempt to capitalise unfairly on the fame and public interest in the late Dodi Alfayed. The domain name was ultimately transferred to Mohammed Alfayed.

Other features of interest of the policy include:

1. there is no doctrine of precedent applying to the decisions under the uniform policy. This is because it is policy, not law, that is being applied by the arbitrators;
2. there is no appellate structure under the policy. If the respondent disagrees with the arbitrator's decision, the only way to prevent the transfer of the domain name to the complainant is to commence legal proceedings in a national Court in a jurisdiction to which the complainant has submitted.

The complaints filed on behalf of New Zealand rights owners to date have all resulted in the relevant domain name being transferred to the complainant and the policy appears to have achieved its objectives of being a fast and cost effective means of resolving disputes of this nature.

LEADR NEW ZEALAND UPDATE

LEADR is in the throes of major reorganisation to reflect the growth of the organisation and its role in the ADR community taking into account the needs of its membership.

Part of this change will involve the LEADR training being carried out by separate contractors although current Australian trainers may continue to be involved under the different structure. From New Zealand's perspective the group of New Zealand based trainers will continue to train in workshops and are working to broaden the range of training products available. This will enable us to gear workshops and seminars specifically to the needs of the New Zealand community, use international trainers where desirable and have the flexibility to ensure that we retain the high standard of training upon which LEADR prides itself.

LEADR NZ is moving through its adolescent period and as LEADR implements its structural changes NZ will take on a more independent role while maintaining its overall relationship with Australia. This will mean that many of the tasks that were previously dependant upon input or decisions from Australia will be able to be dealt with more efficiently.

In the meantime LEADR continues to be active in both training and other activities.

On the home front both the Wellington and Auckland committees of LEADR have been active. The Wellington committee is currently running a series of fortnightly lunchtime workshops on specific points of interest to members and lawyers in Wellington. This well subscribed programme includes topics such as "Raising the prospect of mediation with the other side"; "Mediation opening statements"; "The ten biggest mistakes lawyers make in mediation" and so on. The interest shown highlights the potential to develop this idea further.

In addition the Wellington Committee intends to hold monthly group meeting for members interested, as well as others, in meeting on a continuing basis to discuss issues in common. Facilitation shall be shared. Some functions of the group are peer support, practice issues in interest areas, such as employment, human rights, family and so on.

The Auckland committee is looking at ways to increase mediator involvement at a local level. They are considering both observation programmes and low-key simulation exercises. In addition they are planning local seminars. Auckland members with comments as to what they would like to see happen locally should contact either of the co-chairpersons: Bill Barker (bbarker@voyager.co.nz or Suzanne Tongue (johnrust@kiddtattersfield.co.nz)

The LEADR 2000 ADR International Conference will take place in Sydney on 27–29 July. The conference theme is "the Third Millennium: building the future". It is about contributing to the development of a civil society by devising and using methods of solving disputes without recourse to adversarial systems. A combination of plenary sessions and small workshops will cover a range of topics including: ADR in the Armed Forces, marketing services to Asia, Mandatory ADR, Mediators in Space, Dispute system design and ADR in the workplace and environmental context. The conference promises to meet the high standards of its predecessors.

Contact Sue Freeman-Greene at LEADR phone: 04-470 0110, Fax: 04–470 0111; e-mail leadrnz@xtra.co.nz ❑

UPDATES TO YOUR MATERIALS

STUDENT COMPANION

edited by

Lynne Taylor

CONTRACT

Maree Chetwin

Exclusion clauses

Rogers v HIH Casualty & General Insurance (NZ) Ltd (CA 281/99 11 April 2000, Blanchard, McGechan and Young JJ)

The Court of Appeal considered an exclusion clause in the appellant's motor vehicle insurance policy that covered private and social or domestic use.

> The exclusion clause excepted:
>
> either practising for or taking part in any race, time trial, rally, sprint or drag race or similar motor event, demonstration or test.

The appellant had written off his Ferrari Testarosa during an advanced training course for drivers of high performance cars at the Pukekohe Racetrack. The High Court took the view that absence of competition did not prevent what was occurring from being "similar" within the policy exclusion. The training course was an organised motor event involving elements of speed or danger which so qualified and might be described as a "test" although not an "event" or "demonstration".

The Court of Appeal noted that this was very much a situation on its own policy and own facts in which authorities did not greatly assist except as to general principles. The insurance policy was to be construed objectively, on its words. The vital concluding words were to be read ejusdem generis and, to the extent any ambiguity existed, contra proferentem against the insurer.

The Court of Appeal considered as a matter of ordinary language the word "motor sport" qualified each of the succeeding words "event, demonstration, or test". If there was any ambiguity reading contra proferentem produced the same conclusion. The events of the day were not a "demonstration" or a "test" let alone a "motor sport demonstration, or test". A construction ejusdem generis of "similar motor sport event, demonstration, or test" with earlier exclusion wording required an element of competition. The High Court found that elements of speed and danger involved in matters such as racing were a sufficient link to create similarities. The Court of Appeal disagreed. When the concluding class comprised "motor sport event[s], demonstration[s] or test[s]" there was an inevitable implication of need for sporting competition going past mere elements of speed and danger. There was no competition.

The insurer needed to word the exclusion to shut out activity which while not sporting competition and not reckless, posed heightened risk. The insurer did not go so far. The appeal was allowed.

Restraint of Trade

Brazier v Bramwell Scaffolding (Dunedin) Ltd (CA 222/99, 3 May 2000, Gault, Keith and Tipping JJ)

The Court of Appeal dismissed an appeal against the High Court decision that the appellants had acted in breach of a covenant in restraint of trade regarding the sale of a scaffolding business and had failed to observe the terms of an interim injunction, which was designed to protect the parties' contractual rights. The Court of Appeal also upheld the damages award of $785,000 to the respondents together with solicitor and client costs of $120,000.

Until 1997 Harvey, the second respondent, held forty per cent of the shares in Bramwell Dunedin. The remaining sixty per cent was held by a company of which Brazier was the controlling shareholder. Brazier also controlled the second appellant Brazier Scaffolding Ltd. There was a struggle for control of Bramwell Dunedin that led to litigation. A settlement was reached whereby Harvey bought Brazier's 60 per cent shareholding. The parties also entered into mutual restraint of trade which in general terms meant the Harvey interests were restrained from operating in Southland and the Brazier interests were restrained from operating in coastal Otago, each for five years from March 1997.

In order to facilitate the financing of his purchase of Brazier's shares in Bramwell Dunedin, Harvey formed Bramwell Scaffolding. Young J, in the High Court, found that the effect of that step and the consequent transfer of interests, amounted to an assignment of the benefit of the restraint of trade covenant from Bramwell Dunedin to Bramwell Scaffolding.

In September 1997 a company called Able was formed. Young J found that Able was the vehicle for the Brazier interests to continue to be involved in the scaffolding industry in Dunedin and elsewhere in coastal Otago. This was described by His Honour as a wilful and contumelious breach of restraint of trade covenant.

Young J found that there had been breaches of the covenant in restraint of trade on two related bases. It was said that Brazier Scaffolding had sold scaffolding and a vehicle to Able in September 1997 for $200,000. Young J concluded that significantly more scaffolding had been supplied by the Brazier interests to Able than was justifiable under the suggested $200,000 sale. He found that substantial quantities of scaffolding equipment had been supplied to Able by Brazier Scaffolding and an associated company, to a level that went substantially beyond anything referable to the payments apparently made of $200,000. That additional equipment was made available on either credit terms or effectively by way of loan and that was sufficient in the view of the Judge to conclude that Brazier Scaffolding was thereby interested or concerned in Able's business. Secondly, it was the case that Able was a front for the Brazier interests. The Court of Appeal held that there was evidence to support these factual findings.

Section 130 Property Law Act 1952 requires notice of an assignment to be given to the debtor, or other party against whom the thing in action is to be enforced before the assignment becomes effectual at law. The appellants argued that as no notice had been given to the Brazier interests of the assignment from Bramwell Dunedin to Bramwell Scaffolding that the latter could not enforce the restraint. Bramwell Dunedin had gone out of business and therefore suffered no loss. The Court of Appeal considered that *Mountain Road (No 9) Ltd v Michael Edgley Corp Pty Ltd* [1999] 1 NZLR 335 demonstrates that if the assignment is not complete at law but is valid in equity then the assignor may sue on account of the assignee. Both assignor and assignee were before the Court. This attempt to defeat the Harvey interests' claim was held to have no underlying merit.

The Court of Appeal was satisfied there was no injustice to the Brazier interests in the decision to award damages instead of an injunction for the post-trial period. Adequate notice was given and there was no error of principle in the assessment.

The award of solicitor and client costs was appropriate. In the words of Tipping J "Putting the matter bluntly, the conduct of the Braziers was akin to fraud." While acknowledging costs are not a punishment, His Honour considered the Judge was entitled to take the view that the Harvey interests should not be out of pocket. The amount involved was not unreasonable.

Remedies

M & M v BNZ (HC Auckland, CP 572/96, 17 March 2000, Chambers J)

The Ms entered into a deed of compromise of all matters of difference between themselves and the defendant bank. The deed contained a confidentiality clause that required all parties to keep the deed and the settlement it evidenced "secret and confidential from any other person or persons". The defendant was held to be in breach of this clause when it supplied the deed and associated details of the settlement to a firm it had contracted to do its credit recovery work.

The deed also contained at cl 13.3:

> Any breach of the provisions of this clause shall entitle the party adversely affected thereby to treat this Deed of Settlement as having been terminated and discharged save that the bank (if it is the party adversely affected) shall thereupon be under no obligation to repay any moneys received by it prior to the date of such breach to [the Ms].

The Ms pleaded that they were "entitled to treat the deed as having been terminated and discharged and to the payment of the moneys paid by them to the [bank] pursuant to it". They also claimed aggravated, exemplary or punitive damages.

Chambers J was satisfied that the expression "the party adversely affected thereby" in cl 13.3 meant "the other party" or "the party not in breach". The purpose of cl 13.3 was to make it clear that if there was a breach of the confidentiality provision the innocent party had a right to cancel and there was no right to damages. It was not necessary to satisfy s 7(4)(b) of the Contractual Remedies Act 1979 to cancel.

The actions of the Ms were viewed objectively. It was clear that they had cancelled the agreement and would be entitled to compensatory damages. However they had not sued for compensatory damages. They were not entitled to recover moneys already paid as this is precisely what s 8(3)(b) of the CRA prevents. The Ms could not prove any material harm resulting from the bank's disclosure of the deed. At best the Ms would have been entitled only to nominal damages.

As for aggravated damages, Chambers J held that there was no outrageous or high-handed behaviour on the bank's part. He concluded without hesitation that the bank's behaviour did not come anywhere near the described standard.

Chambers J considered that the drafter may have had in mind the extraordinarily wide discretion conferred by s 9 CRA whereby the Court can upon cancellation make whatever order is "just and practicable". Clause 13.3 (which would prevail over the s 9 power: see s 5 CRA) may have been an attempt to circumscribe that discretion.

BANKING LAW

Lynne Taylor

Guarantees

Coffey v Morris (HC Christchurch, CP 90/94, 27 March 2000, Chisholm J)

Coffey, Morris and Roberts were co-guarantors of a debt of $14 million. The creditor obtained judgment for this sum against all three. Coffey, the plaintiff, made a payment to the creditor and then sought a contribution from Morris and Roberts on the ground that he had paid more than his one-third share of a debt for which all three were jointly and severally liable.

Morris successfully argued that a discharge obtained by him before Coffey made his payment to the creditor operated as a discharge of all co-debtors and extinguished Coffey's right to seek a contribution. This argument reflected the long-standing principle that unless a creditor reserves its rights then a discharge of one joint and several debtor operates as a discharge of all co-debtors. Provisions expressly reserving the creditor's rights to enforce its judgment against other co-debtors and Coffey's right of contribution were not contained in the deed of discharge. The judgment is significant because Chisholm J followed two English Court of Appeal decisions (*Watts v Aldington* (1993) Times, 16 December; *Johnson v Davies* [1998] 2 All ER 649) in holding that, assuming the usual stringent test for implied terms was met, it was possible for such reservations to be implied in the deed of discharge. Chisholm J was prepared to imply a term reserving the creditor's rights to enforce its judgment against other co-debtors but not a term reserving Coffey's right of contribution.

Roberts had also entered into a discharge agreement with the creditor but was unable to rely on the above defence because his discharge had occurred after Coffey had made his payment and issued the proceedings seeking a contribution. Both Morris and Roberts argued that Coffey's right of contribution was extinguished because Coffey's payment settled a number of different liabilities to the creditor and the terms of Coffey's discharge did not distinguish between the different liabilities. This argument was not accepted. Chisholm J instead isolated the component of Coffey's payment that was attributable to the judgment debt. It then became apparent that Coffey had not paid more than his proportionate share of that debt and so was not entitled to seek a contribution from Morris or Roberts.

EMPLOYMENT LAW

Graham Rossiter

Accord and Satisfaction

Marlow v Yorkshire New Zealand Ltd (Employment Court, WC 9/00 1 March 2000, Chief Judge Goddard)

An accord and satisfaction provides a valid and effective defence to a claim in respect of which the accord is properly applicable. It has been defined in *British Russian Gazette Ltd v Associated Newspapers Ltd* [1933] 2 KB 616 as "the purchase of a release from an obligation, whether arising under contract or tort, by means of any valuable consideration not being the performance of the actual obligation itself".

Here the issue was whether the settlement entered into by the parties upon the defendant's termination of the employment of the plaintiff operated so as to bar the plaintiff's action for breach of contract.

The plaintiff claimed damages for the alleged breach by the defendant of its duty

to provide a safe workplace. The plaintiff claimed that she sustained OOS as a result of the alleged breach. The settlement entered into by the parties related to the plaintiff's redundancy. It included payment of salary in lieu of notice, holiday pay, a redundancy payment, relocation costs and an "ex gratia" payment in acknowledgment of the plaintiff's "support and contribution" to the defendant. The letter of offer sent to the plaintiff required her to acknowledge that she "would have no further claim upon the defendant in respect of (her) employment contract". The defendant made reference to the "unambiguous" language of the letter of settlement and the "close relation in point of time" between discussion connected with the plaintiff's condition and the settlement. The plaintiff argued that the settlement must be construed as being limited in its application to matters specifically referred to which related to the issue of redundancy.

Chief Judge Goddard found in favour of the plaintiff and ruled that her action could proceed. The judgment is useful as a review of the law of accord and satisfaction and its application to the settlement of employment disputes. It was held that "a compromise or settlement is a contract and like any other is capable of being subject to disagreement as to its meaning and effect". It is a matter of determining what the agreement made between the parties on a proper construction means. This was seen as "essentially a question of fact and construction of the written agreement as explained by the surrounding circumstances". His Honour cited a passage from Foskett's *The Law and Practice of Compromise* (1996) that in interpreting a settlement agreement its wording is "to be limited by the particular purpose for which it was executed". There was also said to be a principle that unless an actual or potential dispute can be discerned as existing before an agreement between the parties is made then that agreement will not be taken to have compromised an issue subsequently raised.

It was held that the settlement agreement must be limited to claims of the nature of which the parties were discussing and that these arose out of the redundancy of the plaintiff's position. The settlement could not reasonably be taken to preclude the plaintiff from making claims coming to light later out of unrelated events during the employment. Further, it would be "artificial to read the words of the letter (from the defendant) without regard to the circumstances giving rise to its composition or to the purpose of the letter. These were to deal with the unfortunate situation of the plaintiff's contended redundancy and nothing else."

EVIDENCE

Bernard Robertson

Litigation privilege

Crisford v Haszard (CA 63/00, 1 June 2000, Richardson P, Gault and Thomas JJ)

Crisford was the plaintiff in proceedings against Haszard. Haszard had a friend (or so he thought) named Harris with whom he arranged to discuss the litigation by telephone. Harris spoke to Crisford's solicitor who arranged for her covertly to record the telephone conversation. Crisford's affidavit of discovery referred to the recording and transcript of the conversation (that being the first time that Haszard knew that the conversation had been recorded) but claimed that it was privileged from production as it had been brought into being for the purpose of submission to his legal advisers to enable them to conduct and advise on litigation. On an interlocutory application, the High Court Judge ordered the recording to be produced and Crisford appealed. The precise point did not appear to have been decided in any comparable jurisdiction.

The Court held first that recording a non-privileged conversation did not, without more, change the nature of the resulting document so as to attract privilege. The recording was not a note or personal summary of a conversation that betrayed the advice or views of the legal adviser or the agent who obtained it, nor was it a communication to anyone. It was simply an electronic version of the non-privileged conversation. Secondly, (adopting 13 *Halsbury's Laws of England* 2d para 81) the conversation had been a communication between opposite parties or made by or on behalf of the opposite party and did not attract the protection of "without prejudice" negotiations and was accordingly liable to disclosure.

The appeal was dismissed. The judgment also contains brief discussion of the rationales for litigation privilege, including a summary of the Law Commission's review of the rationales which are heavily based on the "work product doctrine".

Hearsay/Admissions

Juken Nissho Ltd v Northland Regional Council (CA 68/00, 15 May 2000, Richardson P, Gault and Thomas JJ)

JNL had a resource consent to discharge contaminants. A condition of the consent was that JNL monitored the discharge and forwarded the data in reports to the regional council. JNL contracted with a firm of consultants to monitor the discharges and write the reports. Two reports showed that breaches of the resource consents had occurred. JNL forwarded these reports without comment to the regional council which subsequently prosecuted JNL for offences under s 15(1) of the Resource Management Act 1991. JNL appealed against conviction on the grounds that the reports were inadmissible as they were not admissions by JNL. Apparently, the only reported case in which a similar situation arose was in the High Court of Australia in *Lustre Hosiery Ltd v York* (1935) 54 CLR 134.

The Court applied the principles in *Parkes v The Queen* [1976] 3 All E R 380, 383; *R v Duffy* [1979] 2 NZLR 432 and held that JNL had forwarded the report which showed that a breach of the resource consent had occurred without questioning whether that was the case. By putting forward the reports in that way in fulfilment of its reporting obligations, JNL had to be taken to be asserting or acknowledging the probable existence of the facts stated in the reports. They were therefore admissible as admissions as an exception to the rule against hearsay.

Burden of proof

Juken Nissho Ltd v NRC (as above)

The NRC prosecuted JNL for offences under s 15(1) of the Resource Management Act 1991 which provided that no person was to discharge [contaminants] unless the discharge was expressly authorised by, inter alia, a resource consent. It appeared that JNL had exceeded the limits on discharges contained in the resource consents it had been granted. JNL appealed against conviction on the ground that the burden of proof was on the prosecution to prove beyond reasonable doubt that the discharges had not been within the terms of the resource consents. The offences were triable summarily and so the question was whether s 67(8) of the Summary Proceedings Act applied.

The Court held (approving the decision of Thorp J in *Bay of Plenty Regional Council v Bay Milk Products Ltd* [1996] 3 NZLR 120) that on a natural reading of s 15(1) of the Resource Management Act, the phrase beginning "unless" was intended as a qualification to what went before, an exception or excuse. The burden of showing that the discharge was within the terms of the consent was therefore upon the defendant. Since the discharges were monitored by the defendant who was required by statute to collect and forward the data this would not impose an onerous requirement on the defendant.

Hearsay

R v Rongonui (CA 124/99, 3 April 2000, Elias CJ, Richardson P, Thomas, Blanchard and Tipping JJ)

The defence sought to introduce evidence that the accused had stabbed and killed her

neighbour as a result of provocation. To explain the accused's characteristics the defence sought to introduce evidence from experts who had examined the accused, the evidence to include what the accused had told them while she was being examined. The trial Judge excluded this evidence on a number of grounds, including that the history related to the psychologists was hearsay. This also resulted in a ruling that there was no evidential foundation in the Crown case for a defence of provocation and that the defence would not be put to the jury without evidence from the accused herself.

On appeal, the Court of Appeal unanimously held that the evidence should have been admitted and that it laid a foundation for the defence of provocation. The only part of the ruling relevant here was the statement in para [52] that the historical evidence should have been admitted under the exception to the hearsay rule recognised for diagnostic history in *R v Smith* [1989] 3 NZLR 405 (CA).

With respect, this must be wrong in principle. The crucial sentence in *R v Smith* is at p 410 l 21 and reads:

> Now firmly established as an exception to the hearsay rule, evidence is accepted from medical witnesses of statements of fact made by their patients to enable them to express an informed opinion.

The problem is the first clause. The evidence concerned is not hearsay. It is introduced merely to show that it was said and acted on the mind of the expert in forming an opinion. It enables the other side to identify and question the assumptions which underlay the expert's opinion. It is not introduced as evidence of the truth of the facts asserted and therefore is not hearsay. It would not be permissible to use it as evidence of the facts asserted unless it fell within a recognised exception to the hearsay rule, if indeed the hearsay rule has survived recent tendency to test the evidence merely by reference to prejudicial effect and probative value.

It seems then that the evidence should not have been excluded on this ground, but nor should it have been regarded as laying an evidential foundation for the defence of provocation unless it was admissible on some other ground as evidence of the truth of the facts asserted.

FAMILY LAW

John Caldwell

Family Protection Act

Williams v Aucutt (CA 179/99, 20 April 2000)

An adult daughter claiming under the Family Protection Act 1955 did not contend that she had any present or future economic need for maintenance and support. The assets enjoyed by herself and her husband were greater than those in her deceased mother's estate. The claimant did argue, though, that she deserved greater provision than the effective total of $50,000 granted under the mother's will because she had been a member of the mother's family, and had contributed to her mother's life. At the time of her death, the mother's estate amounted to about $920,000. When making her will the mother apparently believed it only to be about half that sum. Under the will, the claimant's only sibling was the primary beneficiary.

Delivering their joint judgment Richardson P, Gault, Keith and Tipping JJ reviewed the principles of Family Protection claims. In a judgment destined to become a much-cited authority, the earlier case-law principles were essentially reaffirmed. Some points, though, including the following matters were accorded particular emphasis by the Judges:

- the reference in s 4 FPA to provision of "proper ... support" for a claimant embraced recognition of the claimant having belonged to a family, and of having been an important part of the deceased's life. Financial need was not a prerequisite to a claim;
- where no economic need existed, the deceased's moral duty to recognise the claimant's family membership could be satisfied by a legacy of a "moderate amount";
- there were indications, as reflected, for instance, in the Law Commission's report (which received only qualified and weak judicial endorsement) that some Family Protection orders in recent years for adult children had been out of line with current social attitudes to testamentary freedom.

Allowing the appeal from the High Court judgment, in which Heron J had awarded a 25 per cent share in the residue amounting to around $200,000, the Court of Appeal awarded the additional sum of $50,000. In a separate judgment, Blanchard J agreed with this outcome. His Honour, however, wished to make it clear that the award should only be made in this case because the deceased had apparently misunderstood the size of her estate.

ADMINISTRATIVE LAW

Hamish Hancock

Lumber Specialities Ltd v Hodgson (HC Wellington, CP 10/2000, 29 March 2000, Hammond J)

The plaintiffs, beech sawmillers, challenged the lawfulness of a directive issued by two Ministers under the provisions of s 13 State-Owned Enterprises Act 1986, to Timberlands West Coast Ltd. The directive effected an immediate change to TWC's Statement of Corporate Intent, which had previously allowed beech harvesting.

In September 1999, the plaintiffs entered into longer tem contracts with TWC for the supply of beech. These contracts were typically for eight-year terms, from 1 April 2000, subject only to procuring resource consent.

Hammond J held the Ministers had not acted unlawfully by requiring TWC to cease beech logging and to "abandon its application for resource consent *forthwith* ... prior to the implementation of a new statement of corporate intent". His Honour said "SOEs are vitally interested, and involved in, important commercial and human enterprises, on a day to day basis. It is to be expected that emergencies might arise, or there might be other matters of compelling public interest which require direct attention". The Ministers' use of s 13 SOE Act for a conservation purpose was not improper. The Ministers had had regard to the considerations set out in Part I of the Act before issuing the directive. There was no requirement to consult other than with the TWC board, and this had been done. "Doubtless ... in other circumstances (such as a mid-term government, and with a sudden and largely unheralded change of governmental direction) far more would have been required in the way of consultation."

The plaintiffs also asserted that the Ministers breached s 27 NZ Bill of Rights Act 1990 ("... right to the observance of natural justice ..."). On this Hammond J said: "For myself, I have no doubt that s 27(1) is an exceptionally important provision in the New Zealand Bill of Rights. Surprisingly little use has been made of it in civil litigation in general. ... A given government may wish to change a well-established policy. That is, after all, a central (and necessary) feature of governance. But, in so doing, it may have to intervene in established property, or contractual, rights. What then, is to happen? ... Whether s 27 of the [Bill of Rights] could be made a surrogate for the kind of constitutional provision I have noted is an 'interesting question'. But an assertion of a breach of a substantive right of that kind was not run before me, and I therefore put it to one side."

The Court also held that the directive entitled TWC to terminate its contracts with the sawmillers (with one exception) as its issuance came with the force majeure clause. ❑

ADR IN THE ERB

Phillip Green, Barrister, Wellington

scrutinises the dispute resolution provisions of the ERB

This paper proffers an objective view about dispute resolution process shortcomings in the Employment Relations Bill. These shortcomings will impact on all causes and all parties. This is not an issue about preferring employers or employees.

It is said that Part 10 of the Bill will address two perceived current defects:

- delay and resourcing: in as much as justice delayed is justice denied, it is argued that the Tribunal does not always provide fair and just resolution of the differences between the parties; and
- the involvement of lawyers: it is said that the Employment Tribunal has become too formal and legalistic. It was, after all, established as a low level and informal dispute resolution procedure (ECA s 76(c)).

THE INSTITUTIONS

Part 10 of the ERB establishes the Institutions, their roles, powers and jurisdiction. Clause 156:

> states that the object of the Part is to establish procedures and institutions that:
>
> (a) support successful employment relationships and the good faith obligations that underpin them; and
>
> (b) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and
>
> (c) recognise that difficult issues of law will need to be determined by higher Courts.

Clause 164(1) records that:

> No mediation services may be challenged or called in question in any proceedings on the ground:
>
> (a) that the nature and content of the services was inappropriate; or
>
> (b) that the manner in which the services were provided was inappropriate.

"Mediation services" here refers to the services provided by the chief executive of the Department of Labour.

Many private mediations are carried out under the auspices of the Arbitrators' & Mediators' Institute Protocols. The Institute's Mediators are bound by a Code of Ethics. Breaches of the kind protected by cl 164(1) may, in private mediations, lead to disciplinary action against a mediator who is a member of the Institute and, possibly even civil proceedings might follow to recover loss. State provided mediators will be cushioned against such interventions.

A new Institution is created called the "Employment Relations Authority" or ERA (cl 168):

> an investigative body that has the role of resolving employment relationship problems by establishing the facts and making a determination according to the substantial merits of the case, without regard to technicalities. (cl 169(1))

The authority has an equity and good conscience jurisdiction and is obliged to apply that jurisdiction (cl 168(3)). It may make any order available to the High Court under our plethora of contracts legislation (cl 173). Members do not need to be legally qualified (cl 177).

The first inquiry to be made by the authority is to determine whether an attempt has been made to resolve the matter through use of mediation. If it considers that no such attempt has been made, or that the attempt was inadequate, the authority is obliged to direct that the Mediation Services be used (cl 170(1)(a) and (b)).

The authority is then given certain powers:

> **171 Powers of authority –**
>
> (1) the authority may, in investigating any matter:
>
> (a) call for evidence and information from the parties or from any other person;
>
> (b) require the parties or any other person to attend an investigation meeting to give evidence;
>
> (c) interview any of the parties or any person at any time before an investigation meeting;
>
> (d) in the course of an investigation meeting, fully examine any witness;
>
> (e) decide that an investigation meeting should not be in public or should not be open to certain persons;
>
> (f) follow whatever procedure the authority considers appropriate.

The procedure requires that the authority, in exercising its powers and functions "must act in a manner that is reasonable having regard to its investigative role". How one tests that reasonableness is less than clear.

Clause 185 introduces more startling aspects to the authority's process and procedure. This provision deals with how the authority should give its determinations:

> **185. Determinations** – In recording its decision on any matter before it, the authority, for the purpose of delivering speedy, informal, and practical justice to the parties:
>
> (a) must:
>
> (i) state relevant findings of fact; and
>
> (ii) state and explain its findings on relevant issues of law; and
>
> (iii) express its conclusions on the matters or issues it considers require determination in order to dispose of the matter; and
>
> (iv) specify what orders (if any) it is making; but
>
> (b) need not:
>
> (i) set out a record of all or any of the evidence heard or received; or
>
> (ii) record or summarise any submissions made by the parties; or

(iii) indicate why it made, or did not make, specific findings as to the credibility of any evidence or person; or

(iv) record the process followed in investigating and determining the matter.

Where a party is dissatisfied with the authority's decision, it may challenge the authority's determination. The application must specify the grounds (cl 190(3)(d)).

The applicant must also state whether a direction from the Court is required that the judicial hearing be a full hearing of the entire matter. But, there are hurdles to jump. Under cl 192, once an applicant applies for a de novo hearing the authority must submit to the Court a written report in relation to the authority's investigation (cl 192(1)).

The report must give the authority's assessment of the extent to which the parties involved in the investigation have facilitated rather than obstructed the authority's investigation and whether or not the parties have acted in good faith towards each other during the investigation. The parties have an opportunity to comment on the authority's report before it is submitted to the Court and their comments, together with the authority's report, are then filed with the Employment Court. The Court may only grant a de novo hearing if it is satisfied that the applicant, in the course of the authority's investigation, acted: "... in a manner that was designed to resolve the issues involved". The Court must, as a first step, consider whether an attempt has been made to resolve "the matter" by use of Mediation Services (cl 198(2)).

If the Court considers that no attempt has been made or only an inadequate attempt was made to resolve the matter through mediation, it must direct the parties to the Mediation Services before it can itself formally consider the matter. There is an exception to this requirement where the Court considers that the Mediation Services will not serve any constructive purpose or that it is not in the public interest to refer the matter to mediation (cl 198(2)).

The Court is specifically excluded from advising or directing the authority in relation to the "authority's" exercise of its investigative role, powers, and jurisdiction (cl 198(4)). Therefore, the Court appears only to have the theoretical ability to determine a review under Part 1 of the Judicature Amendment Act 1972.

Finally, there is appeal to the Court of Appeal from the Employment Court on questions of law (cl 224).

NATURAL JUSTICE

Just outcomes are only ensured by the application of the principles of natural justice. These principles protect against corruption of the system. They preserve the essential integrity of judicial processes required for the maintenance of public confidence in our institutions. Employment law issues are often emotionally laden and can achieve high public profile. They provide fertile ground for the constant testing of public confidence in its processes and outcomes.

Natural justice embodies notions of "fairness", a concept not easy to define. In *Maxwell v Dept of Trade & Industry* [1974] QB 523, 539, Lawton LJ observed:

> From time to time, ... lawyers and Judges have tried to define what constitutes fairness. Like defining an elephant, it is not easy to do, although fairness in practise has the elephantine quality of being easy to recognise.

In *Trustees of Rotoaira Forest Trust v A-G* [1999] 2 NZLR 452, Fisher J had before him an application to set aside an arbitral award for breach of natural justice. It was alleged that there was a lack of opportunity to be heard. The Court summarised the principles of natural justice (at p 463) and included the following:

(c) as a minimum each party must be given a full opportunity to present its case;

(d) in the absence of express or implied provisions to the contrary, it will also be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have the opportunity to be present throughout the hearing; and that each party be given reasonable opportunity to present evidence and argument in support of its own case, test its opponent's case in cross-examination, and rebut adverse evidence and argument.

For a more detailed discussion refer to *Brooker's Arbitration Law & Practice*, Green & Hunt, E11.

THE INQUISITORIAL APPROACH

The Bill seeks to introduce some remarkable innovations. We are firm embracers of the adversarial system. Any alternative or modification to the embraced system may be viewed with a level of suspicion. The apparent aberration where the status quo is disturbed can be explained away by reference to the specialist jurisdiction which allows for some form of idiosyncratic modification. But what we have never accepted is the European investigative or "inquisitorial" model per se as a method for resolving disputes. We have limited experience of an inquisitorial approach within our jurisdiction. Where that has been adopted, it is through gradations of process linked back to the application of natural justice principles and annexed to an adversarial buffer to provide the safeguards. A number of examples demonstrate the welding of one approach on to the other.

The Human Rights Act 1993 gives the Race Relations Conciliator investigatory power balanced by application of natural justice principles, including rights of appeal.

The Immigration Act 1987 establishes processes to determine whether or not a person should be granted residence. It is the New Zealand Immigration Service (NZIS) which has an initial investigatory or inquisitorial role. Their decisions are made by reference to the "Government Residence Policy". (Immigration Act 1987 (IMA) s 13B) The current policy at Ch 1 includes as "fairness" requirements:

- the applicant is informed of information that might harm their case;
- the applicant is given a reasonable opportunity to respond to harmful information;
- the application is decided in a way that is consistent with other decisions;
- appropriate reasons are given for declining an application;
- only relevant information is considered;
- all known relevant information is considered.

(*Government Residence Policy*: Ch 1: A1 Fairness & Natural Justice)

The NZIS decision is subject to review by the Residence Appeal Authority. (IMA s 18B) The authority must ensure that the Natural Justice Policy provisions have been complied with. If the authority receives further information it must disclose that information to the appellant and give an opportunity for rebuttal (IMA s 18F(7)).

Would be immigrants are afforded better protection in the determination of their fate than employers and employees under the present Bill.

So we already have the adoption of partially disguised inquisitorial processes slipping into our jurisprudence. They add to what we have. They positively aid the pre-existing and well-established practices.

Both the adversarial and inquisitorial processes have the same starting point, the need to establish fact. The facts need to be ascertained so that the law can then be applied.

In the new world, a primary function of the ERA will be promptly to resolve difficulties in the employment relationship (cl 156). The authority as "an investigative body" has the role of resolving the employment problem by establishing the facts and making a determination according to the substantial merits of the case (cl 169). The authority is to be inquisitorial.

It is in this sensitive area of questioning by the determiner of fact and the applier of law that we see such strong contrast between European civil law and our common law.

In New Zealand, when a Judge appears to descend into the pit by such an act, it is likely to prompt an allegation of bias by the losing party. See *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146 (CA) and more recently, *R v Loumoli* [1995] 2 NZLR 656. In that case, during the trial the Judge intervened 110 times and asked 232 questions. During the defence case, he intervened 61 times and asked 163 questions many of which were in the nature of vigorous cross-examination. The Court of Appeal, not only expressed concern about the impact of such questioning upon the jury, but, also at (699):

> the effect the Judge's interruptions had on the orderly and lucid development of the case for the defence.

The issue is one of balance. In the adversarial system where counsel conducts the interrogation of witnesses there is a referee sitting to observe that rules concerned with fair play are observed. But here, in this Bill which has as part of its goal the reduction of lawyerly involvement, it is the investigating authority who will ask the questions. What balancing of interests and fairness controls are required in an inquisitorial system if it is to operate successfully in New Zealand?

To some, it may come as a surprise to learn that an openly stated inquisitorial approach to fact finding has already slipped into our jurisprudence through the Arbitration Act 1996. It is the Second Schedule of that Act which imposes a set of mandatory provisions for all domestic arbitrations unless the parties can agree to opt out of the Schedule or part of it. Clause 3(1)(a) to the Second Schedule states that:

> ... unless the parties agree otherwise, the parties shall be taken as having agreed that the powers conferred upon the arbitral tribunal include the power to:
>
> (a) adopt inquisitorial processes ...

So there it is. Inquisitorial processes adopted as part of our New Zealand jurisprudence.

Just as the Employment Relations Bill seeks to create speedy resolution of disputes, and, with quite some informality, the Arbitration Act 1996 also seeks to achieve that end – although making available the full gamut of formality for those who elect to use it. The arbitrator's ability to use inquisitorial processes, however, is tempered by a number of very important provisions. Article 18:

> requires that the parties shall be treated with equality and each party shall be given a full opportunity of presenting that party's case.

Article 34 concerns the Court's ability to set aside an award. There are very limited grounds upon which an award can be set aside. However, one of the grounds is that the award is in conflict with the public policy of New Zealand. (Article 34(2)(b)(ii)) and award is declared to be in conflict with the public policy of New Zealand if:

> a breach of the rules of natural justice occurred during the arbitral proceeding; or in connection with the making of the award. (Article 34(6))

It will be seen at once, that adoption of inquisitorial process under the Arbitration Act 1996 is still set in the context of a hearing where the parties will at least have an opportunity to hear the questioning and be able to respond to it. The application of inquisitorial processes is balanced by the presence of the rules of natural justice which by their rigor demand a fairness of process which can be measured and checked. The *Trustees of Rotoaira* case (op cit) was determined by application of the Arbitration Act 1996.

SAFEGUARDS UNDER THE CIVIL LAW

The inquisitorial European civil system also has a claim to longevity. It originated in the later Roman Empire and came to be adopted by the Roman Church. The influences of these sources made the system common in Europe by the 16th Century. In all forms, the Judge's investigation is not limited to the evidence put before the Court. The Judge proceeds with an inquiry on his or her own initiative. (*The Oxford Companion to Law*, Walker OUP 1980 ed p 623.)

In a typical Civil system, at an early stage of the proceeding and in any event well before trial, the defendant and his counsel acquire an absolute and unlimited right to inspect the entire dossier, that is, all of the evidence collected by the prosecution and the investigating Magistrate.

For an example of this, see s 147 of the German Code of Criminal Procedure (*Strafprozessorbnung*). The Code even provides that counsel may take the dossier to his or her office for proper study.

In France, the criminal investigation at its pre-trial stage is in the hands of the juge d'instruction. This Judge will build a dossier by interrogating all available witnesses including those named by the suspect and will collect other relevant evidence. The suspect is also questioned and typically does "talk" to the Judge rather than remaining silent. At the conclusion of the investigation, the Judge decides whether or not the evidence justifies bringing a formal charge. If a decision is made to proceed, then the file moves to a panel of three Judges. Only after having studied the dossier, and having given defence counsel an opportunity to submit arguments and to suggest the taking of additional evidence, does the panel determine whether or not there exists what could be called "reasonable cause" such as to allow the accused person to move to trial.

The hallmark of the process is transparency, and in a sense, accountability where the investigating Judge knows that a decision to move forward will be reviewed by a panel of three Judges to determine the appropriateness of the lower Judge's decision.

ERA – SAFEGUARDS

The present position is that the authority is unhappily free of the fundamental checks and balances either to be found in the European Civil law or to be found applying to inquisitorial processes under the Arbitration Act 1996 or to any number of other Tribunal processes where the adjudicator has the right to a limited inquisitorial function. (eg Human Rights Act 1993 and Immigration Act 1987) This flows from a number of the provisions in the Bill. As you will have noted, cl 185 calls upon the authority to give what would normally be considered a flawed decision. The authority does no more than state findings of fact, apply the law, expresses conclusions and makes orders as necessary. It is not required to set out or record evidence heard or received, or submissions made. It is not required to indicate why it made or did not make specific findings as to the credibility of any evidence or person. It is not even required to record the processes followed in investigating and determining the matter. Witnesses interviewed and what they said does not need to be recorded! It has the power to injure the reputation of a party without explanation or affording opportunity for redress. Normally such omissions in a decision would result in a successful appeal or judicial review.

Because of what it is not required in the authority's decision, it is perplexing that there are then created a series of obstacles to the bringing of a successful challenge on appeal. A prerequisite to challenging the determination of the authority before the Employment Court must be the requirement that the applicant specify the grounds on which the application is made. The appellant must determine whether or not to seek a full hearing. The good faith requirements again fall into play with the authority reporting on whether or not the appellant conducted itself in a manner designed to resolve the dispute before the authority. The ability to access the de novo appeal right is contingent on a clean bill of health in this report.

The appellant must specify the grounds of appeal. But how does one specify grounds for appeal if it is impossible to determine who the authority may have spoken to, and when, (for the timing may be important), what was said and whether a counterveiling opinion was expressed by anyone else, whether or not the submissions were received and read and why it should be that a particular credibility finding has been made – or not made. (see cl 185) The provisions impair a party's ability to bring any meaningful challenge on fact. Provided the law is applied in a manner consistent with authority the authority's decision becomes impenetrable. Furthermore, because the Employment Court may not advise or direct the authority in relation to its investigative roles, powers and jurisdiction, judicial review is all but impossible. (cl 198(4)) Such a review would have to take into account the matters the authority is not required to deal with in its decision. Those matters effectively prevent an aggrieved party from relying on the breach of natural justice which most often forms the basis for such a review.

An aggrieved party, aggrieved not just because of the original dispute – but now also because of an apparently inexplicable decision – may want to seek redress through a de novo hearing. And, yet the act of taking full opportunity to present a case (itself a principle of natural justice) may be seen by the authority as obstructing rather than facilitating the authority's investigation. Insistence on putting a particular point of view may be considered to be acting in bad faith – or at least not acting "in good faith towards each other during the investigation". To be deprived of a de novo hearing before the Employment Court, one does not necessarily have to act in bad faith, one only has to fail to act in good faith. The last vestige of potential accountability is then removed by cl 198(4).

BILL OF RIGHTS ACT

Fisher J in *Trustees of Rotoaira Forest Trust* left open the possibility of express or implied provisions varying some of the aspects of natural justice requirements. So, perhaps the rejoinder to my concerns may be that by statute the parties are having to accept a variation of many of the fundamental tenets of natural justice. But, there is a further problem. That problem lies in the New Zealand Bill of Rights Act 1990. Section 27 of that Act states: (in part)

> **27. Right to justice** –
>
> (1) every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law;
>
> (2) every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

Self-evidently, the Employment Relations Authority is a "tribunal or other public authority" and it has power to make determinations in respect of people's rights, obligations and interests which are protected and recognised by law. There is a statutory presumption that tribunals established by Parliament will observe the principles of natural justice. That means essential checks and balances of a kind which demonstrate that *Elephas Maximus* presence as espoused by Lawton LJ in *Maxwell*!

The fundamental principles of natural justice must be evident within the authority's processes including the final step of recording the decision. The process must allow the parties to test the authority's determination by discriminating objective review. Whether or not a party was acting in good faith should itself be subject to test by the Court. Denial of the right to a de novo hearing in the context of the present inquisitorial regime will create further injustices, and through reaction, inevitably more disputes. Aggrieved people rapidly lose the ability to compromise.

Unless there is transparency within the process (and natural justice is concerned with ensuring a high degree of visibility through the process), then the Employment Relations Authority will be bereft of integrity before it starts work. It will be mistrusted, if not by all-comers, then, by many. The party who "loses" will have that mistrust confirmed. That is because the process does not allow the opportunity for a losing party to understand how it was that the decision came to be made. That essential quality, absent from the present Bill, will encourage a perception that employment disputes are to be resolved through a process akin to the Court of Star Chamber arbitrariness.

The adage that "For justice to be done it must be seen to be done", is drawn from the well of human experience which says that such an approach will find a large measure of acceptability.

The system may offer speedy resolution but it will not provide for a just resolution. In the absence of significant modification to protect universally accepted rights, the system will undermine the ability of the authority to fulfil its laudable statutory objectives. ❑

THE RUSH TO PRIVACY

William Akel, Simpson Grierson, Auckland

on freedom of speech and invasion of privacy

At the 21st International Conference on Privacy and Personal Data Protection, held in September 1999 in Hong Kong SAR, Ms Jane Kirtley, Silha Professor of Media Ethics & Law at the University of Minnesota, referred in her paper "*Privacy and the News Media: A Question of Trust, or of Control*", to a global epidemic of new privacy initiatives, all of which in her view threatened to inexhaustibly restrict every aspect of the news gathering and editorial process. New Zealand is obviously not immune from these initiatives, and the decision in *P v D*, 25 February 2000 (Auckland, CP 126-SW99) is the most recent at the High Court level.

Indeed, it appears that editorial freedom in both news gathering and publishing was at the heart of the defence of the *Sunday Star Times* as the editor deposed that the newspaper had not even reached a point where serious consideration was being given to publishing any specific article on the claimant. Relying on s 14 of the New Zealand Bill of Rights Act 1990, the *Sunday Star Times* argued that it should not be required to give an undertaking where there was no substantial evidence that it intended to act in flagrant breach of another's rights and to name P would not be such a breach.

The High Court disagreed:

> [T]he right of freedom of expression is not an unlimited and unqualified right and in my view is subject to limitations of privacy as well as other limitations such as indecency and defamation. I adopt the statements of Jeffries J, the Court of Appeal and McGechan J in the *News Media Ownership* case and I join with Gallen J in accepting that the tort of breach of privacy forms part of the law of New Zealand.

Before we rush to firmly entrench a tort of breach of privacy we should bear in mind the caution issued by Hoffman LJ in *R v Central Independent Television plc* [1994] 3 All ER CA 641, at 651:

> There are in the law reports many impressive and emphatic statements about the importance of the freedom of speech and the press. But they are often followed by a paragraph which begins with the word "nevertheless". The judge then goes on to explain that there are other interests which have to be balanced against press freedom. And in deciding upon the importance of press freedom in the particular case, he is likely to distinguish between what he thinks deserves publication in the public interest and things in which the public are merely interested. He may even advert to the commercial motives of the newspaper or television company compared with the damage to the public or individual interest which would be caused by publication.
>
> The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. And publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which "right-thinking people" regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.
>
> Furthermore, in order to enable us to meet our international obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 November 1950; TS 71 (1953); Cmd 8969), it is necessary that any exceptions should satisfy the tests laid down in art 10(2). They must be "necessary in a democratic society" and fall within certain permissible categories, namely:
>
> > in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority or impartiality of the judiciary.
>
> It cannot be too strongly emphasised that outside the established exceptions (or any new ones which Parliament may enact in accordance with its obligations under the convention) there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.

According to *P v D*, breach of privacy is an established exception to freedom of expression in New Zealand which is not the case in England. Yet there is no consideration in the judgment of how the new tort impacts upon the long-established principles with regard to prior restraint of the media, and the plea of truth or justification – the long established trump card that protects freedom of expression, of which the media is a major beneficiary. The judgment does not even refer to the Court of Appeal decision in *TV3 Network Services Ltd v Fahey* [1999] 2 NZLR 129.

Before we too readily assume that the new tort is firmly established, full consideration needs to be given to:

- the impact on the established rules on prior restraint;
- related to this, the effect on the defence of truth in defamation and the issue of the public interest;
- the role of the legislature.

PRIOR RESTRAINT

Our rules with regard to prior restraint are over 100 years old. In *Bonnard v Perryman* [1891] 2 Ch 269, 284 the Court of Appeal said:

> The subject matter of an action for defamation is so special as to require exceptional caution in exercising the jurisdiction to interfere by injunction before the trial of an action to prevent an anticipated wrong .... Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in case of libel for dealing most cautiously and warily with the granting of interim injunctions.

In *Attorney-General v British Broadcasting Corporation* [1981] AC 303, 362 Lord Scarman placed the test for any prior restraint of free expression at a very high level:

> [T]he prior restraint of publication, though occasionally necessary in serious cases, is a drastic interference of freedom of speech and should only be ordered where there is a substantial risk of grave injustice.

Our Court of Appeal expressly reiterated these established principles in *TV3 v Fahey*. The Court also reaffirmed the principle that where a publisher intends to justify, the circumstances must be exceptional to warrant an injunction rather than leaving a complainant with a remedy in damages. The Court referred to its previous decision in *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406, 407:

> The principles have been stated by this Court in *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4 and *Ron West Motors Ltd v Broadcasting Corporation of New Zealand (No 2)* [1989] 3 NZLR 520. By reason of the principle of freedom of the media, which has been emphasised by this Court in those cases and others including *Attorney-General for the United Kingdom v Wellington Newspapers Ltd (No 2)* [1988] 1 NZLR 180 (the *Spycatcher* case) and *Television New Zealand Ltd v Solicitor-General* [1989] 1 NZLR 1, and which is reinforced by s 14 of the New Zealand Bill of Rights Act 1990 as to the right of freedom of expression, it is a jurisdiction exercised only for clear and compelling reasons. It must be shown that defamation for which there is no reasonable possibility of a legal defence is likely to be published. In relation to a possible defence of justification, we put the matter in this way in the *New Zealand mortgage* case at p 7:
>
> > It is true, as Mr Upton says, that this Court has not yet had to consider whether the principle restricting interim injunctions in defamation cases applies in New Zealand. But we think that the ideas underlying it are equally applicable in this country. As Oliver J put it, when justification is to be relied on as a defence an injunction will not be granted except in cases where the statement is obviously untruthful and libellous.
> >
> > One way of showing that may be to show that there is no reasonable foundation for the defence. Whether or not that is so in any particular case cannot be answered by an abstract test; it must depend on the facts of the particular case so far as they are known to the Court when hearing the application.

The judgment in *P v D* refers to *Sunday Star Times* submitting "that there were a number of factors which should tell against P in exercise of the Court's discretion, principally freedom of expression under s 14 of the New Zealand Bill of Rights Act 1990 ... (and) the undesirability of imposing prior restraint in the absence of reliable evidence of breach of a clearly definable obligation or the right of another ...". The argument appears to have proceeded on the basis that the newspaper had not even reached a point where serious consideration was being given to publishing any specific article on the claimant, however this could not be ruled out in the future. The newspaper argued that the permanent injunction that was sought by the claimant would preclude any future publication by the newspaper of the information that the claimant wished to prevent, whatever the circumstances.

The Court approached prior restraint quite differently from the traditional approach to prior restraint of the media. It referred to Spry "*The Principles of Equitable Remedies*" 4th ed, 385:

> When a perpetual injunction is sought to restrain the performance of acts that involve a breach of the legal rights of the plaintiff, as a first step it is necessary that the plaintiff should show that those acts would, if they took place, be unlawful, and so far as the question is one of the existence of legal rights, he must ordinarily, in a Court of combined legal and equitable jurisdiction, establish the existence of those rights on a balance of probabilities ...

The Court found that an injunction was warranted as the *Sunday Star Times* intended to breach the legal rights of the plaintiff. The legal right was a right to privacy. The Court found the tort of privacy in New Zealand encompassed four factors:

- disclosure of private facts must be a public disclosure and not a private one;
- facts disclosed to the public must be private facts and not public ones;
- matter made public must be one which would be highly offensive and objectionable to a reasonable person of ordinary sensibilities;
- the nature and extent of legitimate public interest in having the information disclosed.

It was these four factors that the Court believed provided the appropriate balance between the rights of freedom of expression and a right of privacy in cases of public disclosure of private facts.

As stated, there is no discussion of *TV3 v Fahey*. In that case the Court of Appeal appears to say that the same test for prior restraint should apply regardless of the cause of action. In *Fahey* the three grounds relied on for an injunction were interfering with administration of justice relating to existing defamation proceedings; civil contempt; and trespass and invasion of privacy. The Court said at p 134:

> This brings us to the third point, namely, that where both free expression and other rights and values are raised the Court must seek to accommodate and balance both sets of values. In that situation, too, the same general principles should apply, namely that the jurisdiction to restrain the proposed publication is exercisable only for clear and compelling reasons.

And at p 136:

> The only aspect which could be the subject of objection is the surreptitious recording on film of the conversation and screening of that film, but the substance of the conversation could be published in any event. TV3 has indicated it will seek to prove the truth of what is to be published in the disputed second programme. That engages the well-established rule that prior restraint should only be entertained in clear and compelling circumstances. While the question of trespass or invasion of privacy is analytically a separate issue, it is, in substance, very much bound up with the question of truth. If TV3 establishes the truth of what is to be published, there could be little room for a significant award of damages for any trespass as such. What is more, in such circumstances, damages would clearly be an adequate remedy.

Freedom of speech and freedom of the press are two of "the pillars of liberty" (Lord Salmon in *Attorney-General v BBC*). Freedom of expression pursuant to s 14 NZBOR is subject only to such reasonable limits prescribed by law as can be "demonstrably justified in a free and democratic society" pursuant to s 5. As the Courts consider the new tort of invasion of privacy further, it is more likely than not to be in the context of press freedom, or media intrusion. Whatever one's bias, much greater consideration will need to be given to the established principles on prior restraint before the Courts too readily grant injunctions for breach of privacy. As Lightman J warned in *Service Corporation International v Channel 4 Television Corporation* [1999] EMLR 83 at 90:

> But if the claim based on some other cause of action is in reality a claim brought to protect the plaintiff's reputation and the reliance on the other cause of action is merely a device to circumvent the rule, the overriding need to protect freedom of speech requires that the same rule will be applied.

The same warning was issued by Robertson J in *Beckett v TV3 Network Services Ltd*, Whangarei Registry, CP 10/00, 18 April 2000. The plaintiffs sought an injunction to stop the broadcast of a programme about the death of a doctor in advance of a coroner's inquest. Referring to *TV3 v Fahey* His Honour first of all noted that "any prior restraint of free expression must pass a high threshold". One of the grounds relied on for the injunction was breach of privacy. Obviously this did not apply as the events involved the death of the doctor shortly after his arrest in a public place by police officers. The Court said:

> The Court for good reasons of policy and principle has been most cautious in all cases which seek prior restraint. There is nothing in the circumstances or the evidence which emerge before me which came anywhere near fulfilling the high standards which must necessarily be demanded, before the Court will act as a censor on legitimate public debate and interest about an issue of serious concern.

TRUTH AND PUBLIC INTEREST

Truth is an absolute defence to a defamation claim in New Zealand. It is not subject to any requirement that the subject matter is in the public interest. "The rationale of the defence is that a person is entitled only to the reputation his or her behaviour deserves." Todd (ed) *The Laws of Torts in New Zealand* (2nd ed, 1997) para 16.9. *Lange v Atkinson* [1998] 3 NZLR 424, 435.

That the matter complained about need not be in the public interest is also in line with the defence of honest opinion. As the Court of Appeal noted in *Lange v Atkinson* at p 436:

> There is no requirement stated in the (Defamation Act) that the matter on which the opinion is expressed has to be of public interest: *Awa v Independent News Auckland Ltd* [1997] 3 NZLR 590 at p 595. This apparent relaxation of the common law requirement of public interest would seem to be consistent with s 14 of the New Zealand Bill of Rights Act 1990. Nor need the opinion be shown to be one which would be held by a reasonable person on the basis of the proven facts. It no longer needs to be objectively fair. It is enough for the defendant to show that the opinion was held. This may be difficult to show, however, if no reasonable person could genuinely have held it.

As stated above, there could be no prior restraint of the media if truth (and honest opinion) were put in issue. The public interest is irrelevant.

The new tort of breach of privacy changes all this. The claim proceeds on the basis that what is to be published or broadcast is true. The principal inquiry according to *P v D* focuses on:

- is what is to be published highly offensive and objectionable to a reasonable person of ordinary sensibilities? and
- the nature and extent of legitimate public interest in having the information disclosed.

There is a dramatic shift of focus. On an application for an injunction on a claim in defamation, the Court makes no final determination as to whether what is to be published or broadcast is in fact true. The inquiry usually ends once the plea is put forward. If truth is not established at trial the defendant is at risk that damages will be aggravated.

In a claim for injunctive relief based on privacy the Court does make a final determination on the four factors referred to above. In essence it is a determination reflecting subjective values on vague terms, and perhaps reflects how the Court perceives the role of the media in society.

> In seeking to measure what is "highly offensive" the American Courts have developed what Prosser calls a "mores test" (Prosser, 1971, p 857). But the leading cases fail to provide reliable guidelines as to where the line is to be drawn. (*Melvin v Reid* 112 Cal App 285, 297 p 91 (1931), *Sidis v F-R Publishing Corporation* 34 F Supp 19 (SDNY 1938.)
>
> "In neither *Melvin* or *Sidis* is a real attempt made to consider the extent to which the information divulged was 'private'. The conceptually vague notions of 'community customs', 'newsworthiness', and the 'offensiveness' of the publication, render these and many other decisions concerning 'public disclosure' singularly unhelpful in an area of considerable constitutional importance." Professor Raymond Wacks, Professor of Law and Legal Theory at the University of Hong Kong states in his paper "Privacy Reconceived: Personal Information and Free Speech" delivered at the 21st International Conference on Privacy.

Invariably a claim based on invasion of privacy will be about protection of reputation or standing in the community. A person will not want the public at large to know about some private facts buried in the past that could affect present reputation and standing. Mr Tucker did not want the world at large to know of his previous convictions. The claimant

in *P v D* does not want the world to know about a past unfortunate incident and treatment at a psychiatric hospital.

The Court of Appeal was not oblivious to the conceptual difficulties when it first explored privacy in *News Media Ownership Ltd v Tucker*, CA 172/86, 23 October 1996. It referred to the claims of intentional infliction of emotional distress and invasion of privacy as raising important and difficult issues. The Court stated:

> We add only that we agree with Ms Moran that the extent of any defence of justification would require consideration. We have in mind in particular the argument that a plaintiff who makes an appeal to the public for funds may in some circumstances have to accept a certain amount of investigation of his history. No view would now be appropriate on that or any other aspect of the ultimate legal issues in the case.

The point is that the new tort of privacy cuts across the established balance between freedom of expression and protection of reputation. In the rush to privacy the Courts must take care to ensure that the proper balance is maintained. This is no easy task. In *P v D* the Court said it did not find the decision on factors (c) and (d) above as clear cut as the first two factors. The Court acknowledged that mental illness should not be a cause of exclusion, scorn, or embarrassment. However, approaching mental illness in this way did not take into account P's own feelings, believing that publication would have a serious effect on his/her own confidence and ability to free him/herself from rumour, speculation and innuendo.

The Court concluded:

> On the material before me there is no basis for concern that P's past or present mental health renders P unfit to carry out P's profession to an appropriate standard and that the disclosure of the information is in the public interest in so far as assessment of P's character, credibility or confidence is concerned. I accordingly consider that legitimate public interest in having the information disclosed is minimal.

THE ROLE OF PARLIAMENT

In the rush to privacy the Courts become the arbiter of issues akin to media ethics and standards that are usually the province of an editor-in-chief. The Court will not of course wish to be seen as a censor (*Auckland Area Health Board v TVNZ*) but in deciding issues of reasonableness and public interest in media law matters it runs a real risk of being seen as such. Hoffman LJ in *Central Independent Television* (p 653) welcomed intervention by the legislature:

> I would not for a moment dispute ... the fact that a right of privacy may be a legitimate exception to freedom of speech. After all, other countries also party to the Convention have a right of privacy. ... But we do not and there may be room for constitutional argument as to whether in a matter so fundamentally trenching upon the freedom of the press as the creation of a right of privacy, it would not be more appropriate for the remedy to be provided by the legislature rather than the judiciary.

McGechan J suggested the same in *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716, 733:

> Beyond these expressions of support for the concept I will not presently go, although I observe that the need for protection whether through the law of tort or by statute in a day of increasing population pressures and computerised information retrieval systems is becoming more and more pressing. If the tort is accepted as established, its boundaries and exceptions will need much working out on a case by case basis so as to suit the conditions of this country. If the legislature intervenes during the process, so much the better.

The legislature however has shown a marked reluctance to endorse any civil action for breach of privacy. The Privacy Act 1993 post-dates *Tucker*. That Act is limited to the promotion and protection of individual privacy with regard to the collection, use and disclosure by public and private sector agencies of information relating to individuals and access by each individual to information relating to that individual and held by public and private sector agencies. It is about data protection only.

Indeed s 2 of the Act expressly excludes from the definition of "*agency*" any news medium in relation to its news activities. "News activity" covers both the gathering of news and the preparation or compilation of articles or programmes of or concerning news, observations on news or current affairs, and the dissemination to the public of any article or programme of or concerning news, observations on news or current affairs.

The New Zealand Bill of Rights Act does not expressly endorse a concept of breach of privacy unlike the (UK) Human Rights Act 1998. Although there has been comment on a right to privacy in the context of "search, arrest and detention" (eg *R v A* [1994] 1 NZLR 429), unlike freedom of expression, a right to privacy is not one of the stated democratic and civil rights referred to in the Act.

The 1989 Broadcasting Act saw legislature intervention with regard to privacy and broadcasting. Section 4 obliges every broadcaster to maintain in its programmes and their presentation standards which are consistent with "the privacy of the individual". Section 13(1)(d) provides that if the Broadcasting Standards Authority finds that a broadcaster has failed to maintain standards consistent with the privacy of an individual, the broadcaster can be ordered to pay to that individual compensation not exceeding $5000. There is a very limited right of appeal to the High Court.

Significantly, s 4(3) of the Act specifically states that no broadcaster shall be under any civil liability in respect of any failure to comply with any of the provisions of s 4.

So it may be argued that between 1989 and 1993 the legislature turned its collective mind to the issue of privacy, particularly as relates to freedom of expression and the media, and certainly the broadcasting media. It decided that a regime of data protection would be implemented. However, privacy as relates to at least the broadcasting media should be dealt with by way of a code and a specialist body (the Broadcasting Standards Authority) with limited input from the High Court. Indeed, s 4(3) of the Broadcasting Act 1989 tends towards excluding a broadcaster from the reach of the common law if there is a failure to maintain in programmes and their presentation standards consistent with the privacy of an individual.

(There is no similar regime for the print media, although complaint can be made to the Press Council.)

There can be little doubt that a right to privacy is fundamental in a democratic society. It is part of our freedom and dignity and the mutual respect we hold for each other. The real issue is how we safeguard that privacy and at the same time ensure that well-established concepts relating to prior restraint of freedom of expression and press freedom are not too readily discarded. ❑

TO HEED THE CHILD'S VOICE

Patsy Henderson, The Miriam Centre, Auckland

asks whether counsel for the child fulfil the child's right to be heard

Over the last ten years of our involvement with the Family Court as diagnostic and evidential interviewers and as therapists, the Miriam Centre's clinical team has become concerned that the Family Court has difficulty in assessing the degree of risk a parent poses to a child where serious concerns or allegations are raised by or for a young child in relation to the parent within custody and access proceedings. The Court's investigative process seems unsuited to eliciting the young child's experience of traumatic events and as a result the Court is failing to hear and to heed some young children's complaints of parental abuse. The author is currently in the process of undertaking a qualitative longitudinal study reviewing the cases in which the pattern has occurred. This paper reports on the interim findings of that review and analyses the elements of the Court process contributing to this pattern, suggesting ways in which the process would be improved.

SURVEY SAMPLE

All children were drawn from the Miriam Centre client base, (from an 11 year period 88-99) who fitted the profile above. Fourteen children and 17 "significant adults" have been reviewed and interviewed thus far. Strict ethical guidelines were followed in obtaining permission to work with these families again. Initially, the intention was to limit re-interviewing to the adults, however all the children asked to be included when they discovered the study from their families. In order to avoid further damage to the children by raising these issues for them again, their involvement in the study was integrated into a therapeutic process discussing ways of improving the Family Court investigation for children like themselves. They all entered into this enthusiastically.

THE ISSUES

We believe that this research is significant to Family Court and Care and Protection Professionals in that it highlights areas of current practice that continuously disadvantage young children in that they prevent children's experience (of adults' behaviour) being discovered. The research findings highlight the need for the development of a streamlined specialist investigative procedure focused on the young child using age-appropriate techniques.

As it stands, the process risks failing both the internal prescriptions of s 23 of the Guardianship Act to make the child's best interests paramount and also New Zealand's external international commitments to that same end under the United Nations Convention on the Rights of the Child.

There are two issues which, in our analysis, contribute to this situation: first, the process of the Court's investigation generally and second, the theory or methodology of interviewing children used by the Court's professionals.

The Family Court process is hampered by its isolation from investigations taking place in the criminal justice system. At present, parallel investigations by different professional groups take place with little reference to one another, to the detriment of the child and family, and frequently to the disadvantage of one or other of the investigations. Interlinking is commonly only by the Family Court professional report writer (who may or may not be an expert in the dynamics of child abuse or criminal evidence procedures) commenting on the evidential video or verbatim diagnostic, this comment becoming "the expert" opinion relied upon by the Family Court.

Furthermore, the Family Court's interview methodology is inappropriate for young children (see below), and is inappropriate to enable any child to disclose sensitive matters. The procedures are antithetical to those necessary to open any meaningful conversation with a young child, even regarding information of a non-sensitive nature.

The methodology often employed is even inappropriate for evidence collection. The Family Court's professionals frequently employ generalist interpretative assessment methods rather than safe evidential practices appropriate to the age of the child and to child abuse disclosure. In this, the Family Court appears to have been left behind by the development of specialist interviewing methodology made in the criminal field.

Overall it appears the investigative process in the Courts, both criminal and Family, regarding young children is designed predominantly to meet the needs and expectations of the adult participants, legal practitioners and parents. While the professional concern of investigators is of course for the child, the practices they use are only reflective of adult legal preoccupations and not effective for dealing with children. Young children are often unable to respond to the resultant structures and process, and accordingly their experience cannot be discovered. If the child's experience is not elicited, the child cannot be protected, Buckley J "The Child's Input in Custody and Visitation Disputes", 1988 American Bar Association.

Briefly outlining the solution

This paper outlines a proposal for a more appropriate investigative procedure for the Family Court in these difficult and sensitive cases. We argue that any such process must, of necessity, employ methods considerably different from those currently utilised in the Family Court investigation.

Our proposal involves two interrelated elements. First, there is a need for a proposal for a new model of interview-

ing. We outline a model, drawing upon socio-cultural developmental theory and sociology of childhood research and the clinical work developed in the Miriam Centre over the twelve years of our having provided these services to children and families.

The second element of a better process, in our proposal, is the establishment of a specialist multi-disciplinary service integrating the different agencies and professional purposes. Most importantly, any new service should focus upon the need for a long-term resolution for the child and his or her family. It is our firm contention and our clinical experience that such a focus is not only therapeutically sound but also forensically useful in that it encourages both the child and family's greater cooperation in the investigative process. Our clinical experience clearly shows that children most often tell when they believe it will result in a positive outcome for themselves and family ie "daddy getting help ..." or a younger sibling protected.

The next section of the article outlines the current Family Court process and considers the specific problems identified with the interview methodology and theory and the issues surrounding counsel for the child and the Court's attitudes to sexual abuse generally.

Current Family Court procedures

This section of the paper considers the pretrial or defended hearing investigative process in Northland as drawn from all 14 cases so far reviewed. Discussion with colleagues outside of Northland shows similar practices occur elsewhere.

When serious allegations are raised in the Family Court, by a very young child or a parent against a parent, the current process is:

- counsel for the child is appointed who interviews the parents and may or may not interview the child;
- a private psychologist is employed by the Court to investigate the allegations and to provide a s 29A report ("the s 29A reporter"). This report then becomes extremely influential in Court decisions;
- the evidence already gathered (ie evidential video or verbatim diagnostic notes) are commonly ignored by the Court at the time and the Family Court implements its investigation separate from any earlier inquiries, although the s 29A reporter frequently comments on this earlier evidence;
- the Family Court sets a date for hearing;
- in the interim access, supervised or unsupervised, is commonly sought and granted to the accused parent.

The s 29A reporter, as a registered psychologist (community, educational or clinical), will have training in general psychological assessment of children, but may not be a specialist in the dynamics of inter-familial sexual abuse or sexual abuse assessment and is not trained as an evidential interviewer. They uniformly (in all cases 1988-99) employed the generalist assessment procedures appropriate for non-forensic situations.

The problems with this process experienced by the children seem to be –

- the interview process;
- lack of trust/rapport with the s 29A reporter;
- brief process (neutral stranger);
- insufficient or inappropriate questioning;
- section 29A assessment seen as needless re-interviewing;
- section 29A assessment experienced as disbelief;
- time lapse;
- observation with offender;
- counsel for the child's involvement with and attitude to the child.

Our review of the children's discussions of their experiences and the actual outcomes of the cases leads us to the following understandings.

INTERVIEWING PROCESS

All the children studied here were subject to the same interview process during their involvement in the Family Court. The child was interviewed alone for one or two brief interviews and was observed with each parents individually. The interviewer based assessments on indirect measures such as perception tests and "family relations" games, occasionally supplemented with questionnaires and questioning about the child's view of the family.

Section 29A reporter

The children were commonly reluctant to speak to the s 29A reporter and frequently failed to disclose anything to him or her, despite earlier disclosures.

Their concerns appeared to focus around spending insufficient time with the reporter to develop any rapport or trust and the child's awareness that the report writer had the power to affect the child's family – "I knew she'd tell the Judge".

Typical comments included: "I didn't tell him cos I didn't know him". "I didn't tell him because he was so big and smelt funny." "I didn't tell him cos he just came and took me to my bedroom away from mummy and asked me questions about if I like going to visit dad's house." "I said yes, cos I didn't know him." "This lady came and showed me pictures, but I didn't know her so I didn't say anything." "I was scared." "I didn't tell her cos I thought she'd tell dad." "She'd tell the Judge and I thought the police would come and mum would go to jail."

The children's reports suggest that the current practice of a brief interview by a "neutral" stranger is not conducive to a young child disclosing sensitive matters. Nor can it ensure any disclosure or lack of disclosure is valid because of the influence of the child's anxiety and distrust.

The practice of brief "neutral" stranger interviews is also contrary to accepted processes in non-criminal research on children. Sociology of childhood and socio-cultural developmental theorists write that in order to facilitate young children to talk about their life experiences the adult must take time to develop trust and rapport (Smith A *Understanding Children's Development*, AUP 4th ed (1998)). In the young child this may take several meetings to develop, before anything, even non-sensitive, is revealed by the child. This rapport-building process of course must not include any questioning about the allegations.

We make two proposals with regard to this. First, any interview should be conducted only after rapport is properly established. It is important that the child is familiarised with the clinic and personnel before the child is separated from "their adult" or there is any discussion about the alleged events entered into. This may take several weeks in a very young child. Such a process would challenge current notions of "suggestion" in the Family Court. However, given that the proposed process demands total abstention from any discussion of the allegations, we argue that these concerns would be misplaced.

Second, the child's understanding of the purpose or destination of the information he or she gives needs to be considered. A proportion of the children in our study appeared confused as to the purpose of the interview. It is also our clinical experience that children are likely to be much more open about their experiences when they perceive the process as positive, a constructive part of problem solution; such as, that the father will get help and they will be able to see him again in safe circumstances. All the children in the study articulated that their responses to s 29A report writers were heavily influenced by their understanding of what the information was to be used for. None appeared to believe it could lead to positive change for them.

Interpretative not investigative

The second area of concern identified was that the interviews were interpretative rather than investigative or evidential. They were not designed to ask the child what (if anything) had happened, when and where, but used general, indirect assessment techniques developed and appropriate for non-abusive situations. The children frequently appeared not to have realised that the reporter expected them to divulge their experiences of sexual abuse. Children commented: "I didn't tell her because she didn't ask me"; "all we did was play games" and "we just looked at pictures and I had to pretend one was my sister but it wasn't my sister it was a baby." "I didn't tell because she didn't ask what dad did."

It appears s 29A reporters are overly conscious of the risk of suggestion and of their lack of training in the field of evidence gathering. Alternatively the problem could be that they believe indirect measures will elicit the evidence. However, methods absolutely appropriate in the "non-sensitive", non-criminal field are ineffective and therefore dangerous when transferred to this area.

This is not to suggest that reporters should adopt leading techniques. It was notable that in one instance a child reported the reporter using highly leading closed questioning. In fact it is important that untrained interviewers do not ask questions about evidence as such interviews are likely to risk contaminating the child's evidence and ultimately to lead to its exclusion.

The investigative interviewing processes developed for the criminal Courts do allow more focused interviewing whilst guarding against contamination by leading questions. This is not to say that the process in the criminal evidential interview is ideal for the young child (Westcott H and Jones J *Perspectives on the Memorandum – Policy Practice and Research in Investigative Interviewing* – Arena (1997)). The s 29A interview and the criminal Courts share the perception that the intervention should be as brief as possible and conducted by a neutral stranger. The experiences of the children in this group suggest this practice to be unhelpful.

Considered overall, the central flaw in the interviewing in this study was that the processes were informed from a perception of children based in a protectionist/welfare or dependency view rather than of an agency perspective. Accordingly, the adult's responsibility is to interpret, rather than to discover the child's actual knowledge, perception, and opinion of their own experience of a parent's behaviour (Neal and Smart (1988)). Where an agency perspective is employed, assessments are based on the recognition that even very young children can and do know their own experiences and can articulate them if interviewed by competent, skilled specialists in a child-centred, family-friendly environment, in age appropriate ways Langsted "Understanding Children's Development". Quoted in *Children's Perspective* Smith A, ed, 4th ed AUP (1994) p 21. In any interview with young children it is the competence of the adult rather than the incompetence of the child that is the critical factor.

Observation with accused

The third issue causing difficulties for the children in the group was the presence (common to the cases in the sample), of the accused. This was of great significance to the children, both because they were unable to tell with the alleged offender present or because they perceived the reporter as allied to the alleged offender. One child, asked in the interview for the research why he didn't tell the psychologist, replied: "maybe cos she asked me in front of dad". Other children commented "I didn't tell cos I thought she was going to tell dad". "She laughed a lot with dad." "I thought she was dad's friend." This is common in children commenting on the CYF evidential video process also – "I only told the good bits cos I thought dad might see the video".

The findings regarding the children's reluctance corresponded with international literature which shows that children do not feel able to disclose abuse in front of the offender and often employ behaviours compensatory towards or protective of the offender, masking the abuse from onlookers (Hall N in *"The Voice of the Child". A Handbook for Professionals*. Eds Davie, Upton and Verma (1996)).

Thus, interviewing the child with the accused parent is unlikely to facilitate any disclosure, the child might have to make. Any report relying on observations of such interactions that ignores this factor is therefore seriously flawed.

Re-interview

Fourth, the children experienced the s 29A interview as a re-interview, in that they had already told one person and were now being expected to tell another (in this study many months later). This duplication appeared unnecessary and irrelevant to the children. One commented that he could not see any reason for disclosing the abuse again in the s 29A interview: "I didn't tell her cos I already told a long time ago and I am safe now". Others commented: "I told mum before so I didn't tell him". "The video lady (evidential interviewer) told me I'd only have to tell one time so I didn't tell the new lady cos don't have to."

Disbelief

Re-interviewing also confused and upset children because they interpreted the need for the new interview as indicating that their initial disclosures had been disbelieved by powerful adults. Their worry was reflected also in the perception that the interviewers were supporters of the offender.

The children worried that if those adults did not believe them it might mean they would be made to go back to the abusive parent, which in these cases it often did. The s 29A investigation can thus realise the typical offender's threat that the child should not tell because they will not be believed, thus re-enforcing learned helplessness

It was clear from the children's accounts that they were generally aware that the reporter had a significant position of power in the resolution of the family matters, and this exacerbated their concern and carefulness. In the words of one child "he was going to tell the Judge what I said and dad would find out".

There are several international studies of criminal trials which also found that children interpret any "re-interviewing" as disbelief by significant adults and that this disbelief is frightening Goodman G and Bottoms B *Child Victims,*

Child Witnesses Understanding and Improving Testimony (Gillford Press New York).

Similarly, after the eventual hearing, children clearly experienced any Court findings against the allegations as disbelief of them personally. The children described feelings of deep sadness, hopelessness or anger on re-interview. The children who appeared less affected by this sense of deep sadness (though all spoke of having these feelings at the time of Court) were those whose mothers had refused to allow their children to be made to attend access or who the children knew were totally supportive of the child's experience. These mothers were often labelled as vexatious by "Court" professionals. For several it was suggested by father's counsel they should undergo psychiatric assessment. The children's accounts highlight the destructiveness of merely attempting to assist children to accommodate to Court decisions going against the child's own understanding of their experiences.

The children's distress echoes the findings of Yamamotto et al (1987) 28 *J of Child Psychology and Psychiatry* 855 in parallel studies where children were asked to prioritise the seven most stressful events in their lives out of a list of 20, including parental death, parental separation. They uniformly listed "not being believed when I am telling the truth" (in the top seven) almost as stressful as parental death and separation.

Time lapse

The final concern, from the author's, rather than the children's perspective, was that the s 29A interview took place months after the initial disclosure or evidential interview. Numerous studies question the safety of such long delays. (See Plotnikoff and Woolfson: *Prosecuting Child Abuse* (1998).) The Court in *R v Lewis* [1991] 1 NZLR 409, also questioned whether it was meaningful to cross-examine a child with regard to videotaped evidence recorded eight months previously. We suggest any general assessments conducted many months later can only show the child's state of mind at that time and is of no significance as to whether abuse ever occurred. This is especially so if the child has been helped to move on by caregivers and professionals.

COUNSEL FOR THE CHILD

The second major area of concern to the children in the sample were their feelings of lack of support or of active disbelief by counsel for the child.

All the children (even the very young) were very keen to have "my own" lawyer. They all said that they had expected that "their lawyer" would be there for them, on their side and working to protect them. They had expected that "their lawyer's" role would be to talk to the child and find out what they had experienced from the parent and to "tell the Judge" and to ensure it was "all sorted out". The counsel for the child would "make dad get help so that I could see him again and he wouldn't do those things" or that she/he would tell and "the Judge would make him stop".

However, the common experience reported by the children was that "their lawyer" had let them down. Counsel for the child was frequently seen as unavailable to them: in the words of one: "why won't she come and see me?" "I could tell my lawyer but she won't answer my letter". Children frequently complained of lack of support.

The children also perceived the lawyer as "dad's friend" and supporter as opposed to theirs: one said "I thought she was my lawyer but she was on dad's side". Another commented "she thought dad was really nice and funny and she laughed and laughed with him ... but he isn't ... she didn't laugh when she came to see me and mum. She was real mean to mum".

The lawyers were perceived by the children as disbelieving them possibly because the lawyer was not able to meet the child's expectation for advocacy. "She came to see me and I told her I didn't want to go but she made me. She didn't listen". "She's not on my side, she's on dad's ... she put me in her car and drove me out to the farm and made me go." ...

Several appeared to feel that counsel was actively hiding the child's reality from the Court. "I asked her to tell the Judge but she said she couldn't." "You tell her to tell the Judge the truth."

This perception of disbelief appeared to have silenced many of the children, who felt it was hopeless to say what they wanted when even their own counsel did not listen. Sadly the children appeared on re-interview to believe that they were responsible because they did not continue to speak out. As one child said on re-interview "I feel guilty now cos I should have told her but she never asked me and she liked dad, she would have told him what I said".

Another child described being inhibited from telling the Judge of her preferences because counsel for the child was present: "I knew she was dad's friend so when Judge ... asked me who I wanted to live with, I didn't say, I just said you'll have to cut me in half, but I really wanted to live with mum".

It is suggested that the first cause of the problems the children experience may be that there is no set or prescribed role for counsel for the child. The role is problematically vague and open to personal style. The fact that counsel for the children are prevented from actually advocating for the children in that they are not permitted to give evidence, may be a reason for the children's dashed expectations.

It may be also that part of the problem is the lack of training of any depth for counsel for the child on children's issues or the dynamics of familial abuse or on the nature or extent of sexual abuse in New Zealand society. Nor is there any training to assist counsel to address their own personal motivations and responses regarding familial abuse. This contrasts sharply with the understanding amongst clinicians that to work within the field of child sex abuse one must have developed an awareness and understanding of one's own processes and the issues.

Another product of lawyers' lack of training in the above seems to be that they tend to be unaware of the areas of significant concern to the investigation of such sensitive matters with young children. It may be that, aware of their own lack of expertise in child psychology, they tend to privilege expert opinion over the child's own words unaware that the "expert" process itself may disadvantage or silence children.

ACCESS DECISIONS

The Family Court is acutely aware of the difficulty in determining the facts and appropriate outcomes where such cases involve very young or "unable" children for whom the Court adult principle of proof cannot function.

As a result, the Family Court was frequently reluctant to refuse offending parents access. (even in the short term while an investigation was being undertaken), an extremely important point when the effect of the offender on the child is considered. Even well supervised access can affect the child's ability to disclose.

The Family Court's motivation is unclear, however it appears that the Family Court attempts to operate within this area with the least discord between the parents as

possible. Influenced, it seems, by the theoretical stance of the founding principles of mediation and conciliation "a mix of the therapeutic and judicial". (*Beattie Report* (1980) Ontario.)

It may also be that the Court finds abuse cases particularly difficult because of the nature of the issue and the emotion/passion that these circumstances frequently evoke in parents, when the issue for them is the protection of their children.

It is interesting to note that often interviews with the child's non-accused parent or that parent's lawyer revealed that the lawyers had been extremely reluctant to raise allegations of abuse (regardless of the evidence), on the grounds that certain Family Court Judges regard such allegations as malicious and vexatious.

Theoretical understanding of what is appropriate for successful child development seems to change over time. Currently the Court appears to be influenced by the concept that all children need contact with their fathers no matter what their experience of the man and in this to have moved from the other extreme of the mother as the sole primary attachment figure. The Court appears to assume that it is better to have supervised access leading to unsupervised sooner rather than later and to have found great difficulty in cutting all contact until a resolution is arrived at. This is regardless of the accepted knowledge of the criminal Court that witnesses can be intimidated or influenced by offenders, commonly reflected in conditions of bail that forbid any contact prior to trial.

All of the children in this study were made to have contact with the parent they had reported as abusing them, regardless of their wishes. In some cases, access was enforced by physical force (by counsel of the child amongst others) or warrant, which the children experienced as immensely frightening and disempowering. The children appear to have learnt only submission from the exercise and to have internalised the fear and anger.

Children are commonly raised on concepts of good and bad behaviour. The assumption is that when they behave badly this is addressed and the children can then move on. The children in this study experienced the Court's decisions as a contravention of this moral code and accordingly saw the issue as unresolved. This caused the children confusion and ongoing anxiety for their own safety.

The children wanted more than merely a decision to stop access, however, and had clear and specific ideas about the resolution they desired. All children in the study were torn between love for their offending parent and dislike of the sexual offending. Of the children in the study only seven per cent wanted no contact at all. However, the other children did not want immediate access nor did they want access without other accompanying changes. They wanted the abuse addressed followed by contact with both parents, either immediately after the father's "treatment" or when the child felt ready.

That the abusive parent would be confronted was the wish of all of the children in the study. Comments such as "you tell him not to do it ... the Judge, Police, counsel for the child ... could tell him not to do it and make him get help". "Dad won't listen to the Judge so you tell him." Another seven-year-old commented: "dad doesn't listen to anyone, so I'll have to tell him", "... cos its up to me cos its me its happening to". This last sentiment was common among several of the children who appeared to believe that they could and should take the responsibility for this. Another example of the competence of these young children and sense of "agency".

Ordering access without taking into account these issues ignores the importance to the child of the resolution of the issues between themselves and the abusive parent. Instead, it is crucial that the Court make an open and clear resolution. Such a resolution should not only better protect the child in the immediate future but also assist the family to identify and to address the issues with a view to the child's long-term best interests, (hopefully some form of healthy relationship with both parents).

A NEW PROCESS

A new process is required to better facilitate children to speak of their experiences.

The first element of a changed system is the need to develop a specialist age-appropriate, child-focused, and family-friendly theory of investigative interviewing, based upon the following principles:

- that the intervention has as its primary focus the constructive long-term resolution rather than win, lose or the potential for prosecution;
- that all individual agency objectives are mutually dependent. A resolution focused process benefits all professional task objectives ie where a child believes the investigation will benefit the child and their family, the quality and extent of any disclosure is greatly enhanced aiding prosecution, care and protection and therapeutic outcomes;
- that the interview methodology recognises the importance of a purpose-built process for the young child, focused on the importance of the interviewer taking time to develop the relationship of rapport and trust, fundamental to any meaningful conversation with any young child;
- that the interview methodology recognises the importance of a focused evidential process that actually asks (safely) the child's experience rather than assuming one can assess this through interpretation of indirect and generalised assessment techniques;
- that the Court recognises the importance of training for interviewers, counsel for the child and Judges in the dynamics of familial abuse so that the necessary process is supported and the complexity of children's responses (particularly towards the alleged abuser and the child's need to survive within his or her family) are not misread.

Clinical experience and research into childhood that trust and rapport between the focused specialist interviewer using age appropriate language (and in this situation evidentially safe methods) in a child-centred, family-friendly environment are critical to the level and quality of any disclosure from the young child about their life experiences. Children will not speak out otherwise even about non-sensitive matters. The current processes do not suffice because they are merely adaptations of adult legal processes and general psychological assessment which were designed to meet the needs of those systems and of adults, not children and thus prioritise the rights of adults over those of children.

SPECIALIST MULTI-DISCIPLINARY AGENCY

The second vital change necessary to the Family Court process (and to the criminal) is to overcome the isolation in which the various investigations currently exist.

There is a need for a purpose-built specialist service, working in close cooperation with and coordinating the other agencies and institutions involved.

It may be that such a system could be operated by a specialist child advocacy service, possibly incorporating an adaptation of the English Guardian ad litem and the Court Welfare Services. The author investigated these services in 1996 and as a Churchill Fellow in 1998. Such a team could include an accredited specialist interviewer for young children, DSAC doctors, the criminal investigations permitting, (police may feel unable to be involved where it is considered that children are too young to cope with the Criminal Court processes), CYPFA social worker and a specialist psychologist. This team would draw together the child's account with any other evidence (medical findings and other collaboration) that may be available. The evidence could be examined, reviewed or tested externally within the Family Court, in the form a more multi-disciplinary discussion rather than the present adversarial confrontational system. The author is aware that the Family Court theoretically is not adversarial in nature, but that this is in actuality how it does function in the defended hearing context.

CONCLUSION

The Family Court was established with the purpose of facilitating resolution of family disputes through mediation, conciliation and adjudication rather than solely by adversarial methods and adjudication. It was thought, rightly so, that children would benefit from their parents' disputes being sorted out in this way rather than through litigation. However, allegations or disclosures of sexual abuse by a young child against a parent are not easily mediated and reconciled without specialist understandings and interventions. The lack of specialisation in the Family Court's professionals has created a situation whereby the Court system is unequipped to deal with allegations of sexual abuse. As a result the Family Court process in its attempts to meet a need (for which it was not designed nor was possibly ever envisaged), the investigation of criminal allegations, has adapted its generalist methodology which tends to give greater credence to the adult denial over the child's disclosure because the child's own experience was not obtained.

A major contributing factor in this situation is that the Family Court investigation takes place parallel to and in isolation from any other investigative process. This isolation results in a lack of shared information and knowledge about the specialist field and techniques of interviewing the sexually abused child. The Family Court's investigations by contrast with the criminal process, lack training and experience in safe evidential interviewing and the dynamics of inter-familial sex abuse.

This leads to dual problems. First, Family Court professionals are less able to facilitate children's disclosures and children with allegations to make can feel unable to do so. All the children in the study showed in their comments that they felt unable to disclose to the Family Court interviewer or if they did tell they were disbelieved and several subsequently gave up. Secondly, the lack of specialist training means that some of the techniques used by interviewers in the study were evidentially unsafe. Such interviews expose the child's disclosures (should any be made) to the risk of exclusion from the Court for fear of contamination.

The children realised that their youth precluded their being listened to. One child had been assessed by the Family Court not to have been abused when she disclosed aged three who when re-interviewed at six years old (following her three-year-old sister's disclosure of abuse), said "he [dad] won't do it to me now, cos he knows I'll get mad ... He knows I'll tell and I'm six now, the Judge would listen. ... You know Judges and people don't listen to you when you are three".

The implications of these children's experiences are that the current system failed them and may fail other children.

It appears that the judiciary and legal fraternity believe that the Family Court system, relying as it does on the examination of adult parties and professional expert witnesses is able to come to an accurate determination of the facts. This study, however, suggests that the Court's processes do not enable the full evidence to be put in front of the Court. The established Court processes do not enable the child's experience to be elicited let alone adduced in evidence.

Unless the Courts develop a way of understanding children and more appropriate methods of practice that do enable young children to speak, the best interests of children cannot be determined because the Court will not know what has happened to the child.

The Miriam Centre's experiences with these children suggest that attention should be given to the possibility of developing a specialist, multi-disciplinary team approach, specifically designed for the very young child, in order to prevent young children's allegations of parental abuse going unheard in the Family Court. ❑