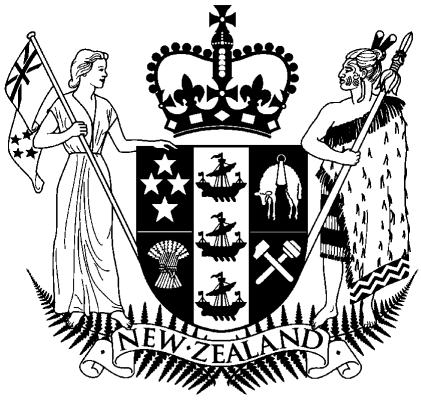

Court of Appeal Report for 2003

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APPENDICES

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1 INTRODUCTION

The Court

The Court of Appeal, located in Wellington, has existed as a separate court since 1862. Until 1957 it was composed of Judges of the then Supreme Court (now the High Court) sitting periodically in panels. In that year the Court of Appeal was reconstituted as a permanent court separate from the Supreme Court. The Court now consists of the President and six other permanent members. Before the entry into force of the Supreme Court Act 2003 on 1 January 2004, the Court also included the Chief Justice by virtue of office.

The Court deals with civil and criminal appeals from matters heard in the High Court, and criminal matters on indictment in District Courts. As well, matters appealed to the High Court from District Courts and certain tribunals can be taken to the Court of Appeal with leave if they are considered to be of sufficient significance to warrant a second appeal. The Court may, if it grants leave, hear appeals against pre-trial rulings in criminal cases. Finally, the Court, again with its leave, hears appeals on questions of law from the Employment Court.

Before the new Supreme Court was established, civil decisions of the Court on first appeal from the High Court could in general be appealed to the Judicial Committee of the Privy Council, in some cases as of right, in others with the leave either of the Court of Appeal or the Committee. Criminal decisions could be appealed with the leave of the Judicial Committee. Appeals in cases heard after 1 January 2004 lie to the Supreme Court with the leave of that Court. Savings provisions in the Supreme Court Act leave appellants whose appeals were heard by the Court of Appeal before January 2004 with whatever rights they had to appeal to the Privy Council.

Caseload

The number of cases dealt with by the Court in its criminal jurisdiction rose slightly in 2003. The Court dealt with 482 criminal cases and 148 civil cases. In 2002 the Court dealt with 444 criminal and 151 civil cases. Six criminal and 12 civil cases awaited judgment at the end of the year.

In addition to the 148 substantive civil appeals mentioned above, the Court dealt with 235 miscellaneous motions, compared with 215 in 2002. Miscellaneous motion matters are listed once a month and heard by a permanent bench. This area of the Court's jurisdiction has become more time consuming with increased numbers of litigants in person appearing. This sometimes raised the question of security in the Court, with the attendance of a Security Officer being required for that and other reasons on a number of occasions this year. In the Court's 2002 *Annual Report* it was noted that the number of notices of discontinuance received had decreased considerably in comparison to previous years with only 50 such applications being processed. In 2003 that number rose to 77. A further 20 appeals were deemed

abandoned under Rules 10 and 11 of the Court of Appeal (Civil) Rules 1997, indicating that well over one-third of appeals filed in a year do not in fact proceed.

The number of civil appeals filed has again dropped in 2003 with 246 appeals accepted compared with 276 in 2002. A comparison of the number of appeals filed has been included in the statistics. Applications for fixtures have also declined with 149 received in 2003 compared with the 163 processed in 2002. Applications for waiver of fees were received from 35 appellants. All applications were granted. In comparison, in 2002 there were 45 successful applications. At the end of 2003 in the civil jurisdiction 36 appeals had fixture dates and 17 were waiting to have a date confirmed.

There was again an increase in the number of criminal appeals filed. A total of 486 were received, an increase of 29 from 2002. Of those, 100 were against both conviction and sentence, 105 were against conviction, 133 were against sentence, 71 dealt with pre-trial rulings, 11 were appeals by the Solicitor-General against sentence and pre-trial rulings and 40 were applications for rehearing. Of the remaining 26 appeals, one was referred to the Court by the Governor-General and the others concerned bail, special leave applications, and name suppression.

A number of criminal appeals continued to be heard on the papers in accordance with the provisions of the Crimes (Criminal Appeals) Amendment Act 2001. 29 appeals were determined on the papers in 2003, in comparison with 47 in 2002. A further historical comparison is provided in the following Statistics chapter. No appeals were allowed on the papers in 2003. Three had been allowed in 2002.

In June 2003 a print media based campaign was launched to attract approximately 1500 people who had the right to have their appeals reheard under the inherent powers of the Court, identified in the judgment of *R v Smith* [2003] 2 NZLR 617. Advertisements were placed in 24 metropolitan and provincial daily newspapers, the two Sunday newspapers and all 65 weekly community newspapers. Posters were placed in the public areas of all court buildings, Public Prison Service institutions, Citizens Advice Bureaux and Community Law Centres. The Court received requests from 215 people for information packs. Notices of rehearing have been received from 71 people with only 40 of those qualifying for a rehearing. By the end of last year, the number of inquires and notices of rehearing received had substantially diminished.

The number of appeals concerning pre-trial matters filed with the court has increased from 62 in 2002 to 71 this year. A number of these applications arrived with requests for almost immediate fixture dates and during 2003 the Court was able to meet those requests in every instance.

At the end of 2003, 191 criminal appeals remained on the hearing status list; of those 117 had a fixture date. The caseload position in 2002 at the same time was 168 appeals with 95 having a confirmed fixture date.

Programme for Court sittings

The Court sat in benches of three and five Judges and continued to benefit from the contribution of some 98 High Court Judge weeks in the divisional Courts. The benefit includes the immediate experience of the trial process brought by those Judges to the appellate process. A number of divisional Court hearings were affected this year with late adjournment requests and last minute notices of discontinuance which impacted on the judicial resource and throughput of cases.

The usual monthly cycle of a five-Judge fortnight at the beginning of the month, followed by a fortnight for three-Judge Courts and divisional sittings in either Wellington or Auckland, was followed this year. Two sittings were also held in Christchurch.

The 2004 programme for appeal hearings is in place and will follow the same pattern as that set in 2003 with the exception of the first two weeks now having 3 or 5 Judge matters set down. The usual provision was made for any urgent cases that may emerge for the attention of the Court immediately after the summer recess and there is a substantial workload set down for the first four months of the year.

Procedural developments

The Court's timeliness in processing criminal appeals was considered in 2003 and it is now apparent that the change to the Crimes Act 1961 effective from 10 December 2001 has had an impact on the ability to set fixtures within a 30 day period. It has moved to 60 days. The Registry is conscious of the need for effective case management in both jurisdictions and effort has been made during 2003 with technical training in both areas.

Members of the Court of Appeal

The members of the Court of Appeal in the year under review were the Rt Hon Dame Sian Elias, the Chief Justice, by virtue of that office, the President, Rt Hon Justice Gault and six permanent Judges: Rt Hon Sir Kenneth Keith, Rt Hon Justice Blanchard, Rt Hon Justice Tipping, Hon Justice McGrath, Hon Justice Anderson and Hon Justice Glazebrook.

The Chief Justice studied law at the University of Auckland and Stanford University in the United States, before practising as a barrister and solicitor. Dame Sian was appointed a Queen's Counsel in 1988, was a member of the New Zealand Law Commission and was involved in litigation concerning the Treaty of Waitangi. She was appointed as a Judge of the High Court in 1995 and became Chief Justice in 1999. She was made a GNZM in 1999.

Justice Gault graduated LLM from Victoria University of Wellington. He was a member of a Wellington law firm for 20 years before commencing practice as a barrister sole in 1981. He was appointed a Queen's Counsel in 1984 and a Judge of the High Court in 1987. He became a member of the Court of Appeal in 1991. In 2001 he was appointed DCNZM for services to law. He became President in May 2002

Justice Keith studied law at the University of Auckland, Victoria University of Wellington and Harvard Law School. Before his appointment to the Court of Appeal in April 1996 he was employed in the New Zealand Department of External Affairs and the United Nations Secretariat, a member of the Law Faculty of Victoria University and a member and President of the New Zealand Law Commission. He was made a KBE in 1988.

Justice Blanchard holds LLM degrees from Auckland and Harvard Universities. He was a partner in the Auckland law firm Simpson Grierson and director of several listed companies and a member of the New Zealand Law Commission before his appointment to the High Court in 1992. He became a Judge of the Court of Appeal in 1996.

Justice Tipping graduated LLM with 1st class Honours from Canterbury University. He was awarded the Canterbury District Law Society's Gold Medal and the Sir Timothy Cleary Memorial Prize. He practised as a Common Law partner in the Christchurch firm of Wynn Williams & Co before being appointed to the High Court Bench in 1986. He was President of the Canterbury District Law Society in 1984 and a Council Member of the New Zealand Law Society from 1982-1984. He was appointed as a Judge of the High Court in 1986 and of the Court of Appeal in 1997.

Justice McGrath graduated LLM from Victoria University of Wellington in 1968. He was in private practice as a partner in the law firm Buddle Findlay, in Wellington, until he moved to the separate bar in 1984. He became Queen's Counsel in 1987 and he was Solicitor-General between 1989 and 2000. In July 2000 he was appointed to the Court of Appeal.

Justice Anderson, graduated LLB from the University of Auckland in 1967 and was a partner in the Auckland firm Martelli, McKegg & Adams-Smith until commencing practice solely as a barrister in January 1972. He was appointed a Queen's Counsel in May 1986, to the High Court in May 1987, and to the Court of Appeal in September 2001.

Justice Glazebrook has an MA (1st Class Hons), an LLB (Hons) and a Dip Bus (Finance) from Auckland University and a D Phil from Oxford University in French legal history. Before being appointed to the High Court in May 2000 she was a partner in the law firm Simpson Grierson and a member of various commercial Boards and government advisory committees. She served as President of the Inter-Pacific Bar Association in 1998 and was appointed to the Court of Appeal in May 2002.

The Hon Justice Hammond, the Hon Justice William Young, the Hon Justice Chambers and the Hon Justice O'Regan were appointed to the Court of Appeal as from 1 January 2004 to replace the four members appointed to the Supreme Court. The Hon Justice Anderson was appointed President of the Court from 1 January 2004.

The Hon Justice Hammond graduated from the University of Auckland and the University of Illinois. He was a partner in the Hamilton law firm Tompkins Wake & Co and was a Dean of Law at the University of Auckland. He was appointed a Judge of the High Court in 1992 and was appointed to the Court of Appeal in January 2004.

The Hon Justice William Young graduated from the University of Canterbury and Cambridge University. He joined the Christchurch firm of RA Young Hunter and Co in 1978, leaving in 1988 to practice as a barrister. He was appointed a Queen's Counsel in 1991, a High Court Judge in 1997 and to the Court of Appeal in January 2004.

The Hon Justice Chambers graduated from the University of Auckland and Oxford University. He commenced practice as a barrister in 1981 and was appointed a Queen's Counsel in 1992. He was appointed to the High Court in 1999 and to the Court of Appeal in January 2004.

The Hon Justice O'Regan graduated from the Victoria University of Wellington. He was admitted as a barrister and solicitor of the High Court in 1977 and became a partner with the firm Chapman Tripp in 1984. He was appointed to the High Court in 2001 and to the Court of Appeal in January 2004.

Permanent members' activities

In 2003 Justices Tipping and Keith sat in the Privy Council and President Gault, Justice Keith and Justice Blanchard sat in the Supreme Court of Fiji.

Members of the Court delivered papers and lectures to legal, university and other audiences in New Zealand and overseas. One gave a paper to the Commonwealth Law Conference, held in Melbourne, and another three attended it; two members gave papers at the Conference to mark the 50th Anniversary of the Land Transfer Act 1952, a further two spoke to Australian Supreme and Federal Courts Judges' Conference in Auckland and one gave the Sir David Williams Lecture at Cambridge University.

Other audiences included the Arbitrators & Mediators Seminar, the Centenary Conference of the Queensland Bar Association, the New Zealand Law Students Association, the Legal Research Foundation seminar on Statutes (with three members speaking) (see Rick Bigwood (ed) *The Statute : Making and Meaning* (2004)), the British Institute of International and Comparative Law, Columbia University, the University of Melbourne, the Foreign Policy School in Dunedin, the Australian and New Zealand Society of International Law, an International Committee of Red Cross seminar in Kuala Lumpur, the Department of Inland Revenue, the Wellington Women Lawyers Association, Women in Law at Victoria University, Pricewaterhouse Coopers and the Deloitte Touche Tohmatsu National Tax Conference.

One judge served as a member of the Advisory Council of Jurists for the Asia Pacific and attended a meeting of the Council in Nepal. Other conferences attended included the Worldwide Common Law Judges Conference in Sydney, the Cambridge Lectures, the New Zealand Centre for Public Law's Conference on the Courts and the Conference of Chief Justices (Asia and Pacific) in Tokyo.

Supreme Court

The Supreme Court Act 2003 established, as from 1 January 2004, within New Zealand a new court of final appeal comprising New Zealand judges –

- to recognise that New Zealand is an independent nation with its own history and traditions; and
- to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history and traditions; and
- to improve access to justice.

For appeals from New Zealand, the Supreme Court of New Zealand replaces the Judicial Committee of the Privy Council located in London, and came into being on 1 January 2004, with hearings to commence on 1 July 2004.

The members of the new Court are the Chief Justice, Justices Gault, Keith, Blanchard and Tipping. On average they each have about ten years experience as Judges in New Zealand with about seven years as members of the Court of Appeal. All have sat at various times in London on the Judicial Committee of the Privy Council.

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2 STATISTICS

Criminal Appeals

	Hearing	Allowed	Dismissed	Dismissed On the papers
Conviction & Sentence	90	31	49	11
Conviction	96	22	60	4
Sentence	103	48	48	12
Solicitor-General Appeals	3	1	2	0
Pre Trial	51	18	31	1
Other	27	8	22	1
Sub total	370			
Abandonments/No jurisdiction	83			
Total	**453**	**128**	**212**	**29**

NOTE: The number of cases heard does not equal the number allowed and dismissed. Twenty-eight cases were adjourned part heard, with additional 30 sittings days required to complete hearings. Plus one case was adjourned and has yet to confirm a new date. Seven cases heard in 2002 were decided in 2003 and six judgments for 2003 cases are reserved.

Of the appeals allowed, 28 were allowed in part.

The following table shows comparisons with earlier years

Year	Appeals or applications for leave filed	Oral Hearing	OTP	Allowed	Dismissed/abandoned/ no jurisdiction
1993	550	368	151	110	405
1994	538	305	194	82	417
1995	582	380	226	125	481
1996	512	354	217	98	473
1997	508	-	157	98	415
1998	459	304	117	108	366
1999	565	320	152	118	423
2000	478	330	123	126	386
2001	428	372	34	123	288
2002	457	321	47	122	293
2003	486	370	29	128	324

Criminal caseload

	2001	2002	2003
Permanent Court – seven judges	1	Nil	Nil
Permanent Court – five judges	17	5	3
Permanent Court – three judges	24	51	59
Criminal Appeal Division	285	265	309
On the papers	34	47	29

Civil Appeals

	1999	2000	2001	2002	2003
Motions filed	308	301	296	276	235
Appeals set down	185	149	203	163	146
Appeals heard	193	160	185	153	148
Appeals allowed	58	64	76	60	56
Appeals dismissed	131	95	107	83	91

NOTE: the number of cases does not equal the number allowed and dismissed. Judgments in 12 cases were reserved at the end of the year, 12 judgments came from cases heard in the previous year and one case has been adjourned sine die.

Civil caseload

	2001	2002	2003
Permanent Court – seven judges	Nil	Nil	Nil
Permanent Court – five judges	25	18	14
Permanent Court – three judges	79	71	92
Civil Appeal Division	58	62	42
Discontinued	70	50	77
Abandonments	49	58	20

Year end workflow

	1999	2000	2001	2002	2003
Criminal appeals awaiting hearing as at 31 December	143	109	134	168	191
Civil appeals awaiting hearing as at 31 December	54	47	55	59	55

Privy Council appeals

Date PC judgment	Parties	Result	Whether NZ Judge sat
2.02.03	Geoffrey David Scott v The Queen *(Petition to the PC)*	Dismissed	No
5.03.03	Fullers Bay of Islands Ltd v Northland Regional Council	Dismissed	No
17.03.03	R v Attorney-General for England and Wales	Dismissed	No
19.03.03	McLennan & Ors v Attorney-General	Dismissed	No
14.04.03	Commissioner of Inland Revenue v Vela Fishing Ltd	Dismissed	No
19.05.03	B & Ors v Auckland District Law Society & Anor	Allowed	No
12.06.03	Edward H Collingwood v Minister of Internal Affairs (*Petition to PC*)	Dismissed	No
18.06.03	James McLeod Bennett v Superintendent, Rimutaka Prison & Ors v Karaitiana v The Superintendent, Wellington Prison & Anor (*Petition to PC*)	Dismissed	No
18.06.03	Jones v Attorney-General	Allowed	No
30.06.03	Waikato Regional Airport Ltd & Ors v Attorney-General	Allowed	No
07.07.03	Apple Fields Ltd v Damesh Holdings Ltd	Dismissed	No
14.07.03	Bank of New Zealand v The Board of Management of the BNZ Officers' Provident Assn	Dismissed	No
16.07.03	B & Ors v The Attorney-General	Allowed in part	No
13.11.03	Scott Watson v The Queen (*Petition to PC*)	Dismissed	Keith J
13.11.03	Graham Ashley Robert Palmer v The Superintendent, Auckland Prison *(Petition to the PC)*	Dismissed	Keith J
01.12.03	Pratt Contractors Ltd v Transit New Zealand	Dismissed	No

Total Heard	16
Total Dismissed	12
Total Allowed	4
Appeals from Courts of more than 3 Judges	3
Appeals from Courts of 3 Judges	13

Over the past seven years 22 out of 71 appeals succeeded in whole or in part.

3 MAJOR CASES

The summaries in this and the next chapter and the appendices are simply summaries. It is the text of the judgment itself which is authoritative.

Crown liability for sexual abuse committed by foster parents

The Court in *S v Attorney-General* [2003] 3 NZLR 450 and *W v Attorney-General* CA227/03, 15 July 2003, considered claims for compensatory and exemplary damages against the Attorney-General on behalf of the Department of Social Welfare. The two plaintiffs had been victims of sexual abuse committed by their foster parents prior to the introduction of the first accident compensation legislation. They sought compensation for the physical, sexual and psychological abuse they had suffered. The primary questions raised were whether the claims were barred by the Accident Rehabilitation and Compensation Insurance Act 1992 (ARCI Act) or the Limitation Act 1950; whether the Crown was vicariously liable for the tortious acts of the foster parents; and whether exemplary damages should be awarded.

In *S v Attorney-General* the Court held that neither the ARCI Act nor any of its successors barred the plaintiff's claims for compensatory and exemplary damages. The ARCI Act only covered personal injury suffered after it came into force, and there was no intention, except in the case of gradual injuries, to take away vested common law rights in respect of accidents occurring before this time. In relation to the Limitation Act, the Court concluded that the plaintiff was under a disability in terms of s24 of the Limitation Act because he was mentally unable to pursue his rights due to the effects of post traumatic stress disorder and depression, which inhibited him from bringing proceedings until 1995. The cause of action was therefore not barred because it was postponed until this time under s24.

Four members of the Court (Blanchard, McGrath, Anderson and Glazebrook JJ) also held that the Crown was vicariously liable for the sexual abuse committed by the foster parents due to the special agency relationship that existed between the foster parents and the Crown, and the close connection between the abuse and the purpose of parenting for which the placements were made. The unique agency relationship existed because of the statutory duties placed upon the Superintendent of Child Welfare under the Child Welfare Act 1925 to provide for the protection of foster children. These duties and the increased risk of abuse arising from the placement of children in private homes meant that it was fair that compensation for such injury be borne and distributed amongst the whole community by making the Crown vicariously liable. Tipping J also favoured the imposition of vicarious liability, but not on the basis of agency. Rather, the Court should look at all the features of the particular relationship, its the connection with the abuse, and the various policy factors, and make a judgment about whether vicarious liability should be imposed.

The Court was unanimous that the Crown could not be vicariously liable for exemplary damages. The primary purpose of exemplary damages was to punish a flagrant wrongdoer, and it would be unfair to inflict punishment on the Crown through exemplary damages when the government department responsible for the placements was not directly at fault and was not deserving of punishment.

In *W v Attorney-General*, judgment in which was delivered at the same time, the Court held for the reasons stated in *S v Attorney-General* that there was no accident compensation bar to the plaintiff's claims and that the Crown was vicariously liable for the acts of the foster parents, although not for exemplary damages. However, unlike *S v Attorney-General*, the plaintiff was not found to be under a disability in terms of s24 of the Limitation Act, the effect of which was to bar the plaintiff's cause of action in assault and battery, leaving only the claim in negligence. The negligence claim was not barred because it did not accrue until the plaintiff discovered the link between the abuse and the mental harm during counselling in 1996.

The Court also considered whether the Crown was directly liable for exemplary damages because of the negligence of one of the senior officers in the Department of Social Welfare. The Court observed that it was arguable that the acts of the senior officer could be attributed to the Department, but was not persuaded that the conduct judged by the standards of the time was so grossly negligent that it ought to have been marked by an award of exemplary damages.

Disestablishment of special education facilities

In *Attorney-General v Daniels* [2003] 2 NZLR 742 the Court considered a challenge to certain government decisions surrounding the introduction of a new special education policy, "SE2000". The challenge was brought by parents of children affected by the policy on three primary grounds. The first was that in implementing SE2000 the Ministry had circumvented the requirement under s9 of the Education Act 1989 to enter into agreements with the parents of children in need of special education for the provision of education. Second, the Crown had breached its obligation to provide free education that was not "clearly unsuitable" for the individual child. Third, the Minister's decision to disestablish special classes, units and services was in breach of s98(2) of the Education Act 1964.

The Court first considered the structure of ss8-10 of the 1989 Act. The effect of those sections was to essentially divide children with disabilities into two categories. First, those who in the Minister's judgment did not require "special education" and who enjoyed, under s8, the "same" or "equal" right to enrol and receive education as other children. Second, those who in the Minister's judgment required "special education" and who, under s9, were to have their needs met via an agreement with the child's parents or via a Ministerial direction. The Court held that "special education", as defined in the 1989 Act, referred only to education provided at those special schools, classes or clinics established under s98 of the 1964 Act. Therefore only those SE2000 programmes established under s98 of the 1964 Act required Ministerial directions in respect of individual students under s9: on the record such directions had been made in respect of those programmes.

The Court turned to the second ground. Section 8 provided that people with special education needs had the "same" or "equal" rights to education as those who did not, a reference to the right to free education contained in s3 of the 1989 Act. The Court rejected the submission, which the High Court Judge had accepted, that s3 imposed a free-standing, justiciable right that education be "not clearly unsuitable" for a particular individual. This did not mean that children had no legally enforceable

rights concerning the provision of education: an "all or nothing" approach to justiciability of the provision of education was inappropriate. Enforceable rights did exist and were specifically established by and under the legislation. There was no doubt that certain failings of a school to comply with its legal obligations could give rise to legal proceedings, for example a failure to open for the required period or a failure to employ registered teachers. Legal proceedings might also be available in cases of decisions affecting individual students, for example in relation to expulsion and suspension. These specific rights in themselves provided for regularity in education and were designed to ensure appropriate quality.

The Court turned to the disestablishment of special classes, clinics and services by the Minister under s98(2) of the Education Act 1964. The Court emphasised that s98(2) required the Minister, when making the decision, to consider whether "sufficient provision" was made by other facilities "reasonably near to the same locality". The policy to disestablish the facilities had been made globally. There was nothing in the Minister's affidavit to demonstrate that the Minister had undertaken such an examination, locality by locality. Accordingly, the Court declared that the Minister had acted in breach of s98(2) when he disestablished the special classes, units and services.

Insider trading

In *Southern Petroleum NL v Haylock* [2003] 2 NZLR 175 and *Patek v Haylock* CA204/02, 3 April 2003, the Court considered whether the insider trading regime established by the Securities Markets Act 1988 gives rise to liability only in cases where the inside information was actually used in dealing, or whether possession of the information was sufficient.

The respondents, four former shareholders of Southern Petroleum No Liability (SPNL), applied for leave under s18 of the Act to bring insider trading proceedings by, and at the expense of, SPNL. The intended defendants were Mr Patek, a former director of SPNL, and Energy Exploration NZ Ltd, the successor to Petroleum Industries Ltd (PIL). PIL was a subsidiary of Petrocorp Exploration Ltd (Petrocorp), a member of the Fletcher Challenge group of companies. Mr Patek was the general manager of the energy division of Fletcher Challenge Ltd. That position meant that he was also the Chief Executive of Fletcher Challenge Petroleum Ltd, and a director of Petrocorp, of PIL and of SPNL. PIL was incorporated to acquire the outstanding shares in SPNL, which was 85 percent owned by Fletcher Challenge Ltd. The respondents eventually (but reluctantly) agreed to sell their shares to PIL, after an increased price of 75 cents per share was offered.

The respondents subsequently argued that, as a result of inside information obtained at a meeting about the exploitation of a gas resource by a joint venture between Petrocorp and SPNL, Mr Patek and Petrocorp (as a substantial security holder of SPNL) knew that the true value of the SPNL shares was considerably higher. It was said they advised or encouraged PIL to buy their shares, or communicated the information to PIL knowing it would buy their shares. These actions were said to be in breach of ss9(1)(a) and (b) of the Act. The High Court Judge granted leave to bring the proceedings at the expense of SPNL. Mr Patek and Energy Exploration appealed,

contesting the Judge's finding that there were arguable causes of action against them. SPNL also appealed, seeking to reverse the order that it meet the costs of the intended proceedings.

The Court observed that an application by shareholders for leave to bring insider trading proceedings at the expense of a public issuer should not require a trial of those proceedings to be conducted in advance. Necessarily the basis of an arguable case must be presented. Leave under s18 was not to be granted lightly. But the leave stage was not the time to determine whether the claim was proved, and the Court was concerned to avoid making findings of fact. The application called for a broad assessment of whether there had been shown to be no arguable case against the insider or, if there was, that there was good reason for not bringing the intended proceeding. The latter inquiry was not simply the exercise of a discretion, but called for an assessment of the factors put forward as providing reasons for or against the grant of leave, weighing them to ascertain whether on balance there had been established good reason.

The starting point was the presumption in s3(2) of the Act. Mr Patek was presumed to have the information by reason of being a principal officer of SPNL. There was evidence to the contrary that he did not acquire the information at the meeting by reason of his directorship of SPNL, because he actually attended as an officer of Petrocorp. However the High Court Judge concluded that arguably Mr Patek was at the meeting on behalf of SPNL as well, and the Court was not persuaded the Judge was wrong. The question was not whether the meeting was a joint meeting but whether, because of the relationships between the parties, the information acquired by Mr Patek at the meeting was held by him also in his capacity as a director of SPNL. Similarly, while Petrocorp undoubtedly had the information as the operator of the joint venture, it was arguable that those joint venture arrangements and Petrocorp's position as operator existed because of Petrocorp's substantial shareholding in SPNL. Therefore the Court was not prepared to find that the presumption in s3(2) had been rebutted in relation to either Mr Patek or Petrocorp.

The Court then considered whether s9 required a causal link between the possession of the inside information and Fletcher Challenge's decision to raise the offer for the remaining minority shares. The words and scheme of the provision imposing liability contained no requirement for proof of use of inside information linking its possession to the conduct giving rise to liability. United States cases suggested that mere possession of inside information was not enough to establish liability. However, the common element in the provisions of the New Zealand Act imposing liability was the requirement that dealing or tipping takes place or is contemplated by a person who "has" inside information. The provisions could easily have been drafted to focus on use or taking advantage of the information, but such language was notably absent. This suggested that, in the New Zealand context, insider trading laws focus upon restoration of value relinquished or not realised rather than damages and consequential losses. The scheme could operate effectively on the basis of absolute liability. There was no need to read in qualifications absent on the plain meaning of the words used. Accordingly there was no need to enquire into the question of the influence (if any) the alleged inside information may have had in the decision to offer 75 cents for the respondents' shares. The appeal against the grant of leave was dismissed.

The second appeal was directed to the interpretation of s18(5) adopted by the High Court Judge as extending to costs incurred in the leave application (prior to the grant of leave). The Court agreed that the costs of seeking leave which was an essential part of bringing a proceeding, should be included in the costs of bringing that proceeding. It would be quite incompatible with a scheme under which public issuers were to bear the costs of insider trading proceedings if complaining shareholders were dissuaded from seeking leave to initiate that scheme by the burden of costs on leave applications. This appeal was also dismissed.

Maori Land Court jurisdiction over foreshore and seabed

In *Attorney-General v Ngati Apa* [2003] 3 NZLR 643 the Court considered the jurisdiction of the Mäori Land Court under Te Ture Whenua Mäori Act 1993 to determine the status of the foreshore and seabed. The Court unanimously held that the Mäori Land Court did have jurisdiction to entertain an inquiry into the status of both the foreshore and the seabed. All five Judges observed, however, that whether or not the appellants would succeed in establishing any customary property in the foreshore and seabed lands claimed, and the extent of any such interest, remained conjectural and dependent on the factual findings of the Mäori Land Court.

The appeal arose by way of a case stated to the High Court from the Mäori Appellate Court. Eight questions were postulated. In deciding that the Mäori Land Court had jurisdiction to investigate title to both the foreshore and seabed, the Court considered that answering the questions in the form stated was not helpful. Rather, the Court considered the general issues of first, whether the Crown had beneficial ownership of the foreshore and seabed at common law to the exclusion of Mäori customary title. Second, if that were not the case, whether a number of statutes had extinguished Mäori customary title and established Crown ownership. The Court also considered a submission that the Te Ture Whenua Mäori Act did not give the Mäori Land Court jurisdiction to investigate title to the foreshore and seabed as the Act only referred to "land". The respondents placed considerable reliance on the decision of the Court of Appeal in *In Re the Ninety Mile Beach* [1963] NZLR 461.

Elias CJ concluded that the radical title acquired by the Crown on cession of sovereignty was not inconsistent with common law recognition of Maori property rights, which continued until lawfully extinguished. The property interest the Crown had, therefore, depended on any pre-existing customary interest, the extent and content of which was a matter of fact discoverable by evidence of the custom and usage of the particular community. The burden on the Crown's title could extend from usufructory rights to exclusive ownership equivalent to fee simple title. The key point was that Maori customary property was a residual category of ownership not dependent upon title derived from the Crown. Maori custom and usage recognising property in both foreshore and seabed lands displaced any English Crown prerogative or presumption against private ownership of land on the margins of the sea or land covered by it, unless such property interests have been lawfully extinguished.

Elias CJ observed that the decision of the Court of Appeal *In Re the Ninety Mile Beach* could be explained only on the basis that the Court had applied the approach taken in *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72, whereby

Maori property had no existence in law until converted into land held in fee of the Crown. That view was, however, contrary to the common law and to successive statutory provisions recognising Maori customary property. It was "revolutionary doctrine" at the time, unsupported by authority and contrary to the reasoning in other New Zealand, Australian and Canadian cases. Accordingly it should not be followed.

The Chief Justice turned to consider the various legislative provisions relied on by the respondents. She concluded that s150 of the Harbours Act 1955 did not have a confiscatory effect and was inadequate to expropriate Maori customary property. There was an absence of any direct indication of intention to expropriate. Similarly, the Territorial Sea and Fishing Zone Act 1965 and the Territorial Sea, Contiguous Zone and Exclusive Economic Zone Act 1977 did not extinguish any Maori customary property. Those Acts were principally concerned with sovereignty, not property rights. The title vested in the Crown was radical title which was not inconsistent with native title. The exercise of any interests in Maori customary property would be subject to the management of the coastal marine area under the Resource Management Act 1991, but that Act did not extinguish any such property. Further, the seabed and foreshore were "land" for the purposes of s129(1) of Te Ture Whenua Maori Act. No distinction could be drawn between lake beds or river beds and the seabed as a matter of language.

Gault P did not expressly overrule *In Re the Ninety Mile Beach*, considering that the judgments in that case actually disclosed that, but for s150 Harbours Act and its predecessor, grants in respect of foreshore found on investigation to be Maori customary land would have been within the Court's jurisdiction. *In Re the Ninety Mile Beach* could be distinguished on the basis that the Judges did not rule on the factual situation where the land investigated was not claimed to border the sea. The position in such a situation might be different.

Keith and Anderson JJ in a joint judgment observed that the common law, consistently with international practice, had long recognised two different Crown interests in land areas, sometimes referred to as imperium and dominium. The Treaty of Waitangi clearly distinguished between the two. It was also long established that the Crown could grant and did grant to subjects the soil below the low water mark, including areas outside ports and harbours. Accordingly, under the law of England that became part of New Zealand law individuals could have property in sea areas including the seabed. In relation to *In Re the Ninety Mile Beach*, the Judges referred to the need for clear and plain extinguishment of native property rights. In failing to recognise the importance of that principle the judgment misconstrued the provisions of the harbours legislation and was wrongly decided.

Tipping J largely adopted and supported the reasoning of Elias CJ, observing that if the Maori Land Court made a status order under s131, it did not necessarily follow that a vesting order under s132 would be appropriate. Accordingly, there was no inevitability that a status order under s131 would convert to a Land Transfer Act title under s139.

Power to detain refugee status claimants

In *Attorney-General v Refugee Council of New Zealand Inc* [2003] 2 NZLR 577, the Refugee Council and others brought representative proceedings on behalf of persons detained in the Mangere accommodation centre while their applications for refugee status were determined under the Immigration Act 1987. The principal issue in the proceedings was whether the statutory provisions relied on by the Immigration Service applied to those who claimed refugee status upon arrival in New Zealand, and if so, what constraints arose under the Convention on the Status of Refugees 1951 and the New Zealand Bill of Rights Act 1990. A further question was the lawfulness of the Operational Instruction issued to immigration officers to guide the exercise of their discretion under s128(5) of the Immigration Act to detain persons claiming refugee status.

A court of five determined these issues and three judgments were given. The Court held unanimously that claimants for refugee status could be detained under s128(5) of the Immigration Act 1987. This provision was intended to facilitate an applicant's removal from New Zealand as soon as practicable after an application for refugee status had been declined. Sections 128B and 129X did not displace the broad application of s128(5).

Turning to the lawfulness of the Operational Instruction, Blanchard, Tipping and Anderson JJ, in a judgment delivered by Tipping J, considered that the Instruction could not be read as requiring an unlawful approach by immigration officers to their statutory power of deciding whether refugee status claimants should be detained at the border under s128(5). They also held that although it was appropriate to seek judicial review of a document such as the Operational Instruction, it was not appropriate to judge the lawfulness of the instruction by its interpretation and implementation in individual cases. Finally, they considered that the Instruction was consistent with the approach mandated by the Refugee Convention. McGrath J agreed with this conclusion and noted that although the Instruction had a precautionary theme, it had no bias towards detention. Glazebrook J thought that some changes in wording were desirable but also agreed that the Instruction was not unlawful. She said that the Instruction was clear that a detention decision must assess all the factors relating to the arrival of the claimant and make a decision based on an individual assessment of circumstances.

As for the individual case at hand, Blanchard, Tipping, Anderson and McGrath JJ held that there was no basis for concluding that the discretion to detain D, a particular claimant, had been improperly exercised in assessing the case. Further, the decision that detention at the border was necessary had been reasonable in the light of the facts and not arbitrary in light of relevant articles of the Convention or the New Zealand Bill of Rights Act 1990.

The Court therefore allowed the Attorney-General's appeal and set aside the order declaring the Instruction to be unlawful. It dismissed the cross-appeal against the decision that s128(5) did create a power to detain refugee status claimants, and declared that the treatment of D was not unlawful.

Scope of duty of care owed by solicitors in tort

The issue in *Frost & Sutcliffe v Tuiara* CA104/03, 27 November 2003, was whether the duty of care owed in tort by the appellant solicitors to the respondents was wider in scope than the duty that they owed in contract. The respondents had entered into a transaction as a result of which they lost their house. The solicitor who handled the transaction on their behalf had advised the respondents strongly, both orally and in writing, against entering into the transaction.

Three causes of action were pleaded: the tort of negligence, breach of contract and breach of fiduciary duty. The cause of action brought in tort, described as "breach of duty of care", did not plead any duties wider than those pleaded in contract, but simply repeated the contract pleading with exactly coincident allegations of breach. The High Court Judge found there was no breach of contract and no breach of fiduciary duty but the appellant solicitors were nevertheless still liable to the respondents in tort.

The Court identified three problems with the Judge's approach. First, the basis upon which he found for the respondents was neither pleaded nor argued. Secondly, the case was not one in which there was any basis for holding that the solicitors' duties were wider in tort than in contract. The third problem derived from the Judge's conclusion that the solicitors were negligent because the solicitor did not tell the respondents *why* they should not enter into the transaction. The second problem was closely examined.

The Court held that the contractual duty, created by an implied term, was to exercise such skill, care and diligence as was required in the circumstances, including the scope of the retainer. In this case the contract of retainer could not sensibly be viewed as limiting the scope of liability to a greater extent in contract than in tort. The scope of the retainer was equally apt to influence what a competent practitioner should have done whether the obligation was analysed as contractual or tortious. The Court did note, however, that there might be rare cases where it was possible to regard the tortious duty as wider than that in contract, but these must be very much the exception rather than the rule. An express limitation of the scope of the contractual duty that limited the retainer in an artificial and improper way might result in the Court finding that the duty so excluded was nevertheless still owed in tort.

In conventional circumstances, the Court said, the two causes of action would usually be concurrent and co-extensive. That would be so unless the relevant factual context involved matters which were not relevant to the contractual cause of action but did have relevance to the relationship of the parties in tort. If the relevant facts were not co-extensive, there might be a wider duty in tort because of the greater width of the circumstances relevant to that cause of action. But if the relevant facts were the same for the purposes of both contract and tort, the situation would have to be most unusual before it would be appropriate to hold that greater duties were owed in contract than in tort. The Court observed that, in general, parties should be able to limit the scope of their potential liability by the terms of their contract. It would not normally be appropriate for that express or implied limitation to be outflanked by an unlimited application of general tortious liability. The solicitor's appeal was allowed.

Substantial security holder disclosure

In *Richmond Ltd v PPCS Ltd* [2004] 1 NZLR 256 the Court considered aspects of the disclosure regime established by the Securities Markets Act 1988 and the interpretation of notice and pause provisions in the constitution of Richmond Ltd (Richmond) which were drawn from the Listing Rules of the New Zealand Stock Exchange. The case concerned PPCS's acquisition of shares in Richmond between 1996 and 2000. It was common ground that PPCS failed to disclose its relevant interest in the company when required to do so. The existence of the interest was obscured by the use of nominees at the time. However, in response to a declaration by the Richmond Board that it was in default of the notice and pause regime established by the Richmond constitution, PPCS sold most of its shares to a third party. It later reacquired them in a bona fide transaction. Suspecting that there had been a warehousing arrangement, Richmond and a group of its shareholders commenced actions against PPCS. This brought the earlier breaches to light, and led to actions being brought against PPCS alleging breach of the notice and pause regime and its failure to comply with the disclosure requirements of the Act. Under the Act, the High Court ordered PPCS to forfeit 16.76% of the company. The orders also prohibited the exercise of voting rights on the remaining 35.78% owned by PPCS, but said that the prohibition would not take effect if it launched a takeover and acquired 90% control of Richmond. The latter order was intended to force an outcome in the long-running takeover battle for Richmond. The High Court rejected the action based on the notice and pause regime.

PPCS appealed against the orders made against it and Richmond appealed against the Judge's decision on the notice and pause issue.

The Court first discussed the scope of the power to make orders under s32 of the Securities Markets Act following a breach of certain of its provisions (in this case those relating to the disclosure obligations of substantial security holders). The section provides a broad range of remedies directed at the shares held by a person in breach of the Act. The Court said that s32 was intended to provide potentially severe civil sanctions, aimed at maintaining the integrity and effectiveness of the regulatory regime. Orders could therefore be made under the section for both remedial and deterrent purposes. While the Act did not provide for criminal penalties for breach of the regime, as it did in other contexts, this was not determinative of the scope of s32 orders. The legislative history indicated that s32 was intended to create a workable regime for imposing sanctions on those who failed to comply with the Act.

The Court then turned to the question whether the Act allowed orders to be made against shares acquired after shares acquired in breach of the Act had been sold. The Court noted the wide discretion given by the Act, which indicated that the Court should have the power to frustrate corporate manoeuvring. As a narrow interpretation would open avenues for the evasion of sanctions by those minded to breach the law, the Court accepted that orders could be made against subsequently acquired shares in some circumstances. Whether this was permissible depended upon whether there was a sufficient relationship between the more recently acquired shares and those acquired in breach. On the facts, PPCS had engaged in a continuous course of conduct, directed towards obtaining control of Richmond, which linked the two acquisitions sufficiently to justify a s32 order. It was significant that although it had repurchased the shares in

a bona fide transaction, it had retained some of the benefits of its earlier failure to disclose.

Turning to the content of the orders made in the High Court, the Court held that it was inappropriate to use s32 to manipulate the market. Therefore the voting rights prohibition, which was in part aimed securing a final outcome to the takeover battle, was inappropriate. When the increased price paid on the reacquisition of shares sold to the third party was taken into account, the financial aspect of the forfeiture order was held to be sufficient to serve the deterrent and remedial purposes of the Act. The prohibition on voting was therefore quashed.

The second appeal, by Richmond, related to the notice and pause regime, which required notice to be given and a waiting period observed before certain transfers were made. PPCS failed to meet these requirements when formally acquiring shares from its nominees. It was given notice by the Richmond Board that it was in default. This meant that the Board could sell its shares if they were not voluntarily divested within 1 month. PPCS sold all the shares acquired in breach of the regime but retained certain other shares which it held at the time. It then acquired more shares. Richmond argued that it could sell the subsequently acquired shares because the default had not been remedied. The Court held that the default was extinguished by the sale of the shares acquired in breach. Thereafter, there was no power to sell other securities contemporaneously held or acquired afterwards.

The appeal of PPCS was therefore successful in part. That of Richmond, supported by a group of shareholders, was dismissed.

In *Perry Corporation v Ithaca (Custodians) Ltd* (2003) 9 NZCLC 263,386 a Court of five overturned a High Court decision which held that Perry Corporation (Perry) held a disclosable relevant interest under the Security Markets Act 1988 in Rubicon Ltd through equity swap arrangements with Deutsche Bank and UBS Warburg.

In mid-2001 Perry, in a series of transactions, sold shares in Rubicon Ltd to Deutsche Bank and UBS Warburg, at the same time entering into matching equity swap contracts in respect of those shares. The shares were held by the banks as hedges for the equity swap agreements. Perry did not file a substantial security holder notice in respect of Rubicon. In June of 2002 Guiness Peat Group (GPG) purchased 19.9% of Rubicon in a book buy, believing that such a holding would make it the largest shareholder. In July 2002 all of the swap positions were unwound and Perry purchased the shares held as hedges by the banks.

GPG was disappointed to find that there was another major shareholder with nearly 16% of Rubicon's shares. GPG alleged that Perry had breached the substantial security holder disclosure requirements of the Securities Markets Act 1988 by not continuing to disclose an interest in Rubicon after the equity swaps had been entered into. In the High Court, Perry was found to have an "arrangement" or "understanding" with its equity swap partners giving it the power to acquire the hedge shares at will and, accordingly, a disclosable interest under s5(1)(f). Substantial forfeiture orders were made against Perry. Perry appealed.

In allowing the appeal Court concluded that, because of the illiquidity of the Rubicon shares, it was almost certain if not inevitable that those shares would be held by both counterparties as a hedge for the duration of the swaps. Furthermore those hedge shares would inevitably have been available for purchase by Perry on termination of the swaps if it wished to do so. This "market reality" did not constitute an arrangement or understanding in terms of s5(1)(f) which required communication and consensus between the parties and not merely a mutual expectation based on commercial reality.

After examining each of the factors the High Court relied on in reaching its conclusion that an arrangement or understanding existed, the Court concluded that the factors that could raise a reasonable suspicion of an arrangement were outweighed by those pointing to there being no arrangement but merely two parties operating in accordance with market reality. In particular, the Court did not see as a significant factor a conversation between Perry's head trader and a Deutsche Bank sales person (including expressions such as "take the shares back" and "unwind the swap"). The Court commented that the focus on terminology in the High Court had been less than helpful, in that people in ordinary business relationships could not be expected to speak with the precision that one would do if seeking to elucidate legal relationships.

With regard to the other factors relied on by the High Court, the Court said that entry into an equity swap for the purpose of avoiding the Act's disclosure requirements was a legitimate motive and did not necessarily signal the existence of a side arrangement or understanding. Rubicon's description and treatment of Perry as a major shareholder was explicable as merely a "convenient shorthand" in a context where all involved were clearly aware of the true situation where Perry had a high level of economic exposure to Rubicon. The confidence of both Perry and Rubicon that Perry could repurchase the shares and the fact that the shares were available were indicative of knowledge of the market reality rather than the existence of an arrangement or understanding. There could be no inference that there had been an arrangement at the time of entry into the swaps from Perry's wish to vote an equivalent shareholding to its economic interest over a year later at the time of Rubicon's first annual general meeting.

The Court considered that no inference could be drawn from the failure of Perry to call its sole shareholder and president, Mr Richard Perry, when its other relevant witnesses were called. Of the "rule" in *Jones v Dunkel*, the Court said there that there was no such rule. Rather, it was a principle of the law of evidence authorising but not mandating the drawing of an inference from the failure of a party to call a witness in some circumstances. The failure to call two witnesses from the banks was, however, a matter that could legitimately be used to draw an inference.

The Court also regarded evidence given by Deutsche Bank and UBS Warburg employees as to the division of functions within the respective banks as of central importance rather than neutral as the High Court had found. The strict division between sales functions (which involved client contact) and hedging functions (which did not) meant that sales staff would be unable to enter into arrangements with clients with regard to shares held as a hedge.

Lastly the Court considered whether s5(2) applied to give rise to a relevant interest because the swaps counter parties were "accustomed to act" in accordance with Perry's directions, instructions or wishes in relation to dealing with the Rubicon shares. While expressing no final view on the meaning of "accustomed to act" the Court indicated that a lesser degree of subservience might be required than had been the case in some earlier authorities. In any case the Court said the banks' accommodation of Perry as to the timing and means of swaps unwinds was largely as a result of acting in their own commercial interests.

The Court also discussed the onus of proof of "reasonable grounds to suspect" in s30 which applies to trigger the Court's jurisdiction to make orders under s32. Gault P, Blanchard, Anderson and Glazebrook JJ held that what is required in order to invoke the Court's jurisdiction is that, on all the evidence, there are reasonable grounds to suspect non-compliance by a substantial security holder. The Court added, however, that the more draconian a penalty that is to be imposed the firmer the basis for suspicion must be, and it would seldom if ever be appropriate to impose an order as severe as forfeiture of shares if the normal civil standard of proof is not satisfied. Keith J dissented on this issue. He took the view that this lower threshold did not apply to the fact of being a substantial security holder, which had to be established on the balance of probabilities.

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4 CRIMINAL TRIAL ISSUES

This chapter summarises criminal cases where appeals against conviction succeeded because of problems arising in the course of the trial.

Conduct of defence counsel

Failure to adduce evidence

In *R v Young* CA13/03, 15 September 2003, a potential defence witnesses was not called and his signed statement was not put in evidence because of defence counsel misunderstandings about the funding arrangements for video link evidence and admissibility of signed statements. The appeal was allowed on this basis, making it unnecessary to consider whether a summing up that fell well short of the usual standard was enough in of itself for the appeal to be allowed. As the appellant had already served his prison term, there was no point in ordering a new trial. The conviction was quashed and a verdict of acquittal entered.

Prejudicial material wrongly introduced

In *R v W* CA195/03, 6 October 2003, the appellant appealed against his conviction on grounds of counsel's incompetence and wrongful admission of evidence. The Court held that prejudicial material of no probative value was included in the complainant's video-taped interview and that counsel had unjustifiably failed to challenge it. Prejudicial evidence of another complainant was also introduced by defence counsel without any apparent justification. For these reasons the Court held that there had been a miscarriage of justice. The appeal was allowed and a new trial ordered.

Conduct of trial

Criticism of accused for failure to file alibi notice

In *R v Montgomerie* CA36/03, 4 August 2003, the Court of Appeal considered the prejudice caused to the appellant where a judge wrongly criticised the appellant at trial for failing to fulfil a non-existent duty to file a notice of alibi. The appellant appealed against his conviction for cultivation of cannabis on the basis that the Judge misdirected the jury in relation to an alleged failure by appellant to give an alibi notice. The indictment alleged the commission of an offence "on or about 18 February 2000". Applying s367A(8) Crimes Act 1961 to the facts of this case, an alibi notice would only be required where the accused was claiming that he was not on Great Barrier Island where the offence was alleged to have occurred on 18 February or during the period immediately before that date. The appellant expressly disavowed the raising of an alibi as a defence and he was certainly under no legal obligation to give notice of an alibi in respect of the lengthy period referred to by Crown counsel and by the Judge.

The critical issue at the trial was one of credibility. The police officer who discovered the cannabis gave evidence that the appellant admitted that it was his. At trial the appellant denied having made such an admission and denied that the cannabis was his. The Court of Appeal held that the remarks made by the Judge concerning the need for a notice of alibi arose from a misunderstanding of the legal requirements of s367A. As a consequence the Judge criticised appellant for breach of a duty which did not exist. This criticism reflected directly on the crucial issue of credit and this occasioned a miscarriage of justice. Because the issue of credibility was so central to the trial, the wrongful impugning of the appellant made it inappropriate to apply the proviso to s385(1) Crimes Act 1961. Accordingly the appeal was allowed and a retrial was ordered.

Excessive judicial intervention

In *R v Baleitavuki* CA142/03 & *R v Abbott* CA159/03, 24 October 2003, the Court of Appeal considered the effect of excessive judicial intervention during a trial in the form of questioning an accused. The appellants were tried by a District Court Judge and jury on an indictment relating to aggravated robberies. One of the grounds of appeal was that a miscarriage of justice had been occasioned by bias on the part of the Judge, exemplified by the judge's unfair questioning of Abbott following his examination by counsel.

The Court considered that the judicial intervention could not be seen as an attempt to clarify evidence. Rather, the Judge's questions would have conveyed the impression that the Judge disbelieved Abbott's evidence, regarding him as guilty by association with known criminals, and included among the known criminals was Baleitavuki. The apparent message to the jury was unmistakable. Regardless of the Judge's intention, the impression given was that the Judge accepted the Crown case in relation to both accused and rejected that of the defence. A fair trial was thereby denied. Accordingly the appeal was allowed, the convictions were quashed and a new trial was ordered for both appellants.

Failure to disclose significant material

In *R v Marshall* CA351/03, 28 November 2003, the appellant successfully appealed against convictions for rape, sexual violation by unlawful sexual connection and indecent assault of a girl aged between 12 and 16 years. The crucial issue on the rape charge was consent. Of the numerous grounds of appeal, two were critical.

First, it was said that the Crown wrongly failed to disclose information to the defence. The information consisted of medical notes of an examination of the complainant undertaken by an independent medical practitioner but held by the police. The notes were not disclosed, but the defence was provided with a police job sheet which indicated that the complainant had not consented to an internal examination. The trial Judge had rejected a defence application for disclosure of the notes without giving reasons.

The Court held that there was a common law duty on the Crown in New Zealand to disclose to the defence any significant material which could affect the credibility of a

prosecution witness. While noting that there might be exceptions to that rule, the Court thought it apt to cover the present case. This meant that disclosure was prima facie obligatory in the circumstances, though privacy concerns might justify withholding the information. Turning to that question, the Court said that under the Privacy Act regime privacy interests had to be balanced against the accused's right to a fair trial. The medical notes were considered highly sensitive, but were important to the appellant's defence as they commented on the complainant's willingness to make a complaint at the time, her refusal to submit to an internal examination and the absence of any overt signs of trauma. These features meant that they were likely to have materially assisted the defence in a case where consent, and the roughness of sexual intercourse, were in issue. Consequently, the Court held that the privacy interest was outweighed and the notes should have been provided to the defence.

Secondly, it was argued that a lies direction should have been given to the jury, as the Crown prosecutor had alleged that the appellant had told lies throughout counsel's cross-examination and in his closing. The Court affirmed that where allegations of lying had become a significant issue at trial, as here, a lies direction would usually be necessary. The allegations made were relevant only to credibility, as the mere fact (if proven) that the appellant had lied did not indicate guilt in the circumstances. Therefore, a direction of the type noted in *R v Toia* [1982] 1 NZLR 555 was necessary. This ground of appeal was therefore made out.

Lack of legal representation

In *R v Hill* CA26/02 & *R v Turton* CA38/02, 17 February 2003, the appellants had been convicted on charges under the Crimes Act 1961 and the Insolvency Act 1967 arising from the bankruptcy of Hill. Both appellants dismissed counsel appointed to represent them shortly before the trial was to commence. The trial Judge refused an adjournment of the trial which proceeded with the appellants representing themselves. The issue was whether the appellants' rights to a fair trial under s24 of the New Zealand Bill of Rights Act were breached. The Court found that there was no breach of the Bill of Rights nor any prejudice or unfairness in the first appellant's case as he had effectively waived his right to counsel. In the case of the second appellant, however, the Court found that she had continued to make it clear that she wished to have legal assistance and that the lack of representation led to a real possibility of a miscarriage of justice as she asked very few questions, neither gave nor called evidence on her own behalf and relied on the first appellant to conduct a defence on behalf of both of them.

The Court also concluded in the case of the second appellant that the Judge misdirected the jury on the onus of proof under ss126(1)(f)(i) and 126(1)(g)(i) of the Insolvency Act so far as it related to her alleged liability as a party to the offending committed by the first appellant as the principal. Section 126 effectively reversed the usual onus of proof of mens rea so far as it related to the bankrupt as principal, but in the case of an accessory, the Court considered that the burden remained on the prosecution to prove all essential elements of the offence including the relevant mens rea. The Court's reasoning was that Parliament could not have intended to place upon an accessory the considerable burden of proving the state of mind of the principal.

Inappropriate remarks by Crown counsel

In *R v Hodges* CA435/02, 19 August 2003, the appellant was found guilty of one count of sexual violation by unlawful sexual connection and one count of kidnapping. He appealed against his conviction in part on the basis that Crown counsel's closing address was unfair, emotive and inflammatory. The Court held that counsel's approach was inappropriately prejudicial and inflammatory. The proper role of Crown counsel is to be firm, even forceful, but not emotive or inflammatory. The Crown should lay the facts dispassionately before the jury and present the case for the guilt of the accused clearly and analytically. It should also traverse the legal ingredients of the count and call the jury's attention to the evidence which the Crown says satisfies the onus and standard of proof in relation to each ingredient. While defence counsel attempted to address the situation by asking the jury not to be influenced by some of the things Crown counsel had said and to concentrate on the evidence, this did not ameliorate the situation as the Judge gave no support to defence counsel's approach. Only a very clear and firm direction to that effect from the Judge could have let the jury know what the correct position was. Something significantly more than a standard direction about prejudice and sympathy was required.

The problems of Crown counsel's closing were compounded by the Judge's reference in summing up to one aspect of the Crown case with seeming approval. The Crown had asked the jury to consider whether the appellant was the "sort of person" who would ignore it if a woman was saying no. The Judge gave the impression she was endorsing the validity of this submission, which the Court considered invited propensity or bad character reasoning in a wholly inappropriate way. At the very least the Judge should, in context, have invited caution with this kind of reasoning process. Further, the Court noted that the Judge's summary of the Crown's case was substantially more analytical and convincingly presented than the case as advanced by defence counsel. The problems inherent in Crown counsel's closing address, combined with the failure of the Judge to give proper directions, resulted in a real risk of a miscarriage of justice. A new trial was directed.

In *R v Kaluza* CA129/03, 12 November 2003, the Court also quashed the defendant's conviction on one count of sexual violation by rape and ordered a retrial because of inappropriate remarks made by Crown Counsel which were not adequately addressed by the Judge in the summing up.

The appellant faced two counts of rape relating respectively to two separate incidents on the same night involving the same complainant. The appellant initially denied any sexual activity with the complainant in a statement to the police. He was acquitted on the first count and found guilty on the second. However, on appeal a retrial was ordered. During the Crown's closing address in the retrial inappropriate comments were made on two matters. The first was that counsel said three times that the appellant "had got away with touching her", which the Court found suggested to the jury that the appellant had actually been guilty of sexual violation in the first incident or was lucky to have escaped. Although in the summing up the Judge told the jury that the appellant had been acquitted on the charge relating to the first incident, the Judge went on to use the same unfortunate expression as Crown counsel when summing up the Crown case, and did not point out that the comment was inappropriate.

The second matter was Crown counsel's reference to lies. Counsel suggested to the jury that the appellant's lie to the police provided proof of his guilt. However, the lie could also have had an innocent explanation, and although the Judge gave a direction on lies, the corrective work was undone when reference was subsequently made, without comment, to counsel's statement that "most often people lie because they have been caught doing something they know is wrong".

The Court considered that the Judge's directions were inadequate to correct the inappropriate remarks by Crown counsel. The jury's verdict therefore could not stand.

The convictions were set aside and a new trial ordered.

Evidence

Admission of deposition evidence when witness overseas

In *R v Arvand* CA145/03, 9 October 2003 the Court allowed in part an appeal against conviction by the appellant for a large number of sexual and dishonesty offences against women. The appellant was alleged to have undertaken a practice of befriending Asian women in New Zealand, stupefying them, gaining access to their bank accounts and sexually violating them. Because two of the witnesses had returned to their native countries, the question was whether their deposition evidence could be admitted under ss175(4) and 184(1) of the Summary Proceedings Act, which allow evidence in the form of a deposition or written statement to be put before a jury. The technical requirements of the section having been satisfied, the sole question was whether the evidence should be excluded on fairness grounds. The High Court had permitted the evidence to go forward.

The Court noted that it would only be in exceptional cases involving alleged sexual offending where it would be appropriate for the complainant not to be presented to the jury for examination. In one case, this high threshold was met, because the appellant had been literally caught in the act. There was sufficient independent evidence that it was difficult to see how the complainant's evidence could be attacked, and any possible routes of challenge had been explored at the depositions stage. The other case was of a different order. Difficulties had emerged with the interpreter and the witness's understanding of questions, particularly in relation to the issue of consent. In the circumstances, fairness required that the jury be given an opportunity to observe the witness giving evidence and make judgments as to her credibility and reliability. The appeal against the three convictions in relation to this complainant was allowed. The other convictions stood, various grounds of appeal not having been made out. The sentence was reduced.

Effect of Inducements on Reliability of Evidence

In *R v Condren* [2003] 3 NZLR 702, the Court considered the effect of inducements on the reliability of evidence. The appellant appealed against a decision allowing the Crown to call the evidence of certain witnesses in the appellant's murder trial. The Crown proposed to call the evidence of three witnesses, a co-accused, Brockie (who had been granted immunity from prosecution), Stilwell (who claimed to have been

present when the alleged killing occurred but who had not been granted immunity), and Joy (who had had a conversation with the appellant prior to the killing).

The appellant submitted that Stilwell's proposed evidence should not be called because of his prior convictions, drug addiction, his interest as a potential claimant for a $50,000 reward, the possibility of being charged as an accessory, and an admission of lying in a statement to police. As for Brockie, the immunity amounted to a continuing inducement; further because to the circumstances of his coming to give evidence and his 150 prior convictions, Brockie's evidence was so unreliable that it ought to be excluded. Finally, the appellant challenged the admission of the evidence of Joy on the ground that its prejudicial effect outweighed its low probative value.

The Court held that the combined effect of all the factors, in particular the lack of immunity from prosecution as an accessory after the fact, was such that the evidence of Stilwell should have been excluded, and was inadmissible unless the Solicitor-General granted immunity. Joy's evidence was also held inadmissible.

The Court observed that in considering the exercise of the discretion to exclude evidence, a court is required to identify the existence of any operative inducements upon an accomplice, to ask what the power of those inducements might be, and whether they are likely to give rise to a real danger that false evidence will be given by the accomplice and thereby cause a real danger of injustice to an accused. In reaching an overall judgment there may be other factors such as the character of the witness giving rise to a susceptibility to inducements and whether there are considerations relating to the evidence itself which may give cause for concern.

In terms of the policy considerations which have traditionally concerned the Court, the possibility of prosecution as an accessory causes the greatest concern. It has been traditionally recognised as the factor which is likely to cause a person to give evidence which will inculpate co-offenders with the motivation of exculpating the witness.

The Court also noted that the possibility of a reward is not unusual. Indeed, it has been characterised as absurd to use such a possibility as a reason for exercising the discretion.

Evidence relating to attendance of SAFE programme

R v Grace CA400/02, 16 June 2003, the appellant challenged his conviction for sexual violations on the ground that the admission of evidence relating to his attendance at a SAFE programme was in error.

The Court held that there was no probative value in the SAFE evidence unless it was linked to admissions made during the interview and even then such value was slight. On the other hand there were public policy concerns about evidence relating to therapeutic courses.

The Court also held that a statement made by the appellant was obtained in breach of the appellant's rights. The appellant was arrested late at night and taken to the police station for questioning. He indicated a desire not to talk but was constantly pressed

by a police officer resulting in admissions. A videotape facility was available but not offered. The interview was also conducted at a late hour. Parts of the interview should have been excluded on *Halligan* principles. In all the circumstances, the interview should have been excluded on grounds of general unfairness. The appeal was allowed and a new trial was ordered.

Expert evidence given in cases involving child complainants

In *R v Baillie* CA418/02, 10 March 2003, the Court quashed the appellant's conviction and ordered a retrial because of the nature of evidence given by a clinical psychologist and the Judge's direction on recent complaint evidence. The appellant had been convicted after a trial by jury of five charges of indecent assault and five charges of oral sexual violation relating to a boy aged 13 to 14 years at the relevant time.

At trial the Crown called evidence from a clinical psychologist. This evidence was given under s23G of the Evidence Act 1908, which allows expert evidence to establish whether a victim's emotional and mental state and development were consistent with sexual abuse. The thrust of the psychologist's evidence was that 36% of adults who suffered sexual abuse as children developed post traumatic stress disorder, that the complainant suffered from that disorder, and that in her opinion there was no evidence of a source of trauma other than the alleged sexual abuse. The psychologist also endorsed the complainant's credibility. The Court held that the psychologist's evidence, coupled with the endorsement of credibility, exceeded the ambit of s23G and gave rise to a risk of a miscarriage of justice because the psychologist was purporting to answer the ultimate question.

This risk of miscarriage of justice was increased by a direction on recent complaint evidence during the summing up. The Judge had instructed the jury that a complaint made shortly after alleged abuse may demonstrate consistency and assist with ascertaining credibility. But the Judge later observed that on account of the passage of time the jury may choose to give the disclosures little weight. The complaints had, however, not been introduced as recent complaint evidence, but as part of the counselling process, which was when they were made. The defence case was that the evidence lacked spontaneity and suggested inconsistency on the complainant's part. The Judge should therefore have decided whether the disclosures were evidence of recent complaint, and if not, should have explained its significance without resort to recent complaint formula.

In *R v Jarden* CA51/03, 4 August 2003, the Court examined the permissible scope of expert evidence under s23G of the Evidence Act and the effect of evidence that goes beyond that scope. The Court held that the evidence given went beyond the proper limits of the section and this, together with inadequate judicial direction in respect of that evidence, had occasioned a miscarriage of justice. In particular, the Court noted its concern at the psychiatrist's comment that "there has been no known prior sexual abuse". Such a comment was a factual matter, being outside the scope of permissible opinion evidence, and also carried the inevitable inference of the doctor's opinion that the matters before the Court were, in fact, occasions of sexual abuse. Also of concern was the witness's evidence about the complainant's emotional maturity, which was

based on a comment by the child's mother and not direct examination of the complainant. The convictions were quashed and a new trial was ordered.

Expert opinion on mental disability

In *R v Hurihanganui* CA81/03, 24 October 2003, the Court reviewed the principles governing the admissibility of expert evidence on the mental disability of a witness (including the accused) which affects his or her ability to give reliable evidence. The appellant was convicted of aggravated robbery. The principal evidence was a confession, which contained a substantial number of unequivocal fabrications. The appellant sought to lead evidence that he suffered from three mental disabilities or disorders. In particular, he had a mental age of between 11 and 13 years but a chronological age of 20 years, and suffered from Asperger's disorder and a schizo-affective disorder. The Asperger's condition meant that he might not have understood the gravity of the situation and could have been led to say yes to almost any question. The schizo-affective disorder might have led him to entertain delusions. The trial Judge ruled that only evidence of the reduced mental age could be given, as the effects of the other disorders were not apparent in the record of the interview.

The Court considered the principles set out in *R v Toohey* [1965] AC 595 in light of recent decisions by the High Court of Australia and the English Court of Appeal. The Court accepted that the existence of a mental disorder which reduced the capacity of a witness to give reliable evidence would generally be admissible. The disorders met this criterion. Their effect was almost certainly outside the knowledge and experience of the jurors. Expert evidence about their effect would in the Court's view have assisted the jury in determining the reliability and credibility of the accused in making his confession, which was a major issue at trial. The Court therefore held that the evidence should have been put before the jury. Given the pivotal nature of the confession the appeal was allowed and a new trial ordered.

DNA evidence – reference to peer reviews

In *R v Templer* (2003) 20 CRNZ 181, the Court applied the proviso to s385 of the Crimes Act 1961 to dismiss an appeal against conviction for the rape of a long term resident of an IHC Home. The DNA evidence was crucial in the case. Although dismissing the main ground of appeal, the Court considered two issues relating to peer review of the expert testimony given in relation to the DNA evidence.

First, ESR scientists called by the Crown gave evidence that a defence expert, who was not called at trial, had checked their findings. This could have implied to the jury that the expert had concluded that the evidence could not be challenged. It was therefore inadmissible hearsay. The Crown's tactic was also contrary to public policy as it would discourage the employment of experts by the defence.

Secondly, one ESR Scientist had given evidence that peer review of her work had been undertaken. This again amounted to introducing hearsay evidence by implication. The Court left open the question, which did not arise in the case, of whether a direction from the Judge could have cured this error.

Ultimately, however, because the DNA evidence was so compelling, it was held that no possible miscarriage of justice had occurred. The appeal was therefore dismissed.

Recent complaint evidence

R v Garcia CA132/03, *R v Growcott* CA140/03 & *R v Brand* CA156/03, 17 December 2003, was a successful appeal against convictions for kidnapping, rape and being a party to rape of a young woman. The Crown had adduced recent complaint evidence, following a pre-trial ruling, that the complainant had subsequently complained to other persons about the rapes. It was not discovered until cross-examination of the complainant that the recent complaint evidence was not in fact recent. The Court considered that the introduction of the evidence as recent complaint evidence might have been avoided had the complainant's evidence been rebriefed before trial. The protection provided for complainants by the removal of the right to cross-examine at depositions meant that the Crown must accept that evidential interviews were required to be conducted with care to ensure that inadmissible evidence was not inadvertently admitted.

Evidence was also led, as proof of consistent behaviour, of a further attempt to complain to the police. A tactical decision had been made by that appellant to introduce evidence that he was also accused of rape in order to support a theory of either innocent reconstruction or fabrication. However, this was admitted on the mistaken basis that the complainant had made the complaint when in fact the complainant had had merely accompanied another person to the police station who made a complaint of rape against one of the appellants. When it was found, during cross-examination, that the complainant had not in fact complained to the police, the defence did not go on to allege fabrication or collusion. The Court held that the appellant was led to a tactical decision he should not have been called on to make and that could have prejudiced both himself and the other appellants. The central issue at trial having been the credibility of the complainant, the inadvertent augmenting of her credibility by the introduction of this prejudicial evidence rendered the verdicts unsafe.

Cross-examination on statement by co-accused

In *R v McKenzie* [2004] 1 NZLR 181, the Court considered the uses to which the statement of a co-accused could be put in cross-examination. In the case, the co-accused's statement was inconsistent with the evidence of the accused. Counsel for the co-accused employed that statement in cross-examination. Counsel for the Crown then sought to exploit other inconsistencies in the statement. The trial Judge ruled that because the statement had already been used in cross-examination without objection, it followed that the Crown should also be permitted to make use of it.

The Court held, following a line of New Zealand and overseas cases, that cross-examination on the substance of the statement was permissible but that reference should not have been made to its source. This balanced the need for the prosecutor to be able to explore fully issues of fact in the case with protecting the accused from having to explain or comment upon remarks that were not of his or her making. On the facts, prosecuting counsel had gone too far, in a way that had caused unfair prejudice to the appellant. Counsel for the co-accused had also crossed the line, but

only in an insignificant way. As the summing up on the point did not deal with the resulting unfair prejudice, the conviction was quashed and a retrial ordered.

Jury directions

Evidence of prior misconduct

R v Ashraf CA136/03, 24 July 2003, was a successful appeal by a husband against a conviction for raping his wife. Evidence had been led at trial about violence by both parties during their "fraught relationship". The Court considered that as the defence case at trial had been advanced on the basis that the complainant was obsessive and jealous, and that violence was an issue in their relationship, the appellant could not now be permitted to challenge the conduct of defence counsel in cross-examining on that basis.

However, with evidence of prior misconduct being placed before the jury, the Judge was required to give an adequate direction as to the use that could be made of it. While battering a woman is itself a serious offence, it is not necessarily synonymous with an absence of consent to intercourse on a particular occasion. The Judge did not explain to the jury that the evidence that the appellant had abused the complainant could be used only to provide the context in which the rape was alleged to have occurred, with a view to bolstering her credibility. It could not be used as tending to prove that on this occasion she did not consent.

The Court also concluded that the police doctor should not have been permitted to give evidence that in his opinion the complainant's injuries were the result of non-consensual intercourse. The courts will ordinarily exclude expert opinion on an ultimate issue such as consent in a rape trial, as in *R v Eade* (2002) 19 CRNZ 470. The evidence having been led, an appropriately firm and clear summing up may have saved the trial from miscarriage. However, the Judge actually echoed, without comment, the Crown submission that the doctor's evidence supported what the complainant said. The result was that the jury was left with the impression that it could approach the case on the basis that the doctor was entitled to provide the opinion. This error, coupled with the first, made the verdict unsafe. A retrial was ordered.

Mens rea of possession in circumstances of alleged joint possession

In *R v Iese* CA188/03, 6 November 2003, the appellant appealed successfully against a conviction for possession of cannabis for sale on the basis that the trial Judge misdirected the jury about the legal ingredients of possession, both generally and specifically in relation to the present case. The appellant was charged on the basis that he was jointly in possession of the cannabis with others, including A, with whom he was in a relationship. A was proved to be in physical possession of the cannabis. In contrast, there was no evidence physically linking the appellant with the cannabis, and he denied that he had the necessary mens rea of possession.

The Court held that the Judge erred in giving the jury the impression that the appellant's knowledge that A had possession was sufficient in law to put him into possession jointly with her. The Judge failed to refer expressly to the fact that where, as here, immediate physical custody or control is in the hands of another person and the possession of the person in question is alleged to be jointly with that other person, the Crown must prove clearly that the alleged joint possessor has both knowledge of the other's possession and an intention to exercise custody of or control over the items in question in conjunction with that other. The appropriate legal direction should always call attention to the need for the requisite intention. In this case the Judge's failure expressly to mention the need for the appellant to intend to exercise custody of or control over the cannabis, albeit jointly with A, was to omit a necessary legal element which was central to his defence. Accordingly, the appeal was allowed and the conviction quashed. It was not appropriate to direct a retrial.

Recent complaint evidence

See *R v Baillie*, p32 above.

Onus of proof – "credibility contest"

In *R v Tanielu* CA409/02, 6 May 2003, the appellant appealed on the basis that the trial Judge misdirected the jury on the onus of proof, and wrongly invited the jury to treat as irrelevant issues going to the appellant's credibility. The appellant was a taxi driver convicted of indecently assaulting a 17 year old female passenger. He disputed two elements of the Crown case: that the complainant did not consent and that he lacked an honest belief that the complainant consented. The Court held, in terms of onus of proof, that it was imperative that the Judge's direction should be a clear message identifying the elements and explaining that each was to be proved by the Crown beyond reasonable doubt. The Court held that there was a real risk that the Judge's direction to consider whether the complainant's or the appellant's version of incident was credible might blur the onus of proof in the minds of the jury. There was also a failure by the Judge to distinguish between legal direction and factual comment. The jury were entitled to consider the undisputed fact of the appellant's touching and kissing against the backdrop of the complainant's mood that evening and to consider the defence's challenges to her credibility. The trial Judge erred in suggesting otherwise. A miscarriage of justice had occurred, the appellant's conviction was set aside and a new trial was ordered.

Direction on lies

See *R v Marshall*, p27 above.

Proper use of evidence of ownership of stolen property

In *R v Stoves* CA138/03, 30 October 2003, the appellant was convicted of two counts of stealing a hydraulic ram and one count of attempting to steal a hydraulic ram. He appealed against conviction and his sentence of 9 months imprisonment. Part of the appellant's case at trial was that, in relation to the theft of one ram, even if it did belong to the company named in the indictment, the appellant had nonetheless come

by it innocently. The Court held that the Judge misdirected the jury on this aspect of the matter, by telling them that if they were sure about the identification of the ram, that is that it came from the company's machine it was their duty to find the appellant guilty. Although there was a later reference to the appellant's explanation for how he had come by the ram, the Judge left no room for this explanation to operate by telling the jury that it was their duty to convict if the Crown had proved ownership. This direction was patently and fundamentally wrong in the light of part of the appellant's defence. The appellant was entitled to have the innocent acquisition explanation considered by the jury without the Judge giving a direction which in effect took the point away from them if they literally followed the direction. The appeal was therefore allowed to the extent of quashing the conviction on this count. The convictions on the remaining counts were upheld. There was no order for a retrial as the sentence imposed had already been fully served. The appeal against sentence was dismissed for reasons particular to the case.

Self-defence

In *R v Howard* (2003) 20 CRNZ 319 the Court considered the directions to be given to a jury in relation to a proposed defence of self-defence. The appellant had been convicted on one count of injuring with intent to injure.

The Court concluded that the Judge's statement that the jury must decide whether the appellant's actions were done "not in self-defence but injuring" may have left the jury with the clear impression that deliberately causing injury excluded the defence of self-defence. This statement was compounded by the Judge's earlier summation of the Crown case as that "there was no element of self-defence … it just went too far and she was injured". The Court emphasised that self-defence, if found, provided a complete defence to the charge of injury with intent.

The Court also expressed concern over the emphasis placed by the Judge on the need for the defendant to believe in a threat of bodily harm. Self-defence was in principle available against assaults where bodily harm is not threatened: *R v Kneale* [1998] 2 NZLR 169. In addition, the Court questioned the Judge's statement that the law did not protect a person from the consequences of acting out of spite or anger. The Court noted that an angry or spiteful person might also fear a future assault; the additional mindset did not of itself prevent the accused from claiming self-defence.

The Court emphasised that s48 of the Crimes Act 1961 was a simple comprehensive provision and that Judges should be wary of giving it unnecessary embellishment. The Court stated that the proper approach to directing juries on self-defence was to read the terms of s48, to direct the jury to the three elements of the defence identified by the Court of Appeal in *R v Bridger* [2003] 1 NZLR 636 and make the appropriate linkages with the facts. The appeal was allowed and a new trial ordered.

In *R v Styles* CA297/03, 6 November 2003, the Court quashed the defendant's conviction for assault because the Judge's erroneous direction on self-defence meant that the trial miscarried. A new trial was ordered.

In summing up for the jury, the Judge stated that the critical issue was whether the defendant's actions were intentional. The Judge then directed the jury on self-defence by saying that it involved three questions. The first was whether the defendant had acted in self-defence or whether she intended to assault. The Judge said that if the defendant had intended the assault self-defence was not available. The second and third questions were advanced rather obliquely in a lengthy passage that referred to the need to look at the force used, the circumstances as the defendant saw them and reasonableness.

The Court observed that the Judge had adopted an unorthodox formulation of self-defence and should have directed the jury in compliance with the test approved by this Court in *R v Bridger* [2003] 1 NZLR 636. The Court considered that the Judge had created a false dichotomy between an intention to assault and an intention to act in self-defence, and had failed to relate the self-defence directions back to the factual issues which the jury had to assess.

Use of out-of-court statements; comment on accused's failure to give evidence.

In *R v Cameron* CA134/03, 5 November 2003, the Court allowed an appeal against conviction on a charge of sexual violation by unlawful sexual connection and breach of a protection order, because of issues concerning a hostile witness. The trial Judge had granted the Crown leave to treat a witness as hostile when the witness failed to give evidence in accordance with her earlier police statement, which she had not accepted as being the truth. The Judge later directed the jury about the witness's evidence.

The Court held that the decision to declare the witness hostile was within the Judge's discretion, albeit there were irregularities in the process by which he reached his decision: the lack of any formal ruling or reasons for declaring the witness hostile; the lack of Crown request for a hostility ruling at an expected time; and the taking by the Judge of the initiative at an inappropriate time to declare the witness hostile, seemingly without giving counsel for the accused any opportunity to be heard.

The decisive problem in this case was that the Crown, by way of appropriate cross-examination once the hostility ruling had been made, put to the witness what she had said in her out-of-court police statement. The Judge failed to give the jury the standard direction that unless expressly adopted in front of the jury, an out-of-court statement is not evidence of the truth of its contents. There was therefore a substantial risk that the jury may have relied on the witness's out-of-court statement as evidence of facts contained in it, thereby severely weakening the appellant's alibi evidence. Preferably, the Judge could have directed the jury that they should not place any weight on the witness's evidence at all, because when the witness gave her evidence on oath in front of the jury, she said she was thoroughly confused about the crucial question, the date for which the appellant had an alibi.

The Judge had also commented on the fact that the appellant had elected not to give evidence. The Court made the point that if a trial Judge does decide to comment in this way, it is important that the Judge tell the jury how they may appropriately use the absence of evidence from the accused in their reasoning process. It is not

appropriate for the Judge to say, as was said here, that it was for the jury to determine what they made of the point. The Court was satisfied there was a real risk a miscarriage of justice had occurred. The appeal was therefore allowed, the convictions quashed and a new trial directed.

Unreasonable verdicts

In *R v A* CA299/03, 17 December 2003, the appellant was convicted of sexually abusing his two daughters, O and T. T gave evidence in the usual way in support of the Crown case. O, however, gave evidence that her father had not sexually abused her in any way. His convictions in respect of her were based on a confession with he had made but later recanted.

In a case such as the present, the Court said that a conviction should be quashed if, in all the circumstances, the Court is of the view that a reasonable jury could not regard the confession as having sufficient reliability to support a conviction. The verdicts of guilty should be regarded as unreasonable. In this case the Court considered that while it might just be possible to regard the verdicts as reasonably based in relation to the physical acts, this could not be said in relation to the question of consent. When all the circumstances were considered, the Court concluded that the verdicts of guilty on the counts where consent was an ingredient of the offence should be set aside on the ground that they are unreasonable. The admission of hearsay evidence was an additional ground for quashing these verdicts and a ground in itself for quashing a verdict where consent was not an ingredient of the offence. The convictions in relation to O were quashed. There was no order for a retrial on the counts where consent was an ingredient of the offence because the evidence could not reasonably support a conviction on those counts. The Court also exercised its discretion and directed that no retrial take place on the other count.

The Court also quashed the verdicts in relation to T. The Court considered that the Judge failed in his summing-up to point out to the jury the need for careful isolation of evidence and to give them appropriate assistance in performing that task. There was also an apparent inconsistency in the jury's verdicts. For these reasons the verdicts in relation to T could not be regarded as safely based. A retrial on the counts relating to T was ordered.

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5 THE UNITY OF THE COMMON LAW AND THE ENDING OF APPEALS TO THE PRIVY COUNCIL*

In 1769, by a nice coincidence, Captain James Cook made landfall in New Zealand, the first British mariner to do that, and William Blackstone published the final volume of his *Commentaries on the Law of England.* Blackstone's discussion of the application of the law of England to newly acquired colonies is not completely coherent, but it does give a strong sense that much, if not all, of the common law did come to apply to many, if not all, of them.[1] The Privy Council was reminded of this, with express reference to Blackstone, a few days ago when we were asked to rule whether the rule in *Smith v Selwyn*,[2] a decision of the English Court of Appeal given in 1914, was part of the law of Jamaica.[3]

That did not mean however that there was a unity of the common law. Practice, legislation, case law and commentary from early days recognised that there were at least three situations in which the law of England did not apply.

1. At the time of colonisation an existing body of law might exist and, in particular, rights might have been established under it; that might particularly be the case if there was an earlier European coloniser with the consequence that, for instance, French, Spanish, Dutch or German law might have applied with rights being acquired under it; a distinction was commonly drawn between sovereignty being transferred by cession (by treaty) or by conquest on the one hand and being obtained by settlement on the other, with the prior law continuing in the first cases and the law of England applying in the second.

2. Local circumstances might require an answer different from that provided by the law of England, as appears for instance from the qualifications appearing in many early colonial statutes on the application of the law of England.[4]

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* This note is based on a paper given in the 2003 Commonwealth Law Series on 27 November 2003 at the British Institute of International and Comparative Law. I was completing a month sitting on the Judicial Committee of the Privy Council. The New Zealand Parliament had, on 17 October 2003, enacted the Supreme Court Act 2003 ending appeals from the New Zealand courts to London and creating the New Zealand Supreme Court as a court of final appeal. Within the very wide area allowed by the title of the paper, I have emphasised New Zealand material. As comments following the giving of the paper indicated, the role in the past of the Privy Council in Africa, Asia and the Caribbean presents major questions. I am very grateful for those comments, by Mary Arden, Robert Hazell, Anthony Lester and Stephen Sedley, and have taken account of them in preparing this text.

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[1] *Commentaries on the Laws of England* (Clarendon, 1765) vol 1, 104-105.

[2] [1914] 3 KB 98.

[3] In a decision given in December, we decided that it was not : *Panton v Financial Institutions Services Ltd* PC No 95 of 2002, 15 December 2003.

[4] Eg Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens, 1966) ch 11 and for New Zealand the English Laws Acts leading to the Imperial Laws Application Act 1998 and New Zealand Law Commission, *Imperial Legislation in Force in New Zealand* (NZLC R 1 1987); on the choice of the law of England see N J Jamieson "English Law but British Justice" (1980) 4 *Otago L Rev* 488. In one interesting New Zealand application of the limit on the application of the law of England Stout CJ ruled that a statute of Edward II concerning the King's revenue and treating whales as a royal fish was not part of the law of New Zealand. Not only had the statute never been claimed to be applicable, but it would be impossible to make the claim without claiming against Maori for they were accustomed to engage in whaling and the Treaty of Waitangi ensured that their fishing was not interfered with. *Baldick v Jackson* (1910) 30 NZLR 343, 344-345. Another interesting

3. The law of nations, that is to say the law of the wider world community and not simply of England, might apply.

The law of England might then be restricted in its application in newly acquired colonies by an existing body of law, it might be restricted by local conditions, or it might apply rules of a much wider legal system, which Blackstone also declared was part of the law of England.[5] A further issue, raised by the Jamaican case, is the consequence for the law of a colony or former colony of changes in the law appearing in English cases or for that matter in courts elsewhere in the common law world.

Such matters of continuity, unity and difference arose in a recent New Zealand case which continues to cause great controversy. Five judges in the Court of Appeal decided unanimously that the Maori Land Court could investigate Maori claims to "Maori land" in the foreshore and seabed.[6] The question was in abstract terms. No facts were established or agreed. Nor was there any identification of the characteristics of "Maori land", one of the statuses of land recognised in New Zealand legislation – Te Ture Whenua Maori – the Maori Land Act 1993. On that preliminary jurisdictional question we held that the rights existing in 1840 (whatever they might have been) had not been extinguished by the general statutes to which we were referred. We did not rule on the effect of resource management laws, including fishing and marine farming enactments. Ministers have responded by indicating that legislation is to be introduced to regulate the matter.

The case required the Court to go back to 1840 – the year of the Treaty of Waitangi and the declaration of British sovereignty over New Zealand – and indeed earlier, to Sir Matthew Hale in the 17th century, Emmerich de Vattel, the notable Swiss international lawyer of the 18th century, and the great 19th century Americans, Chief Justice John Marshall and Chancellor James Kent (who began his *Commentaries on American Law*, published in the 1820s, with the Law of Nations : his students at Columbia could not properly comprehend the law of the United States, let alone the law of New York State or New York City without understanding the wider world of the law in which each system was to be seen).

In one of his judgments which were well known in New Zealand in the early years of the colony, Chief Justice Marshall in 1823 had plainly distinguished for his court between three different things, among others – the sovereignty of the colonising nations of Europe, the title which they might grant in exercise of their ultimate dominion, and the existing native rights to which that grant of title would be subject.[7] In a second case, decided ten years later, he ruled similarly in favour of the continuity of the private titles to land conferred by Spain in Florida before it was ceded by treaty to the United States.

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aspect of the case is that the Court used the Treaty without any reference to any legislation incorporating the Treaty into national law.

[5] *Commentaries on the Laws of England* (Clarendon Press, 1769) vol 4, p67. The New Zealand Courts appear to proceed on that direct approach, but the Australian position appears not to be so clear with Dixon J, for instance, in *Chow Hung Ching v The King* (1948) 77 CLR 449 saying that customary international law was a source rather than part of Australian law while Starke J suggested that a universally recognised rule of international custom should be applied by Australian courts unless it was in conflict with statute or the common law.

[6] *Attorney-General v Ngati Apa* [2003] 3 NZLR 643.

[7] *Johnson v McIntosh* 5 US 503, 505, 521-522 (1823).

He said this:

> It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conqueror to do no more than displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilised world would be outraged, if private property should be generally confiscated, and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule even in cases of conquest, who can doubt its application to the case of an amicable cession of territory.

The treaty of cession, the Chief Justice recorded, conformed with this principle. The cession to the United States, "in full propriety and sovereignty, [of] all the territories which belong to [the King of Spain]" did pass sovereignty but not private property.[8]

Those statements of principle, based on established practice, are early American contributions to international law in the great tradition of that country's commitment to the law of nations, a matter emphasised last week by Lord Steyn in his F A Mann lecture. The law of nations, after all, is recognised in the Constitution of the United States (in the grant of legislative power), as are treaties (as part of the supreme law of the land and in other ways), and in a very early statute, the Alien Tort Claims Act.[9]

While unity of principle and of approach may be seen in these various authorities, they also recognise much variation in the detail of the resulting law and the rights arising under it. Older cases also valuably reminded the judges of the danger of rendering native title to land in terms which had grown up under English law; a study of the history of the particular country and its usages was called for. "Abstract principles fashioned a priori are of but little assistance, and are often as not misleading."[10] To that extent the unity of the common law would be denied.

So, too, was that unity denied and with very wide impact through legislation, which in New Zealand's case began very early. The first Chief Justice, William Martin, the second Attorney-General, William Swainson, and the first Registrar of the Supreme Court, Thomas Outhwaite, boarded the barque *Tyne* which left Deal on 8 April 1841 and arrived in Auckland via Port Nicholson (Wellington) on 25 September. In those five months they framed laws to provide a basis for government. For Swainson it was an opportunity to institute "in simple, concise and intelligible language" a body of law unhampered "by any complicated pre-existing system".[11] Queen Victoria (or James

[8] *United States v Percheman* 10 US 393, 396-397 (1833).

[9] Also influential in the thinking of the judges in the foreshore and seabed case was Sir Kenneth Roberts-Wray's *Commonwealth and Colonial Law* (Stevens, 1966). The value of that work, nearly forty years on, demonstrates Lord Denning's prescience. While in the foreword he regrets the fact that the profession did not have it 30, 40 or 50 years earlier, "it would be a great mistake … to think that this book has come too late. Sir Kenneth discusses problems which are of vital concern to all countries of the Commonwealth. Not only to the small territories still reaching towards independence, but also the great independent countries…".

[10] Lord Haldane in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, 401-402, 404.

[11] Graeme Reid *New Zealand Dictionary of Biography* vol 1 (Allen and Unwin, Department of Internal Affairs, 1990) 412.

Stephens) had already directed Governor William Hobson that all laws and ordinances were to "be drawn up in a simple compendious form, avoiding as far as may be all prolixity and tautology".[12] That early law included a Conveyancing Ordinance denying to us from the outset the joys of archaic rules of English land law, and a Supreme Court Ordinance giving the Supreme Court (consisting simply of William Martin) all the jurisdiction of the courts at Westminster, avoiding, also from the outset, the problems arising from separate courts of equity, a distinction which lasted until the 1960s in New South Wales (of which colony in 1840 New Zealand was briefly a part). William Swainson also early prepared an Interpretation Ordinance 1851 which, in terms of unity, closely tracked Lord Brougham's Act of 1850, but in terms of local initiative and distinctiveness gave an additional direction to the Judges that

> The language of every Ordinance shall be construed according to its plain import, and where it is doubtful, according to the purpose thereof.

That legislative emphasis on purposive interpretation has continued with only a brief intermission until the present day.[13] The courts may not always have acted in accordance with that instruction, but it has certainly been prominent in argument and judgments in recent decades.[14]

The late nineteenth century was another time for distinctive lawmaking, not just in New Zealand but also in the other Australasian colonies, or for "state experiments" as William Pember Reeves, one of the Ministers of the time and later Director of the London School of Economics, called them.[15] The legislation included the beginnings of the welfare state with the introduction of old age pensions (a matter of equity, according to the preamble to the Act of 1898, to those deserving persons who in their prime of life had helped bear the public burden of the colony and to open up its resources and had contributed to the making of New Zealand), temperance legislation, women's suffrage, Maori land, family protection and an extensive array of labour legislation for which Reeves, apparently the first Minister of Labour in the Empire and also Minister of Education and Minister of Justice, was responsible. The labour legislation regulated safety and conditions in factories and shops, supported by labour inspectors and a Department of Labour, provided for workers compensation, and introduced compulsory conciliation and arbitration of labour disputes. While the workers compensation legislation had precedents in Europe and North America and the family protection (or testator's family maintenance) legislation owed something to Scots law (through the efforts of the formidable Anna, Lady Stout, and her husband Sir Robert, Premier, Attorney-General and Chief Justice), the other legislation was largely innovative to the extent indeed of attracting knowledgeable European observers, including Sidney and Beatrice Webb in 1898 and André Siegfried the following year.[16]

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[12] British Parliamentary Papers 1841 (311), vol xvii p37 quoted in New Zealand Law Commission *A New Interpretation Act* (NZLC R 17, 1990) para 11.

[13] There was a gap between 1868 and 1888; see Law Commission, note 12, para 34, p212.

[14] Eg Bigwood (ed) *The Statute – Making and Meaning* (LexisNexis, 2004).

[15] W P Reeves *State Experiments in Australia and New Zealand* (1902).

[16] Eg *Visit to New Zealand in 1898 …* (1959, 1974) and André Siegfried, *Democracy in New Zealand* (1914, 1982), the later versions being edited by D A Hamer and published by Victoria University Press.

The related widespread interest in legislation implementing government policies was reflected in the trans-Atlantic world by the formation in the late nineteenth century of the Society for the Comparative Study of Legislation which produced a valuable journal. That society and the journal recognised that different countries could learn from one another's legislative measures. There would no doubt be difference, but also common themes. Larger pictures could emerge from the detail, as demonstrated by an excellent early analysis of legislation on workers compensation from more than fifty jurisdictions. The English barrister who did that work concluded that two things were called for to deal with work accidents : (1) good labour safety laws supported by an inspectorate and (2), as a completely distinct matter, a no fault compensation scheme, perhaps in the form of insurance, to assist injured workers and their families.[17] That emphasis, coming from an international non-governmental direction, on seeing the bigger picture in labour matters, was taken up at the governmental level by the elaboration of two conventions on labour standards in the first decade of the century and the establishment of the International Labour Organisation in 1919. While in that year Woodrow Wilson was emphasising the principle of self-determination and new states were being established out of old Empires, the mechanisms to promote international cooperation were being developed, however imperfectly. Unity of the law (or of some law) was now more generally envisaged for the whole world which, as we are often reminded, a century ago had a number of globalising statistics comparable to or beyond those of the present day.[18] The facts reflected in those statistics were matched by a growing body of international law, especially through treaty making, within the League of Nations and beyond it.

That process has grown apace in the last fifty or more years, in response to technology, benign and malign, resulting threats to the environment, to health, to human dignity, and to survival, and to ideological and policy changes. Unity of the law is now increasingly sought on a universal basis and is often reflected in very widely accepted treaties, and, as in the response to the evil terrorist acts of 11 September 2001, through Security Council resolutions which bind the whole world community. That law is very often implemented through national law and national courts which in some cases at least emphasise the need to aim for interpretations of implementing legislation which are consistent with those reached in the courts of other states party to the treaty.[19] Increasingly those bodies of law are also supported by international dispute settlement procedures as within human rights regimes, the law of the sea and world trade matters. While I later return to that wider unity of the law and that growth of international courts and tribunals those matters are not my immediate concern.

Rather, I return to 1900 and turn to the Privy Council and to the Constitution of Australia, enacted by the Imperial Parliament in that year. As Professor Geoffrey Sawer, a very wise student of the Australian constitutional and political scene, observed in 1970 the appeal to London at the time immediately before federation was, for varying reasons, unpopular among fairly widespread and important sections of the

[17] Walker Gorst Clay, "The Law of Employers' Liability and Insurance against Accidents" (1897) 2 *JSCL* 1, 2.

[18] Eg United Nations Development Programme, *Human Development Report 1997* (Oxford University Press, 1997) 83 (currently, comparable shares of GDP for exports, lower capital transfers as a GDP share and much lower migration).

[19] See eg Denning MR in *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616, noted in (1970) 19 *ICLQ* 127.

community. Consistently with that opinion, the draft Constitution prepared by the Federal Convention and adopted by the peoples of the Australian colonies would have abolished appeals to London from the Supreme Courts of the States (as the colonies were to become) routing them to the Federal High Court, and would have much curtailed appeals from that Court to the Privy Council. The matter was in fact the chief issue in dispute in London between the Australian negotiators and the Chamberlain government in the process leading to the enactment by the Imperial Parliament of the Constitution and a compromise was reached to provide for a greater possibility of appeals than initially proposed. In fact, because of Australian legislation and court decisions, only a limited number of constitutional cases were decided in London. Sawer's general conclusion was that

> In no case can it be said that the Board corrected palpable error in the High Court, and it would have made remarkably little difference to the development of Australian law, public or private, if the appeal to London had been abolished in 1900.[20]

The limits placed on the extent of the appeal to the Privy Council from Australia were matched in the early part of the century by Australian and New Zealand concern about the composition of the Privy Council and indeed about the top courts of the United Kingdom and its Empire. In a debate at the 1911 Imperial Conference the Australian and New Zealand Prime Ministers called for a single court, including Dominion Judges, for Dominion Judges to sit especially in cases coming from that dominion and for dissenting opinions to be published.[21] The first proposal appears to have been met with quiet amusement, and while the second was implemented in a limited way, with one New Zealand judge, for instance, sitting during the Great War and two sitting between the World Wars, it was not, it appears, until 1972 that a New Zealand judge sat on a New Zealand case.[22]

The proposal that dissents could be published was accepted at the 1911 conference, but not implemented for a further fifty years, following strong pressure from the Australian judges who sat on the Privy Council during the 1960s.[23] In the inter war period much Canadian opinion was critical of Privy Council decisions concerning the British North America Act, the Canadian constitution, particularly decisions which were seen as restricting federal power.[24] There was specific concern about rumoured divisions among the members of the Judicial Committee, divisions which were not of course allowed to be made public,[25] and suggestions that the selection of the

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[20] "Appeals to the Privy Council – Australia" (1970) 2 *Otago L Rev*. 138, 145. See also the valuable account by Tony Blackshield, Michael Coper and John Goldring in Tony Blackshield and others (eds) *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 560.

[21] For some of the detail see "Public Law in New Zealand" (2003) 1 *NZJPIL* 3, 15-16. For a broader discussion see Stevens, *Law and Politics : the House of Lords as a Judicial Body 1800-1976* (Weidenfeld and Nicolson, 1979) 73-76.

[22] *Police v Duffield* [1974] 1 NZLR 416 (note) – a refusal of special leave to appeal in a summary criminal matter.

[23] Judicial Committee (Dissenting Opinions) Order 1966 (S1 1966 p1100) para 3; for divergent practice in Scottish devolution appeals see Munday, "Judicial configurations : Permutations of the Court and Properties of Judgment" (2002) 61 *Camb L J* 612, 619-626.

[24] For a later instance of British misunderstanding of the Australian constitutional arrangements, this time by a Minister, see *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 43.

[25] But see Lord Wright's tribute to Sir Lyman Duff, former Chief Justice of Canada, in (1955) 33 *Can B R* 1123 for an indication that he had dissented in the 1937 cases.

membership and particularly of the presiding member of the Board in those major cases was decisive.[26] All rights of appeal from Canada were finally removed by 1949. For most of the newly independent members of the Commonwealth in Africa and the Indian subcontinent, the ending of the appeal happened at independence or soon after. The removal of the appeal took longer in Malaysia and Singapore.

The 1911 debate followed criticisms in both Australia and New Zealand in the previous decade of Privy Council decisions, notably, for Australia, in *Webb v Outtrim.*[27] The High Court refused to follow that decision on the basis that on the matter in issue the High Court was the ultimate arbiter unless it was of opinion that the Privy Council should consider the matter and it had not reached that opinion.[28] In New Zealand the concern had a broad basis. In the first decade of the century the Privy Council heard more appeals from New Zealand and allowed more of them than in any other decade until the 1990s. In one particular case concerning Maori rights the Privy Council's criticism not just of the Court of Appeal but also of the Solicitor-General led to an extraordinary "protest of bench and bar" at a special sitting one Saturday morning of the Court of Appeal consisting, of course, of Judges who had not participated in the judgment under question.[29] The sitting manifested a very strong view that the Law Lords did not understand New Zealand law or society. The Chief Justice, Sir Robert Stout, one of those involved in the Saturday morning protest, soon after contributed an article to the Law Quarterly Review asking "Is the Privy Council a Legislative body?"[30] in which he attacked a Privy Council decision on liquor legislation. Campaigns for temperance and prohibition were waged very strongly through that period and again the sense was that their Lordships in London did not understand. The Chief Justice's answer to the question he set himself was that the Privy Council *was* a legislative body.

After the Great War, the issue evaporated. The number of appeals to the Privy Council fell and there was only limited criticism of the decisions handed down. It was a time of minimal law reform and a time when the tie to the United Kingdom and the values of the Empire were emphasised, an emphasis which continued in the mind of the legal establishment into at least the 1950s.[31] The much more capacious view of the law to be seen in the time and judgments of Sir Robert Stout – and earlier – including wide reference to United States material, had gone.[32] The inter war view was narrow. New Zealand politicians were, for instance, reluctant to recognise that New Zealand had a distinct international personality and were reluctant participants in the processes within the British Empire that led to the Balfour declaration of 1926 and

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[26] Eg Robert Stevens *The English Judge* (Hart Publishing, 2002) 26.

[27] [1907] AC 81. The judgment of the Earl of Halsbury is notable among other things for his difficulty in coming to grips with the notion of the legislative power of the state being limited by a federal structure; see 88-91.

[28] *Commissioners of Taxation (NSW) v Baxter* (1907) 4 CLR 1087.

[29] NZPCC 730.

[30] (1905) 21 *LQR* 9.

[31] See for instance the 1956 resolution of the New Zealand Law Society set out in B J Cameron, "Appeals to the Privy Council – New Zealand" (1970) 2 *Otago L Rev* 172. An early significant indication by a major figure in the law that "it is only a matter of time when the link with the Privy Council will go" came as late as 19 May 1976 from Sir Thaddeus McCarthy in a speech on his retirement as President of the Court of Appeal; [1976] *NZLJ* 376, 380. For a helpful update to the valuable Cameron essay see Richardson "The Privy Council and New Zealand" (1997) 46 *ICLQ* 908.

[32] As early as 1901 the Privy Council had cast doubt on the use of American materials : *Nireaha Tamaki v Baker* (1901) NZPCC 371, 384-385.

the Statute of Westminster of 1931. New Zealand negotiated a postponement of the application of that measure and did not in fact adopt it until 1947, with fears being expressed at that time that the New Zealand Parliament would exercise the new powers to abolish the appeal to the Privy Council.[33]

There was in fact little prospect of that at that time or indeed for some decades. The more immediate focus was on the establishment of a permanent court of appeal, achieved in 1957, although 1956 did see an interesting debate on the question whether the New Zealand courts should follow the Privy Council or the House of Lords in the event that their decisions were in conflict. That was the position with the law of Crown privilege (now public interest immunity) with the House of Lords recognising a Ministerial power of veto over Crown discovery to the courts and the Privy Council declaring that the Courts had the final say. A senior professor declared that the House of Lords as the top court in our common law system was to be followed, while a young barrister, newly returned from Cambridge, contended in essence that the New Zealand Courts should adopt what they thought was the better rule of law.[34] That, on one reading, was the position the Court of Appeal adopted in 1962 when it decided to prefer the Privy Council decision.[35] While the Judges put the matter in terms of prophecy – would the Privy Council follow the House of Lords or adhere to their own decision? - the factors they weighed were essentially ones that went to the merits of the competing rules (including differences between the circumstances of the United Kingdom and New Zealand). That merits approach might be seen as reducing certainty, a basic reason for rules of precedent, but the use of prophecy by no means led to certainty. The Judges divided, with Gresson P adopting the House of Lords position. (He might have been better able to make the prediction since he was soon to be the first New Zealand judge since the Second World War to sit in the Privy Council.) Although the jurisdiction of the Privy Council was falling away through the 1950s to the 1970s Australia and New Zealand persisted with the appeal. In Australia appeals from the High Court were abolished by legislation enacted in 1968 and 1975 with the remaining jurisdiction over appeals from state courts being removed in 1986.

The Privy Council itself was recognising that there could be differences in general common law areas such as defamation and negligence, just as earlier in the century it had recognised that customary rights would differ from one colony to another. In an Australian appeal[36] in 1969 in which Sir Alfred North, the second President of the New Zealand Court of Appeal, sat the question was whether punitive or exemplary damages could be awarded in a libel case only if the case could be brought within a category described in *Rookes v Barnard,*[37] a recent House of Lords decision. The High Court of Australia had refused to follow that approach and had confirmed its earlier position.

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[33] See eg Sir William Perry MLC quoted in B J Cameron , note 31.

[34] R B Cooke and A G Davis [1956] *NZLJ* 233, 296. A broader context to what may appear to be a rather narrow argument is provided by a letter by Harold Evans in the 4 December issue of the Journal. In the aftermath of the Suez debacle and the Hungarian invasion he proposed that New Zealand proclaim its willingness to play a full and active role in a permanent United Nations force (352).

[35] *Corbett v Social Security Commission* [1962] NZLR 878; see the comment in (1963) 1 *NZULR* 124, 130-137.

[36] *Australian Consolidated Press v Uren* [1969] 1 AC 590.

[37] [1964] AC 1129.

The Privy Council asked whether in the face of the House of Lords decision

> the High Court of Australia were wrong in deciding not to change the law in Australia as it had been understood to be. There are doubtless advantages if within those parts of the Commonwealth (or indeed of the English-speaking world) where the law is built upon a common foundation development proceeds along similar lines. But development may gain its impetus from any one and not from one only of those parts. The law may be influenced from any one direction. The gain that uniformity of approach may yield is however far less marked in some branches of the law than in others. In trade between countries and nations the sphere where common acceptance of view is desirable may be wide. … But in matters which may considerably be of domestic or internal significance the need for uniformity is not compelling.[38]

It concluded

> The issue that faced the High Court in the present case was whether the law as it had been settled in Australia should be changed. Had the law developed by processes of faulty reasoning or had it been founded upon misconceptions it would have been necessary to change it. Such was not the case. In the result in a sphere of the law where its policy calls for decision and where its policy in a particular country is fashioned so largely by judicial opinion it became a question for the High Court to decide whether the decision in *Rookes v Barnard* compelled a change in what was a well settled judicial approach in the law of libel in Australia. Their Lordships are not prepared to say that the High Court were wrong in being unconvinced that a changed approach in Australia was desirable.[39]

Fifteen years later the Privy Council essentially refused to decide aspects of an appeal in a New Zealand matrimonial appeal dispute, referring to the superior advantage of the local court and to it being much more favourably placed to consider relevant local considerations.[40]

That growing recognition by the Law Lords of difference and of their unfamiliarity with local circumstances and polices and a resulting reluctance to enter into them are to be related to the recognition that adjudication was not the mechanical, formalistic, legalistic business that so many adhered to in mid century. Against that narrow view for instance of Lord Chancellor Jowitt, who in the words of Robert Stevens mystified an Australian audience in 1951 by stating that the judges should take pride in not

[38] [1969] 1 AC at 641.
[39] [1969] 1 AC at 644.
[40] *Reid v Reid* [1982] 1 NZLR 147.

considering the social and political needs of society,[41] were the attitudes and actions of Lord Reid, the senior law lord from 1962, and Lord Denning who in the same year returned to the Court of Appeal as Master of the Rolls. In Stevens' terms it was a move from substantive formalism to modern times.[42]

Major legislative changes in New Zealand from 1960 on, along with Britain's return to Europe and great changes in trade and security relationships, must also be seen as part of the broader context. The distinctive New Zealand legislative measures included the introduction of the Ombudsman (1962), the accident compensation scheme (1974), freedom of information law (1982), major state sector reforms (1987 onwards), a bill of rights (1990) and the introduction for parliamentary elections of proportional representation (1993).

Three New Zealand cases in the Privy Council since 1996 indicated the further fraying of the unity of the law and the recognition by members of the Privy Council of its diminishing role. In a case involving a local authority's liability in negligence arising from its approval and inspection of the building of a private house the Privy Council, which included a New Zealand member, in an opinion delivered by Lord Lloyd recorded that the New Zealand judges were consciously departing from English case law on the ground that New Zealand conditions were different.[43] The answer to the question whether they were entitled to do that "must surely be Yes". The ability of the common law to adapt itself to the differing circumstances of the countries in which it has taken root is not a weakness but one of its great strengths. Were it not so the common law would not have flourished as it has, with all common law countries learning from each other. The effect of that approach, unless the Privy Council were to engage with the local court in the detail of its assessment of different local conditions, is essentially to deprive the appellant of that second appeal opportunity.

In the second case the Privy Council held that the Court of Appeal had answered certain questions relating to the allocation of Maori fisheries resources without giving proper notice to counsel of their intention to do so. The question involved matters on which admissible and relevant evidence was not before the court.[44] It did not however enter into the merits itself which of course it had power to do and which courts sometimes see as curing an earlier natural justice breach. Rather it sent the matter back to the High Court for decision. It then came again to the Court of Appeal which affirmed the High Court decision by 3:2;[45] and that majority view was endorsed by the Privy Council in a short judgment, given more than four years after the matter first came before it.[46] A legislated solution – which it appears was always going to be needed – is now at last in prospect.

In the third case the Privy Council was again faced with a situation of local difference, but instead of deciding and dismissing the appeal on that ground, as in the local authority negligence case, it allowed the appeal and remitted the case to the Court of Appeal mentioning its limitations in its appellate role where the decision depends upon the consideration of local public policy. Another matter better assessed by local

[41] *The English Judge* (Hart Publishing, 2002) 38, referring to (1951) 25 *ALJ* 296.
[42] Note 21 above.
[43] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513.
[44] *Treaty Tribes Coalition v Urban Maori Authorities* [1997] 1 NZLR 513.
[45] *Te Waka Hi Ika O Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285.
[46] *Te Waka Hi Ika O Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 2 NZLR 10.

courts, it says, was whether a matter is appropriate for legislative development or judicial resolution. A final matter for the consideration of the Court of Appeal was a decision the same judges gave on the same day but sitting as members of the appellate committee of the House of Lords. The two cases were *Lange v Atkinson*[47] and *Reynolds v Sunday Times*[48] about the defence of qualified privilege in defamation proceedings brought by politicians.

The Court of Appeal undertook that reconsideration. The commentators dispute whether and to what extent in our second judgment we departed from the first. The short point is that Mr Lange's appeal failed, with the Court confirming its original statement of principle with an additional point being added to the summary to make explicit what was previously implicit.[49] In the course of coming to that conclusion, the Court addressed the matters which the Privy Council had referred to it – differences in the social situation, in the role and nature of the press, and in the constitutional position; the choice between the legislature and the Court in developing the law; and the decision in *Reynolds*. The reference by the Privy Council to the matters of difference and the New Zealand Court's consideration of them are of course to be related back to the early Blackstonian statements.

The consideration of *Reynolds* highlights an issue of judicial technique on which I have already touched – the choice between the preparation of single judgments or several. A related practical question concerns ways in which a judgment of the Court is put together. We did manage on each occasion to prepare a joint judgment, with a separate judgment on one matter in the first one. Another significant feature of the New Zealand judgments is the very wide range of sources they draw on : cases from ten jurisdictions (notably the European Court of Human Rights), treaty obligations, writers (Milton and Mill as well as Stephen, Dicey and Hogg), law reform reports and legislation as a major part of the context.[50] One explanation of the broad reference is the international aspect of freedom of expression and limits on it, even if local variations occur.

My comments, to the extent that I have made them, on the course of the proceedings followed in the four cases – matrimonial property, local body liability in negligence, Maori fisheries and defamation – must not be taken as a criticism of the members of the Judicial Committee. On the contrary, they were recognising (if indirectly in the fisheries case) their problems in assessing New Zealand conditions and policy considerations. Those matters were for New Zealand courts. But the consequence was that the second appeal to a higher court was not available to the appellants, notwithstanding the appearance. The deference, or the reference back, was one aspect of the working out at the end of the Empire, or really far beyond it, of the original qualifications to the unity of the common law.

That recognition by the Privy Council of the limits on its authority is to be seen as one part of the context for the introduction and enactment by the New Zealand Parliament

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[47] *Lange v Atkinson* [1997] 2 NZLR 22 (HC); *Lange v Atkinson* [1998] 3 NZLR 424 (CA); [2000] 1 NZLR 257 (PC); and [2000] 3 NZLR 385 (CA).
[48] *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.
[49] It also added a passage on a matter which it saw as distinct, the misuse of qualified privilege.
[50] Sir Ivor Richardson, then President of the New Zealand Court of Appeal, documented the growing range of sources in his paper in Bigwood (ed) *Legal Method in New Zealand : Essays and Commentaries* (Butterworths, 2001).

of the ending of the appeal in the Supreme Court Act 2003. In that Act Parliament states that the purpose is to establish within New Zealand a new court of final appeal comprising New Zealand judges —

> (i) to recognise that New Zealand is an independent nation with its own history and traditions; and
>
> (ii) to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions; and
>
> (iii) to improve access to justice.

That emphasis on difference and distinctiveness also appears in a reference, unique in the New Zealand statute book, to the sovereignty of Parliament in s3(2):

> (2) Nothing in this Act affects New Zealand's continuing commitment to the rule of law and the sovereignty of Parliament.

That provision contains within itself Dicey's tension which some would say cannot be resolved. The reference to the rule of law, along with the reference to the new Court being a final one, takes me to my last point and back to the earlier references to Vattel and Marshall.

The "rule of law" can now be given content not simply by reference to national sources (such as Dicey's) but increasingly by reference to international human rights treaties. New Zealand is a party to the major United Nations treaties on human rights and to others prepared, for instance, by UNESCO and the ILO. In all it is party to about 2000 treaties. Together they place major limits, as a matter of international law, on the legislative power of Parliament whatever the position is under national law.

To return to a point I made earlier, those instruments and the underlying body of customary international law and principle recognise a broadening unity of law extending world wide, not limited to the common law world. That body of law is increasingly supported by international methods of dispute resolution including negotiation, mediation, investigation, arbitration and adjudication. The process may be established *ad hoc* to deal with a particular problem or it may be established permanently. It may be a general jurisdiction or be limited to particular areas such as trade or law of the sea. It may involve reviewing national court decisions, as of course is well understood in Europe.[51] That prospect is also growing outside Europe. For instance, the International Court of Justice has made rulings in respect of three American state court proceedings where the right of foreign accused to access consular assistance had been denied;[52] the International Tribunal on the Law of the

[51] Eg Alec Stone Sweet and Thomas Brunell "The European Court and Integration" in Martin Shapiro and Sweet, *On Law, Politics and Judicalization* (Oxford UP 2002) 258.
[52] See the convenient note by Aceves in (2003) 97 *AJIL* 923.

Sea has reviewed the terms fixed by the Western Australian Supreme Court for the release of a Russian fishing boat;[53] and a NAFTA Tribunal has considered the lawfulness under the Free Trade Agreement of orders made by a Mississippi court.[54]

That growing international jurisdiction must however be seen in context. It is rarely exclusive of national jurisdiction. Indeed complainants are generally required to exhaust their domestic remedies before they invoke international ones. Many national courts, as best as I can judge, increasingly acknowledge their role in applying the relevant rules and principles of international law. Their domestic constitutional arrangements, the existing body of law and local professional education and culture can at times appear to make that impossible or difficult, but encouraging signs do appear. One practical manifestation of them is to be seen in the sheer bulk of the volumes of the International Law Reports. The original editors – Arnold McNair and Hersch Lauterpacht – later to be Judges of the International Court, said in the first volume, published in 1929, that there is more international law in existence "than this world dreams of"; they spoke of their "conviction that it is more international law that this world wants".[55] Seventy-five years on those opinions gain real support from the contents of more than 120 volumes.

I would suggest then that instead of considering the unity of the common law and the jurisdiction of the Privy Council we should now be understanding the significance of the growing unity of a wider body of law and the growth of international jurisdictions, some of them world wide. Part of that understanding is to realise that that body of law in most cases will be applied by national institutions, even if they may not have the last word.

K J Keith

This is the sixth of these essays. The Annual Report for 2001 included the paper by Richardson P prepared for the Legal Research Foundation seminar : Rick Bigwood (ed) *New Zealand Legal Method* (2001). Mine have been on "International Law Issues", "The form and style of judgments", "Some reflections on the reading of statutes and other documents", "An Aspect of Separation of Powers : Legislation overriding judgments", and "Appellate Courts : some reflections".

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[53] *The Volga Case* (*Russian Federation v Australia* case No 22, judgment of 23 December 2002.
[54] *Loewen Group Inc v United States of America,* judgment of 26 June 2003.
[55] See the speech by Sir Robert Jennings "The Judiciary, International and National, and the Development of International Law" given on the publication of the 100th volume of the ILR, 102 *ILR* ix.

APPENDICES

A IMPORTANT CIVIL CASES

Accident compensation

Definition of personal injury – whether injury to a foetus is a personal injury to the mother

In *Harrild v The Director of Proceedings* [2003] 3 NZLR 289 the issue was whether a death of a foetus in utero constituted a personal injury to the mother for the purposes of the Injury Prevention, Rehabilitation and Compensation Act 2001. The majority (Elias CJ, Keith and McGrath JJ) concluded that it did.

The respondent claimed damages under s54 of the Health and Disability Commissioner Act 1994 for alleged breaches of the Code by the appellant obstetrician during a pregnancy that ended with her child being still-born. The appellant sought to strike out the respondent's claim on the basis that it was barred by s52 of that Act. Section 52(2) prevents recovery of damages, other than punitive damages, arising directly or indirectly out of a personal injury within the meaning of the Injury Prevention, Rehabilitation and Compensation Act 2001.

Elias CJ noted that a number of the heads of damages claimed by the respondent, for instance damages for humiliation as a result of alleged failures to communicate in accordance with the Code, might not necessarily arise directly or indirectly from the loss of the child. She expressed a preference for declining to answer the point raised by the appeal until the scope of the claim for damages was clear. However, as the other members of the Court did not share that view, she went on to consider the issue.

For Elias CJ, the answer to the appeal did not depend on whether the unborn child was itself a person in law or whether it was biologically "the same" as the mother. Nor was she attracted by the stark choice of treating the unborn child as the same as the mother or as distinct. Drawing support from decision of the Supreme Court of Canada in *R v Sullivan and Lemay* (1991) 63 CCC (3d) 97, she concluded that where the severance of the close physical link between mother and unborn child occurs through the death of the child as a result of medical error, both mother and child suffer physical injury.

Keith J emphasised the importance of the particular legal, statutory and policy context to determining the issue. Accordingly, little assistance could be gained from decisions about criminal liability, guardianship and caesarean sections. Instead, he turned to the philosophy underlying the accident compensation legislation of providing comprehensive cover for all those suffering personal injury in New Zealand, reiterating the comments of Richardson J in *ACC v Mitchell* [1992] 2 NZLR 436 that a "generous unniggardly" interpretation of personal injury was appropriate. Given that approach and the close physical connection between foetus and mother, Keith J concluded that the still birth was properly seen as an injury to the mother.

McGrath J noted that, while at common law a foetus had no rights until it is born ("the born alive rule"), this was founded on convenience and did not rest on developed medical or moral principle. He that reasoning directly from the born alive rule to a

conclusion that mother and foetus was a single entity was problematic. Those problems did not preclude, however, the possibility of "person" having a broader meaning. An unborn child could be a part of a mother's "person" within the ordinary meaning of the word and whether this was so in a particular statute would turn on the context.

Turning to the accident compensation legislation, McGrath J concurred with Keith J that a generous unniggardly approach to interpretation of personal injury was appropriate. This approach required a broad meaning being given to whether any "person" had suffered personal injury. The meaning advocated by the appellant was available on the statutory language. To adopt a narrower definition would be to prefer a strictly scientific approach to a question of legal meaning that did not serve the policies of the legislation.

Blanchard and Glazebrook JJ dissented in a joint judgment. They considered that to treat the death of an unborn child as a physical injury to the mother was to treat a mother and a foetus as a single entity. That was inconsistent with biological reality, modern medical practice and most women's experience of pregnancy. As such, the majority's interpretation was not available on the plain meaning of the accident compensation legislation.

Administrative law

Fisheries – error of law in interpreting statutory moratorium

In *Southern Clams Ltd v Westhaven Shellfish Ltd & Ors* CA154/02, CA186/02, CA190/02 & CA 194/02, 13 February 2003, the Court considered whether s93 of the Fisheries Act 1996 precluded the grant of a permit to an existing permit holder over the same species as the existing permit was held for but in a different geographical area.

Westhaven Shellfish Ltd (Westhaven) wished to extend its cockle harvesting activities in the upper South Island into new areas. The Ministry of Fisheries refused to issue a permit for the new areas, first on the basis of a policy of refusing to amend existing permits in such a manner. The Court in *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries* [2002] 2 NZLR 158 held this policy unlawfully fettered the Ministry's discretion under the Fisheries Act 1992. Westhaven made a fresh application and also applied for a special permit under s97(1)(c) of the 1996 Act to correct the administrative error in failing to grant it a permit in the first instance. Both applications were refused, the first on the basis of s93, brought into force in July 2001, which the Ministry considered now prevented the issue of fresh permits to existing permit-holders to fish the same species in new areas. The special permit was refused on the ground that the Ministry's power to correct administrative errors only extended to clerical errors.

On appeal the Ministry's principal submission was that the replacement of the word "species" with "stock" in the 1996 Act introduced a spatial element into the moratorium on the issue of new permits. The Court accepted that the natural meaning

of "stock" in the fisheries management context, incorporated into s2(1) of the 1996 Act, included a spatial element and that in the 1996 Act "stock" often had that meaning, particularly in relation to the central provisions of the Quota Management System. However the Court considered that, in the particular context of s93, "stock" required a different meaning. The history of the provision also did not indicate that the purpose of the section was to retrospectively broaden the moratorium.

The Court next turned to the special permit. Section 97(1)(c) of the 1996 Act empowered the Chief Executive to issue a permit for a purpose approved by the Minister. On 20 December 1999 the Minister of Fisheries approved a list of purposes including "to allow administrative errors … to be corrected". The Court considered the expression "administrative error" to be a general one. There was no reason why it should be confined to clerical errors. Accordingly, the Court concluded that the Ministry had erred in law in refusing the special permit on this ground.

The Ministry's appeal was dismissed.

Fisheries – marine farming and coastal permits

In *Chief Executive of Ministry of Fisheries v New Zealand Marine Farming Association Inc* [2004] 1 NZLR 449 the Court was asked to consider whether someone who had obtained a coastal permit for a marine farm from a regional council could erect a farming structure prior to obtaining a marine farming permit from the Ministry of Fisheries, and what matters the Chief Executive of the Ministry could take into account when considering an application for a marine farming permit. The respondents were an association of marine farmers and individual farmers, one of which had obtained a coastal permit and had erected a substantial marine farm whilst waiting for its application for a marine farming permit. They argued that a coastal permit entitled the holder to erect structures in the interim, and that the Ministry could not take into account any effects of such structures on fish and marine life in the coastal permit area when making its decision.

At the heart of the case was the interrelationship between the Resource Management Act 1991 (RMA) and the Fisheries Act 1983. In order to establish a marine farm it was necessary to first obtain a coastal permit, which is a type of resource consent granted by a local authority under the RMA, and then a marine farming permit issued by the Ministry under Part 4A of the Fisheries Act 1983. The Court held that a coastal permit did not entitle a holder to erect a farming structure before obtaining a marine farming permit. The coastal permit only entitled occupation where that occupation was reasonably necessary for an activity, and as the relevant activity, namely marine farming, could not be carried out lawfully there could be no entitlement until a marine farming permit was obtained. The Court also held that the Ministry must take into account effects on fish and marine life in the coastal permit area when considering an application for a marine farming permit. The Fisheries Act 1996 precluded local authorities from taking into account such considerations, and it could not have been intended that a gap would be left where neither local authorities nor the Ministry could take such matters into account. The language of the Fisheries Act 1983 also supported this interpretation, and although Part 4A did not make any explicit reference to marine structures, this was not surprising given the piecemeal way in which fisheries legislation had been amended over the years.

Justiciability of advice tendered during the formulation of government policy

In *Milroy & Ors v Attorney-General* CA197/02, 11 June 2003, the Court upheld a High Court decision that neither Ministerial nor Cabinet decisions relating to Treaty of Waitangi grievances, nor the advice of officials leading up to them, were amenable to judicial review.

The Crown had entered into an agreement with Ngati Awa for the settlement of claims following a report by the Waitangi Tribunal. The settlement agreement included the transfer (in accordance with legislation to be introduced) of certain Crown forest land to Ngati Awa. The appellants were cross-claimants to the land. They sought to challenge that part of the settlement involving the transfer of the land, because once it had passed to Ngati Awa it would no longer be available for return to Tuhoe in the event that the Tribunal made any recommendation under s8HB of the Treaty of Waitangi Act 1975.

The events leading up to the signing of the settlement agreement included a consultation process directed by a Cabinet decision. In light of advice from officials in the Office of Treaty Settlements, the Minister in Charge of Treaty of Waitangi Negotiations made some provisional decisions, and Tuhoe was notified of them. One was that the Minister would recommend to Cabinet that the Crown withdraw approximately 25 percent of the land in question from the offer to Ngati Awa. This was not satisfactory to Tuhoe, but the Minister nonetheless determined to place the amended settlement proposal before Cabinet. Cabinet approved the modified settlement package, and Tuhoe was informed of the result. The appellants sought judicial review of the Minister's provisional and final decisions, and of the Cabinet approval of those decisions. However, the focus of the hearing in the Court of Appeal was on the advice provided by officials to the Minister, which was said to be incomplete and inaccurate, and failed to identify all relevant considerations.

The Court resisted the attempt by the appellants to examine the accuracy and completeness of the advice of officials in the course of the formulation of government policy. Such advice was a mere preliminary matter and had no legal effect on rights. It was the resulting legislation and the executive acts in accordance with that legislation that impacted on peoples' rights. The Courts would not intrude into the legislative process: *Te Runanga O Wharekauri Rekohu v Attorney-General* [1993] 2 NZLR 301. The formulation of government policy preparatory to the introduction of legislation was not to be fettered by judicial review. The position was no different merely because government or Crown actions under legislation, when passed, would be contrary to law without that legislation.

Licensing – scope of power to suspend or cancel liquor licence

In *Christchurch District Licensing Agency Inspector v Karara Holdings Ltd & Anor* [2003] NZAR 752 the Court considered the scope of the power to suspend liquor licences under s132 of the Sale of Liquor Act 1989 as it then stood. The respondents were licensed to sell liquor for consumption off the licensed premises. Following a sequence of test purchases conducted by underage persons under police supervision, the Liquor Licensing Authority suspended their licences for short periods. There was a single purchase from each seller. The High Court overturned the suspensions on the

basis that the s132 power could not be exercised for the purpose of punishment (as the Court found it had been exercised). Rather, the Act's purpose was to allow suspensions to facilitate the development of a system of responsible management. The proper course in the Judge's view would have been prosecution of each respondent under the Act, at least in the first instance

Allowing the appeal, the Court said that s132 created a broadly expressed power to suspend which could be exercised to ensure sound management of licensed premises and the continuing integrity of the licensing system. While there was also a regime for criminal penalties, use of s132 in the current circumstances did not duplicate this regime, as suspension proceedings were not criminal in nature, but rather intended to maintain the integrity of the licensing system by ensuring that appropriate standards of conduct were maintained. Use of s132 could overlap with that of offence provisions in certain cases. It could be used for the purpose of deterrence. Though it might have punitive effect, this was merely an incident of a genuine use of the power for an authorised purpose. On the facts, the Court held that the power had been exercised for a proper purpose.

The Court rejected an argument that s132 had been narrowed by the enactment of s132A, which required the reporting of convictions to the Licensing Authority, thus (in counsel's view) rendering suspension a subordinate possibility following conviction. This, the Court said, was contrary to the purpose of the amendment, which was enacted in a climate of concern about the lowering of the drinking age and which was intended to provide a further layer of enforcement and not to curtail existing powers.

The Court also rejected an argument that more than a single breach was required for premises to be "conducted" in breach of the Act. This was inconsistent with the broadly expressed nature of the power, the purpose of the legislation, and considerations of practicality. There were some contrary indications in speeches in the House of Representatives during the passage of the legislation, but the Court said that they were descriptive of the usual case in which the power would be used, rather than definitive of its scope.

Mining licences – error of law

The Court in *Glenharrow Holdings Ltd v Attorney-General* [2003] 2 NZLR 328 considered whether a mining licence issued under s69 of the Mining Act 1971 included a right to another licence on expiry or could be varied. Glenharrow, which was the holder the licence, was entitled under it to mine for certain minerals in an area administered by the Department of Conservation. The licence was granted by the Minister of Energy in 1990 for a period of 10 years. As the land mined was conservation land, the grant required the consent of the Minister of Conservation, whose consent was conditional on the term of the licence not exceeding 10 years.

Two pieces of legislation were enacted subsequent to Glenharrow obtaining its licence. The first was the Crown Minerals Act 1991. This repealed the Mining Act but contained transitional provisions preserving "existing entitlements" including mining licences. The second was the Ngai Tahu (Pounamu Vesting) Act 1997, which vested all pounamu in the area of land mined by Glenharrow in Ngai Tahu. In 1999

Glenharrow applied to the Minister of Energy to vary its licence by extending the term to 42 years. The Minister had the power under s103D of the Mining Act to vary conditions in a licence, and it was said that the 10 year period was a condition. When this was refused, Glenharrow sought a court order to compel the Minister to vary its existing licence or grant a new licence, which it said it was entitled to as of right under s77 of the Mining Act.

The Court held that s77 of the Mining Act did not entitle Glenharrow to a further licence as of right. Although such rights existed under previous mining legislation, they were abandoned following an amendment in 1948. Subsequently, a licensee was entitled only to priority over other applicants when applying for a new licence. The right to apply for a new licence with priority under the Mining Act was extinguished by the Crown Minerals Act. Moreover, Glenharrow could not apply for a new licence under the Crown Minerals Act because the grant of licences for privately owned minerals was now prohibited, and the minerals sought to be mined by Glenharrow were privately owned by Ngai Tahu under the vesting legislation.

The Court also held that the term of a mining licence was not a condition which could be varied under s103D. A condition was a stipulation requiring a course of action, which if not followed could result in forfeiture of the licence. The term of a licence was an essential element of the licence, not a stipulation which could result in forfeiture. Although the 10 year term was a condition of the Minister of Conservation's consent, it did not follow that it was a condition of the licence.

Natural justice in Mäori Appellate Court proceedings

Ngati Apa ki te Waiponamu Trust v Attorney-General [2004] 1 NZLR 462, concerned an application for judicial review by Ngati Apa, Ngati Rarua and Ngati Toa (the cross-claimants) of a decision made by the Mäori Appellate Court on a case-stated reference from the Waitangi Tribunal under s6A of the Treaty of Waitangi Act 1975. The decision of the Appellate Court concerned the boundaries of tribal ownership in the upper South Island for the purpose of a claim made by Ngai Tahu to the Tribunal.

In an earlier decision concerning a strike-out application by Ngai Tahu (reported at [2000] 2 NZLR 659), the Court ruled that the cross-claimants could seek a declaration that the Appellant Court's decision was invalid on the grounds of procedural impropriety and natural justice. Those grounds were supported by reference to alleged disparities in funding between Ngai Tahu and the cross-claimants, and the alleged failure of the Appellate Court to provide the cross-claimants with an opportunity to be heard.

The Court accepted that natural justice required that those affected by the proceeding, including the cross-claimants, were entitled to a fair hearing, including the right to have adequate notice of the proceedings and a reasonable opportunity to present their cases. The cross-claimants sought to supplement those requirements by reference to the Treaty of Waitangi. The Court concluded, however, that the supplementary procedures suggested by the cross-claimants by reference to the Treaty did not add anything to the requirements of natural justice and fairness.

The Court turned to consider whether there was a funding disparity between Ngai Tahu and the cross-claimants that lead to unfairness. The cross-claimants submitted that, in the circumstances, the Appellate Court should have adjourned the hearing until additional funding for research could be obtained. The Court rejected this submission on the law and on the facts. The Court noted that courts in civil cases, unlike serious criminal cases, do not in general have the power to stay proceedings where to continue would cause serious unfairness. Further, a power to stay proceedings would frustrate the purpose of the legislation by inhibiting the very process that the case-stated procedure had been designed to facilitate. On the facts, the Court concluded that there was insufficient material before it to provide a basis for finding that there was such a disparity of funding that that the proceeding became unfair. The Appellate Court had adjourned the hearing three times for some 15 months to accommodate the cross-claimants' preparation and, when the hearing finally began, none of the cross-claimants expressed any opposition to proceeding then.

The Court also concluded that all three cross-claimants had the opportunity to be heard, Ngati Apa and Ngati Rarua through their representative organisation Te Runanganui. Adequate notice of the Appellate Court hearing and its scope had been given. Te Runanganui had undertaken extensive research and presented a case lasting several days; at no stage did it complain about funding or its preparedness. Similarly Ngati Toa did not express any concern about its preparedness to proceed at the hearing or its funding.

Refugee status determinations – burden of proof and the benefit of the doubt

In *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647 the Court considered the approach to be taken by the Refugee Status Appeals Authority when deciding appeals brought by applicants for refugee status. The appellant claimed that the Appeals Authority, in refusing his claim for refugee status, wrongly placed the onus of proving the claim on the applicant and failed to afford him "the benefit of the doubt".

The Court distinguished between the assessment of whether there was a "real chance" of persecution in the country of nationality on a ground recognised in article 1A(2) of the 1951 Convention on the Status of Refugees and the determination of the facts on which such an assessment was to be based. With the former, the Authority was making an assessment or judgment. As such, the test was not amenable to an onus of proof. However, the Court concurred with the High Court judgment (reported at [2002] NZAR 845) that under s129P(1) of the Immigration Act applicants claiming refugee status bore the responsibility of proving their claim, in the sense of raising a sufficient factual foundation from which a determination that there was a real chance of persecution could be made. As such, the Court disagreed with the High Court judgment in *T v Refugee Status Appeals Authority* [2001] NZAR 749 that appellants only bore a responsibility of establishing what their claim was.

However, the Court considered that it was appropriate for the Authority to take a generous approach when evaluating the applicant's evidence, taking into consideration that refugees may not be in a position to submit satisfactory proof of their factual claims. If the Authority was satisfied of the applicant's credibility, it was

appropriate that he or she be given "the benefit of the doubt" in relation to the facts he or she asserted in accordance with the principles stated in the *Handbook on Procedures and Criteria for determining Refugee Status* (Officer of the UN High Commissioner for Refugees, 1992 reissue). In the present case, however, the Authority had not made a reviewable error by failing to apply the benefit of the doubt principle. As no doubt had arisen in the Authority's mind in relation to the challenged factual findings, there was no room for any benefit of the doubt to arise. It was not for the Court on a judicial review application to examine the factual findings on any broad basis.

Revocation of administrative decisions

In *Goulding v Chief Executive, Ministry of Fisheries* CA256/02, 24 October 2003, the Court considered its approach to the revocation of administrative decisions. The immediate issue was when a decision to grant a marine farming permit under s67J of the Fisheries Act 1983 became irrevocable. The permit had been signed off as granted within the Ministry, but before this decision was communicated to the parties further information was uncovered which had been available to the Ministry of Fisheries' decision-maker but was not considered. The decision-maker therefore reconsidered its decision and ultimately declined the application. The applicants argued that the permit was irrevocable once it had been signed off as granted.

As s67J did not expressly govern the issue, the Court considered the common law principles on revocation. The Court held that a decision to grant a permit was only perfected (and therefore final) on its communication to the affected parties. Before this, the decision had been made and could be effective for some purposes, but was nonetheless revocable by the decision-maker. The Court also rejected a contention that the Official Information Act 1982 altered this position because it allowed greater insight into the decision-making process. The Ministry had therefore legitimately revoked the permit and re-exercised its power. The Court affirmed that as a general rule if a decision affected legal rights it was irrevocable once it had been perfected.

The Court also considered s25(j) Acts Interpretation Act 1924, the equivalent provision to s13 of the Interpretation Act 1999. Counsel for the Ministry had submitted that the provision allowed for the re-exercise of powers which were on their face capable of being exercised only once. However, the Court adopted a narrow meaning for the provision, holding that it could be used only to correct errors or omissions in the previous exercise of a power. It could not be used simply because the decision-maker had changed his or her mind.

Banking law

Banker's duty to customer – dishonest assistance

The appeal in *US International Marketing Ltd v The National Bank of NZ Ltd* CA144/02, 28 October 2003, concerned the duty of a banker faced with a customer's demand for payment of an account in credit when the bank became aware that payment might constitute or facilitate a breach of trust in relation to a third party. The National Bank (the Bank) was faced with competing demands. On the one hand it

had its conventional obligation to its customer, US International, to allow it to draw on the funds which stood to its credit. That obligation derived from the straightforward debtor/creditor relationship which exists between a bank and its customer. On the other hand the Bank received a claim from the liquidator of Pakistan Emporium Ltd asserting that the sum of $15,073.98, which comprised the greater part of US International's credit balance, "belonged" to the company in liquidation.

The Court was unanimous in holding that the Bank had breached its contract with US International by failing to pay upon its customer's demand. It would not have been dishonest for the Bank to meet its customer's demand. There was scant evidence for the Bank to believe that funds which it knew had originated from US International's account could somehow have been the funds of Pakistan Emporium. There was simply an assertion of ownership and advice that a representation had been made to the High Court. US International's appeal was therefore allowed. Whether and, if so, to what extent the Bank's breach of contract occasioned loss to US International was a matter which had to be determined by the High Court.

Despite agreement on the outcome, separate judgments were given. Tipping J outlined the basic principle that a bank has a clear prima facie duty to its customer to allow the customer immediate access to its funds for whatever purpose the customer may wish to apply them. Too ready or easy an undermining of that obligation would produce much inconvenience and uncertainty in what is a fundamental commercial relationship. However, a bank is entitled to decline to meet a customer's demand if to do so would, in all the circumstances, provide dishonest assistance. Tipping J examined the approach of the Privy Council in *Royal Brunei Airlines v Tan* [1995] 2 AC 378 and the House of Lords in *Twinsectra Ltd v Yardley* [2002] AC 164, and thought that the dishonest assistance criterion combined subjective and objective elements. The conduct of the person concerned was assessed in the light of what that person actually knew at the relevant time. Against these subjectively determined circumstances the honesty or otherwise of the person's conduct was objectively assessed. In the United Kingdom, there was, following *Twinsectra*, a further subjective element in that the person concerned must appreciate what their conduct is transgressing ordinary standards of honest behaviour. In light of the necessary legal approach, Tipping J thought that the principle had become that a bank is entitled to freeze its customer's account entirely or pro tanto if, but only if: (1) in all the circumstances actually known to the bank, (2) a reasonable banker would know it was dishonest to pay the funds in question to or to the order of its customer, and (if *Twinsectra* was adopted) (3) the bank itself appreciates that to be so. Tipping J said that there may be some relatively rare circumstances in which a reasonable banker would know it was dishonest to meet its customer's demand without making further enquiry. If the bank appreciated that to be so, it should make appropriate and timely further inquiry and then assess the position in the light of what that inquiry elicited. Liability would not arise on this basis if the failure to make further inquiry was only negligent; to give rise to liability the failure must be dishonest.

Anderson J stated that a bank was entitled not to meet its customer's demand if it would be dishonest to do so. Any lesser test would seriously undermine the elemental duty of a bank to pay upon its customer's demand and could encourage timidity and uncertainty in the banking industry. Anderson J did not think that it was possible to

describe the requisite test with greater specificity than by reference to all the circumstances. In a banking context these included the weight to be given to the fundamental obligation to meet the customer's demand compared with the weight which ought sensibly be given to the possibility of a third party's entitlement. And of course, the nature and extent of the bank's actual knowledge would be relevant. Absent wilful blindness, facts unknown to a bank could not render dishonest conduct which otherwise would not be. The nature of the customer's dealings could be relevant and so also the practices of the business in which the customer may deal. In light of Tipping J's judgment, Anderson J respectfully questioned whether the dishonesty test should be complicated by a consideration of not only whether conduct is or would be dishonest but also whether a reasonable banker would know that.

Glazebrook J agreed that the appeal should be allowed for the reasons set out in the judgments of both Tipping and Anderson JJ. She did not consider it necessary on this occasion to determine all the nuances of the test for dishonest assistance. She commented, however, that Tipping J's "reasonable banker" test could be seen as simply an expression of the strong objective element of the test.

Presentment of cheques and their dishonour

Commissioner of Inland Revenue v Thomas Cook (NZ) Ltd [2003] 2 NZLR 296 concerned presentment of cheques and their dishonour. Thomas Cook, in the ordinary course of business, received money from customers in return for which it issued international drafts (cheques). The case concerned drafts issued by Thomas Cook prior to 31 December 1992 but not presented by their respective payees within six years of purchase by the Thomas Cook customer. The Commissioner contended that Thomas Cook was holding unclaimed money which it was liable to pay to the department under the Unclaimed Money Act 1971. The Commissioner contended that the stale cheques had become payable and the money they represented had been owing for more than six years.

First the Court considered whether Thomas Cook became liable on each cheque immediately upon it being drawn and issued. The Court held that the nature of the relationship between drawer and payee of a cheque was clearly such that demand by presentment, unless dispensed with, was a necessary precondition to the drawer's liability to pay.

The Court then turned to the second issue, which was whether the liability of Thomas Cook as drawer, if it did not arise earlier, arose when the cheque became stale and presentment was thereupon dispensed with. Section 46(2)(c)(i) of the Bills of Exchange Act 1908 provides that presentment of a cheque for payment is dispensed with as regards the drawer where the drawee bank is not bound as between itself and the drawer to pay the cheque and the drawer has no reason to believe that the cheque would be paid if presented. The Court was therefore required to consider whether a bank was bound to pay a stale cheque and when a cheque became stale. Section 7D(1)(a) of the Cheques Act 1960 states as one of the rules concerning presentment that a cheque must be presented within a reasonable time after its date. Hence, if it is not so presented there has been no due presentation and the drawee bank is not bound to pay it. The Court held that, in the absence of some express agreement to the

contrary, there was a term implied by custom and usage in the contract between drawer and drawee bank, that the bank is not bound to pay a stale cheque, that is, one which is not presented within a reasonable time. Next, the Court considered that, in New Zealand, a cheque became stale six months after its date. Thus, for the purpose of s46(2)(c)(i) the drawee banks in the case of the cheques in question were not bound as between themselves and Thomas Cook to pay the cheques after six months had elapsed from their dates. But the key question was whether, upon the cheques becoming stale, their payees had to make demand of Thomas Cook as drawer to render the money they represented payable by Thomas Cook.

Section 47(1)(b) of the Bills of Exchange Act provides that a bill is deemed to be dishonoured by non-payment where presentment is excused and the bill is overdue and unpaid. In the case of a stale cheque presentment is dispensed with when and because the bank is no longer bound to pay it. The next question was whether the cheques were overdue. As a cheque is due from the time of its drawing and issue, albeit not payable until presentation, it followed that a stale cheque should be regarded as overdue for the purposes of this section. It was also unpaid.

It followed that when the cheques in question became stale, presentment was dispensed with and they were then overdue and unpaid. As a result the cheques were deemed to have been dishonoured by non-payment. Demand was not necessary to bring about the deemed dishonour of a stale cheque under s47(1)(b). Demand was not expressly required by statute and there was no clear and necessary implication requiring demand. Further, in this case notice of dishonour to the drawer was dispensed with by s50(2)(c)(iv) because the drawee bank was, as between itself and the drawer, under no obligation to pay the cheque. Next, s55(1)(a) of the Bills of Exchange Act provided that Thomas Cook, as drawer of the stale cheques, was obliged upon their deemed dishonour to compensate the various payees. It had to pay liquidated damages, as specified, to the payee.

The Commissioner had established that each of the cheques in issue became stale no later than 30 June 1993. Thomas Cook became liable to pay liquidated damages to the payees when deemed dishonour of the cheques took place no later than that date. The liquidated damages had therefore been owing for more than six years. The six year date was no later than 30 June 1999. The Commissioner's proceedings were commenced in June 2000. The final question was whether Thomas Cook's liability to pay liquidated damages fell within the definition of unclaimed money in s4(1)(e) of the Unclaimed Money Act upon which the Commissioner relied. The Court held that the liquidated damages was "any other money, of any kind whatsoever" in s4(1)(e) and that the money was situated in New Zealand. Therefore, Thomas Cook did have an obligation under s8 of the Unclaimed Money Act to pay to the Commissioner whatever may be the correct total sum in respect of the cheques in issue.

Civil liberties

Baigent compensation for personal injury

The issue in *Wilding v Attorney-General* [2003] 3 NZLR 787 was whether s394 of the Accident Insurance Act 1998 or its successor, s397 of the Injury Prevention, Rehabilitation and Compensation Act 2001, barred Mr Wilding's claim for public law compensation for alleged breaches of the New Zealand Bill of Rights Act 1990. Mr Wilding had been bitten by a police dog and had sustained physical injury after being apprehended by the police following an aggravated robbery. He claimed the police had breached ss9 and 23(5) of the New Zealand Bill of Rights Act and sought public law compensation, arguing that his claim was not barred by the accident compensation legislation. It was accepted that there was no distinction for these purposes between the 1998 and 2001 legislation.

The Court held that Mr Wilding's damages claim, in that it was quantified to provide compensation for the personal injury, was barred by s394(1) of the Accident Insurance Act. The word "damages" included all forms of monetary award intended to compensate for personal injury, and, however Mr Wilding's claim was conceived, the damages sought arose from his personal injury. The Court observed that there was no reason why s394 should not preclude a claim for public law compensation. The object of such an award was to provide an effective remedy, and the legislature had decided that the effective remedy for personal injury was to be found in the entitlements of the accident compensation legislation. The Court noted, however, that a breach of the New Zealand Bill of Rights Act which resulted in a personal injury being suffered could still result in an award directed at compensating for the affront to the right, as opposed to the physical consequences of the breach.

Seizure under the Wild Animal Control Act 1977

In *Attorney-General v PF Sugrue Ltd* [2004] 1 NZLR 220, the Court considered whether compensation should be paid for damage to a helicopter suffered after it had been seized by the Department of Conservation (DOC) under s13 of the Wild Animal Control Act 1977. Section 13 allows a warranted officer to seize aircraft and other items that the officer has good reason to believe have been used or are about to be used for illegal hunting.

The helicopter had been seized after three hunters reported seeing a black and silver Hughes 500 helicopter, with what appeared to be a '6' or a 'G' on its side, shooting deer. This matched the description of the plaintiff's helicopter which was marked with a yellow 'G' on a black rondel. The helicopter was seized by a DOC officer on the strength of this information. In a report to his superiors he documented four reasons why seizure was imperative: to preserve a chain of evidence, prevent unlawful activities, show other operators that DOC would not tolerate unlawful hunting activities and to maintain credibility with the public and farmers. The owners challenged the seizure as unlawful, arguing that DOC had insufficient information to establish the requisite good reason to believe, and unreasonable in terms of s21 of the New Zealand Bill of Rights Act 1990, primarily because of the stated reasons for the seizure.

The Court held that DOC had good reason to believe that the helicopter had been used for illegal hunting given the three hunters' independent accounts. The Court observed that "good reason to believe" did not mean the equivalent of a prima facie case and while it required an objective standard the information did not have to survive the scrutiny of cross-examination at a subsequent trial. The Court also considered whether the stated reasons for the seizure were so improper as to vitiate its lawfulness. Although the seizure of the helicopter to preserve a chain of evidence was considered misguided, the Court was not persuaded that it dominated the officer's thinking to an extent rendering it unlawful. It was also not illegitimate for the officer to have regard to the need for general deterrence and the need to maintain credibility with the public and farmers.

The Court also held that the seizure was not unreasonable. In the circumstances, the lawfulness of the seizure and the prevention and deterrence justifications ensured that it was not unreasonable. The Court considered that there was nothing in the way in which the seizure was carried out that would justify a finding of unreasonableness.

Finally, the Court held that even if unreasonableness had been established, no New Zealand Bill of Rights Act compensation would have been awarded the due to delay. Although the Court found that claims for New Zealand Bill of Rights Act compensation were not covered by the Limitation Act 1950, the Court held that compensation could be refused as a matter of discretion for undue delay. The Court thought that the delay of more than nine years between the seizure and the date of proceedings justified refusal.

Civil Procedure

Apparent bias – judicial officer

In *Erris Promotions Ltd v Commissioner of Inland Revenue* (2003) 21 NZTC 18,214, the Court considered an appeal from an interlocutory ruling by the High Court declining an application to recuse himself from hearing a number of substantive proceedings scheduled to be heard together in the High Court.

The proceedings concerned the disallowance by the Commissioner of depreciation claims for software packages that were the subject of joint ventures. In the High Court, the argument advanced was that the director of one of the joint ventures had disclosed information to him when he was a barrister. This might be seen to influence the judge in his adjudication; the situation was no different from an earlier case from which Wild J had disqualified himself. Wild J declined to disqualify himself. He did not consider himself a person closely associated with the director who was unknown to him before the instructions were received, with whom he had only a brief and professional contact for the duration of the instruction, and with whom he had had no contact ever since. Nor could he recall the detail of his instructions and there was no correlation between the issues in the cases.

The Court found that Wild J had, when in practice, been briefed as counsel in respect of the parties closely associated with the trial in the High Court and that the current

proceedings were significantly connected with the issues involved in his former brief. When circumstances similar to the present case arose in litigation formerly assigned to him in his judicial capacity, Wild J had recognised that there was sufficient justification for his disqualification.

Although with the passage of time that earlier recusal and the circumstances for it had lapsed from his memory, the fact of their existence and the possibility that matters that had troubled him then might be recalled indicated that there was a real danger that Wild J might, even unconsciously, be affected in his impartiality. These facts were crucial where the issue is one of apparent bias, which is based on the principle that justice should not only be done but manifestly be seen to be done. This mandated that any danger about his impartiality being affected should be averted. Further, the implications for a long and expensive trial should the judge recall, in the course of it, those matters that led him to disqualify himself from the previous trial and then conclude that he should not continue with the present one, were practical considerations that reinforced the decision reached by the application of the legal test. The Court further observed that it might be necessary in the future to reconsider the test in *R v Gough* [1993] AC 646 and adopt not only a specifically objective approach, but also a standard other than that of "real danger" in terms of the English or other Commonwealth (in particular Australian) principles. A suggested test might be "would the reasonable informed observer think that the impartiality of the adjudicator might be/might have been affected?" Such a test would arguably give full weight to public perception.

The Court applied this suggested test in *Ngati Tahingi & Karewa Trust & Clark & Ors as trustees v Attorney-General & Anor* CA163/03, 24 September 2003.

Costs awards against the Commerce Commission

In *Commerce Commission v Southern Cross Medical Care Society* [2004] 1 NZLR 491, the Court addressed the question of whether the Commerce Commission ought to be exposed to an adverse costs order where it unsuccessfully opposes an appeal against one of its own determinations declining authorisation or clearance under Part V of the Commerce Act 1986.

The Court noted that it was well established that where the Commission unsuccessfully pursues penalty proceedings, costs will be ordered against it: *Commerce Commission v Fletcher Challenge Ltd* (1999) 6 NZBLC 102,752. However, there had been more reluctance to order costs against statutory tribunals that are represented at the hearing of appeals against their own decisions. It was in the public interest to have the Commission take an active role in assisting an appellate court when reviewing one of its determinations in circumstances where there would otherwise be no opposition to the appeal. It would be a matter of real concern if exposure to costs operated as a disincentive to the Commission's active assistance in such situations. The cost of obtaining prior clearance on appeal to the High Court, as distinct from any further appeal to the Court of Appeal, should be seen as part of the cost of obtaining the clearance itself.

The Court accepted that the new High Court Rules took a more prescriptive approach to costs than previously as, while costs are ultimately discretionary, the presumption

in r46(1) is that costs follow the event. However, the Court considered that courts should not hesitate to depart from that approach where a clear reason such as the departure being in the public interest is shown. As a general principle, the Commerce Commission ought not to be exposed to an adverse costs order for unsuccessfully opposing an appeal if all it has done is to assist the High Court by presenting necessary evidence and argument in opposition to an appeal in the public interest. However, from that general rule, there was some flexibility in the court's inherently broad discretion in order to meet the requirements of each individual case.

Cross-examination in judicial review proceedings

In *White v Wilson* [2004] 1 NZLR 201, the respondent wished to cross-examine certain deponents who had sworn affidavits on behalf of the appellants. The respondent sought substantive relief confined to the extraordinary remedies under Part VII of the High Court Rules. The appellants sought to resist the cross-examination on the grounds that, in judicial review proceedings, cross-examination was not available to the plaintiff as of right. In the High Court the appellants' application to set aside the r508 notice was declined.

The Court held that r508 did not accord a right to cross-examine. It provided an incentive to the served party to submit to cross-examination of a deponent, but did not provide a right to require production and submission and was accordingly consistent with accepted practice in judicial review proceedings. The application to set aside the notice to produce was misconceived. However there were means by which the matters in issue could be dealt with. Both rr438 and 455 entitled a party to apply to the High Court for an order that the evidence of any deponent may be read notwithstanding that the deponent was not present for cross-examination at the hearing. In considering any such application the Court would take into account all matters relevant to the ends of justice, including the practice of cross-examination in proceedings in the nature of judicial review and the potential prejudice to the party who served a notice should evidence be relied on by the other party without submitting it to the test of cross-examination. The appeal failed, but the appellants succeeded on their argument that the respondent did not have a right to cross-examine, only a presumptive right to have the affidavits excluded as evidence if the deponents were not cross-examined. The appellants were able to apply to the High Court for orders under rr438 and 455.

Examination of judgment debtor under r621

In *Hunt v Muollo* [2003] 2 NZLR 322, Mr Hunt was the subject of an order for costs in favour of the Muollos and subsequently of an order for examination under r621 of the High Court Rules, as judgment debtor, as to his means of satisfying the judgment. Mr Hunt was ordered by the Master to produce certain documents, including documents evidencing the financial details of a number of trusts and companies with which Mr Hunt had an association. Mr Hunt first applied for a stay of that order and then, after producing the documents sealed and under protest, for review of the decision. The High Court Judge upheld the Master's order for production. Mr Hunt appealed saying that he was at most a discretionary beneficiary of some of the trusts, and that the trusts owned all the shares in the relevant companies.

The Court held that in the case of a disputed document, r621(3) involved two straightforward steps. The first was to determine whether the disputed document was relevant to the judgment debtor's means for satisfying the judgment. The Rule focuses specifically on the judgment debtor's income, expenditure, assets and liabilities. The words "and generally as to his means for satisfying the judgment" were directed at any other "means" with which the judgment debtor may be able to satisfy the judgment. The expressions "assets" and "means" denote some legally recognised species of property belonging to the judgment debtor and able to be used in whole or in part to satisfy the judgment whether immediately or at some future time.

A discretionary beneficiary had no interest, legal or equitable, in the assets of the trust and only acquired an interest in property on the making of a distribution and then only to the extent of the distribution. It followed therefore that if such an interest as Mr Hunt had in any of the trusts, and via them the companies, was no more than that of a wholly discretionary beneficiary, there was no basis under r621(3) for an order that he produce any of the trust or company documents. They would not be relevant to his assets or other means.

The second step was to determine whether the disputed documents were within the judgment debtor's possession or power. This was an implicit requirement of r621(3). "Power" meant a presently enforceable legal right to obtain inspection of the document from whomever actually held it, without the consent of anyone else. It did not appear that the Court could order somebody to do something that was beyond that person's legal power to achieve.

The Court considered that a negative answer at either step meant that an order to produce could not be made. In this case all the issues deriving from the Muollos' application for production of documents under r621 were remitted to the Master for de novo consideration in the light of the principles outlined.

Privy Council Appeals - Time Limits

In *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* (2003) 16 PRNZ 835, the Court considered its jurisdiction to extend the time period for fulfilling conditions on leave to appeal to the Privy Council. The appellants had failed to file the record in London within the three month time limit and indeed had taken no steps towards this until nine months had elapsed. The appellant claimed that the delay was due to it awaiting the decision of the High Court of Australia in *ACCC v Boral Masonry Ltd* [2003] HCA 5.

The Court held, relying on the decision of the Privy Council in *Roulstone v Panton* [1979] 1 WLR 1465, that it had jurisdiction to extend the time period even where the time fixed in an unsatisfied condition had lapsed. There was nothing in the New Zealand (Appeals to the Privy Council) Order 1910 to prevent the Court considering the application if the condition had not been satisfied and it was open for the Court to "refix the period" when granting final leave. However, in the circumstances of the case the Court declined to extend the time period. This was not a case of solicitor's error, and the pending *Boral* decision provided no reason for the delay. Prospective

appellants could not simply rest on the grant of conditional leave. Respondents were entitled to have litigation brought to finality with reasonable diligence.

Stare Decisis – prior decisions of the Court

In *Jones v Sky City Auckland Ltd & Anor* [2004] 1 NZLR 192, a court of five was asked to overturn a recent decision of a court of three (Blanchard, McGrath and Anderson JJ) in *Sky City Auckland Ltd v Wu* [2002] 3 NZLR 621 that casino license holders were entitled to exclude members of the public from casino premises without assigning reasons.

The Court reviewed its earlier decisions in relation to stare decisis and reiterated the four reasons for departing from previous authority stated by Richardson J in *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404. The Court concluded that there was no reason to depart from *Wu*. The case was less than a year old, had not been subject to critical comment and had been reported to Parliament by the Casino Control Authority without apparent effect. The decision was not concerned with fundamental human rights nor with a major economic or social issue.

The appellant submitted that *Wu* should not be followed because in that case the Court had not been presented with arguments from a public law perspective. The Court rejected that submission. The plain wording of s67 of the Casino Control Act 1990 excluded any possible ground of review of the decision to exclude. The issue was not even a "finely balanced" one, where the Court should in any event be reluctant to reverse itself.

Test for interlocutory injunction – requirement of a serious question to be tried

In *Roseneath Holdings Ltd v Grieve & Grieve* CA222/03, 16 December 2003, the Court considered the preconditions for the grant of interlocutory injunctions. The case concerned a residential property which was to be subdivided. The respondents had agreed to purchase part of the property, and lived there paying rent pending subdivision and the transfer of title. Difficulties with the vendor, City Developments Palliser Ltd (CDPL), emerged and eventually the Grieves brought specific performance proceedings. Around this time, Westpac indicated that it would not grant any further extensions on a mortgage given to CDPL over the whole property. However, as it was unwilling to enforce its rights, an arrangement was reached whereby the mortgage was assigned to the appellant company, Roseneath Holdings Ltd. CDPL then ceased paying penalty interest, and almost immediately the appellant sought to force a mortgagee sale of the property. There were links between the appellant and CDPL.

The High Court granted an interim injunction preventing Roseneath from enforcing its mortgage, despite reaching the view that no serious question to be tried had been established against it. The Judge concluded that, where the overall justice of the case required, an injunction could be granted against a party connected to a defendant against whom a serious question had been demonstrated. That was the case against CDPL.

The Court took a different approach. The purpose of interim relief was to prevent alleged wrongdoers from enhancing their positions prior to the conclusion of litigation. Save in an exceptional case, a court would not intervene to prevent people from exercising their clear rights. Therefore, a serious question to be tried relating to the party against whom interim relief was sought would normally be required before an interim injunction would be granted. However, the Court accepted that where this could not be demonstrated, interim relief might still be granted if it was likely that further critical information indicating that there was such a serious question would become available shortly. This of course was subject to the balance of convenience, and to reconsideration where newly available evidence so required.

It was, however, unnecessary to apply this approach as a serious question had been shown against Roseneath in relation to fraud under the Land Transfer Act. While that action had not been pleaded, this had been explained by concerns over the professional duty of the Grieve's solicitors not to plead fraud without clear grounds. The underlying facts suggested that Roseneath and CDPL may have been parties to a fraudulent scheme to deprive the Grieves of their interest in the property by forcing a mortgagee sale.

The Court agreed with the first instance Judge that the balance of convenience favoured an interim injunction. The appeal was therefore dismissed.

Waiver of privilege by conduct

In *Ophthalmological Society of New Zealand Inc v Commerce Commission* [2003] 2 NZLR 145 the Court refined the test for waiver of litigation privilege by conduct. The matter arose in connection with an application by the Commerce Commission to amend its statement of claim alleging collusive conduct in breach of s27 of the Commerce Act by the Society and others. The Commission originally pleaded its case on the basis that the relevant market was the supply by ophthalmologists of routine cataract surgery (including pre and post-operative care) in Southland. It had sought to amend its statement of claim to instead allege a national market, but its application was ultimately unsuccessful. Then, based on newly available economic evidence, it decided that its original approach had been correct. It therefore decided to continue with its original pleading, but sought to make consequential amendments to it based upon the new available evidence. In the affidavits in support of its application, reference was made to the content of the economist's opinion on which that evidence was to be based. A Master ruled that this did not amount to a waiver of privilege in the opinion. The High Court upheld the ruling.

On appeal, the Court first discussed the proper approach to the appeal. It concluded that the decision that privilege had been waived was not of a discretionary character, but rather involved reaching a finding on the evidence. The question was simply whether the decision under appeal was wrong, although deference would be shown where the first instance Judge or Master had an advantage over the appellate Court.

The Court then turned to privilege. It rejected the suggestion, implicit in several High Court decisions, that the test for waiver by conduct depended simply on broad notions of fairness. Following the decision of the High Court of Australia in *Mann v Carnell* (1999) 201 CLR 1, it preferred to focus the inquiry on whether the conduct in

question was consistent with the maintenance of the privilege. A close analysis of the particular context was required. This might involve considerations of fairness, but was not same as the application of an overriding principle of fairness operating at large.

In the circumstances, the Court considered that the privilege concerned had not been waived. The privilege was intended to protect the process of preparing for litigation and the evidence relied upon in this case would ultimately have been disclosed. In that context, the practice of disclosing part of privileged material in interlocutory proceedings facilitated the litigation process and would not normally involve any unfairness or breach of natural justice indicating a use inconsistent with maintaining the privilege. The appeal was therefore dismissed.

Commercial law

Insurance law - alleged admissions

AMP General (NZ) Ltd v Hugo (2003) 10 TCLR 626, (2003), (2003) 7 NZBLC 103,918, concerned an insurer's ability to rely upon an exclusion clause dependent on admissions by the insured. The appellant was the public liability insurer of the respondent who carried out repairs to the steering box of a truck. Some time later, the truck lost steering control and crashed, causing damage. The owner successfully sued the respondent in negligence for failure to properly reinstate the steering system of the truck. The assessor for the owner's insurer and the its consulting engineer both interviewed the respondent about the procedure used to repair the truck and he made statements to them. The respondent sought an indemnity from the appellant who declined liability relying, amongst other things, upon alleged admissions by the respondent. Condition 3(c) of the insurance policy stated "you must not make or give any admission, offer, promise, payment or indemnity". Section 11 of the Insurance Law Reform Act 1977, however, provided that an insurer could not decline cover if the loss in respect of which the insured sought to be indemnified was not caused or contributed to by the happening of certain events (the admissions).

The Court therefore had to determine, with the onus of proof on the respondent, whether the loss in respect of which the respondent sought to be indemnified was caused or contributed to by any admission by him. The Court stated that an admission in this context was a statement contrary to interest. Here the loss for which the respondent sought indemnity by the appellant was his liability to pay the judgment sum arising from the owner's claim against him. The first limb of the inquiry under s11 was whether the event (the admission) was likely to increase the risk of loss occurring. The second limb was whether the loss "actually sustained" was caused or contributed to by the admission. The emphasis had to be on admissions having the effect of prejudicing the indemnifier's rights. The right in question was to be free from liability to the insured where the insured's admissions caused or contributed to the liability established against the insured. The admissions must, on an objective enquiry, have caused or contributed to the insured's loss, not the risk of that loss. This inquiry was not concerned with an inquiry into a plaintiff's subjective state of mind as to why it brought a proceeding or an inquiry into the indemnifier's ability to settle.

The Court commented that an "admission" in condition 3(c) had to relate to something that could be successfully used against the respondent in Court, otherwise it could not cause or contribute to the respondent's liability to pay the judgment sum other than in an indirect and unintended way. The reliance placed on the admission by the owner and its insurer was irrelevant but the reliance placed by the Court on any admission was relevant. In this case there was no evidence that an admission by the respondent had caused or contributed to his loss. In reaching the conclusion that the respondent was negligent towards the third party the District Court Judge did not rely on any admission by the respondent as the basis for his finding or in support of it. Accordingly, the insurer's appeal was dismissed.

Liquidation – voidable transactions

In *Re Project Works Construction Ltd; Carter Holt Harvey v Fatupaito & Anor* (2003) 9 NZCLC 263,285 the Court considered voidable transactions under the Companies Act 1993. Project Works Construction Ltd was a company engaged in the building industry, which prior to going into liquidation had made two payments by cheque to one of its suppliers, Carter Holt Harvey. One was for $40,000 dated 21 May 2001 and the other was for $100,000 dated 22 May 2001. The liquidators of Project Works filed a notice setting aside these payments as voidable transactions and Carter Holt applied for an order that they not be set aside. It was accepted that if the payments were made in the ordinary course of business they could not be set aside: s292(2) of the Companies Act.

The Court considered, contrary to the approach of the High Court, that each payment should be considered separately to determine whether it was made within the ordinary course of business. This was because the evidence established that, objectively, the payments were treated separately by Project Works. Commenting on the ordinary course of business test, the Court observed that in order for a creditor to prevent a payment being set aside it had to show that an objective observer would have seen nothing abnormal about the transaction in the commercial context that existed at the time payment occurred. That context included any terms of trade. The Court also observed that where payment was made as part of an ongoing business relationship it was necessary to have regard to the prior course of conduct, and that the normality or abnormality of the payment had to be examined against the practices of solvent companies.

Applying this test to the $40,000 payment, the Court concluded that it was made in the ordinary course of business. In the particular context, there was nothing abnormal about the fact it was a payment of arrears or that it was a rounded lump sum figure. The payment of $100,000 was not, however, made in the ordinary course of business. This payment was strikingly unusual because almost one-third of the amount was not yet owing and constituted payment of a trade account four weeks in advance. There was nothing in the evidence that suggested that such a large amount paid so far in advance had occurred before. The Court rejected the argument that it had the power under s295 of the Companies Act to apportion the payment so that it was set aside only to the extent existing indebtedness was exceeded. The whole $100,000 payment was therefore set aside.

Harte v Wood [2004] 1 NZLR 526 concerned the question whether a payment to the respondents was of a preferential nature and whether, if so, they could avail themselves of the equitable protection provided by s296(3) of the Companies Act 1993.

The respondents were owed a total of $68,304 by Valley Foods Ltd (VFL) for soil removal work undertaken at a residential subdivision being developed by VFL. Various initiatives were pursued in an endeavour to recover the outstanding balance. The respondents were informed that VFL was seeking to refinance the development, and that the company had defaulted in relation to its mortgage obligations. The respondents sent a statutory demand for payment to VFL's solicitors, but formal service was not effected. The respondents agreed to withhold further action for a short period to enable VFL to refinance and pay its creditors, at least in part.

Following the service of a fresh statutory demand, VFL's solicitor wrote to the respondents' solicitor offering payment of $40,000 in cash. This was accepted and the respondents agreed to withdraw their statutory demand. However an application was made by other creditors for a winding-up order and VFL was placed into liquidation. The liquidator (Harte) gave notice that the $40,000 payment would be set aside under s294 of the Companies Act 1993. The respondents applied successfully to the High Court for an order that the transaction not be set aside. The payment was made within the "restricted period" set out in s294 (six months back from the commencement of the liquidation). It was therefore presumed that it was made at a time when the company was unable to pay its debts, and was made otherwise than in the ordinary course of business. However, the liquidator was still required to establish that the challenged payment enabled the respondents to receive more towards satisfaction of their debt than they would otherwise have received, or been likely to receive, in the liquidation. The Master concluded that the liquidator had failed to show this on the balance of probabilities, and accordingly the transaction should not be set aside.

The Court considered that the receiver's report detailing an opinion that it was unlikely that there would be funds available for distribution to unsecured creditors of VFL should not have been ignored by the Master. The report was prepared under a statutory duty, and had it been provided as an annexure to an affidavit sworn by the receiver there would have been no question of its admissibility. It was possible that the requirements of s3(1)(c)(ii) of the Evidence Amendment Act (No 2) 1980 had been met, which provides for the admissibility of documentary hearsay in the form of business records in certain situations. In any event the Court accepted that the reference to the receiver's belief contained in the affidavit of Ms Fatupaito, an insolvency practitioner retained by the Official Assignee to investigate VFL's affairs, was admissible in the interests of justice, under r252 of the High Court Rules. Therefore the evidence pointed to a positive conclusion that it was likely the respondents received preferential treatment.

In order for the equitable protection provided by s296(3) to avail a creditor, four requirements must be met: (1) the payment must have been received in good faith; (2) the recipients must have altered their position in reliance upon it; (3) such alteration must have been made in the reasonably held belief that the payment was valid and would not be set aside; and (4) in consequence it must be inequitable in the

opinion of the Court to order recovery in whole or in part. In this case the respondents could not be said to have altered their position in reliance on the payment. There was no doubt they were in a difficult financial position when the payment was received, but there was no evidence that they desisted from attempting to negotiate a compromise with creditors, or file in bankruptcy, upon receiving the cash. The appeal was therefore allowed and the $40,000 payment set aside.

Preston Farm Ltd v Managh CA62/03, 15 December 2003, was an appeal against an order of the High Court dismissing an application under s294 of the Companies Act 1993 for an order that certain transactions not be set aside. The relevant transactions involved the transfer of assets and money between different companies within a family-owned group.

Hillcorp became insolvent in 1998, and the family began winding up its affairs. A beetroot grader and a forklift were sold (at book value) to the appellant company. At that time, the appellant owed Hillcorp $8,955. The effect of the transactions was to increase the indebtedness of the appellant to Hillcorp to $33,495 as at 30 June 1999. In July 1999, Hilhurst Farms paid a total of $379,173 to Hillcorp, and Hill Nurseries paid a further $189,868 (a total inflow of $569,041). These funds were primarily used to pay off Hillcorp's indebtedness to ASB Bank. Prior to these payments, Hillcorp was owed a total of $62,273 by companies associated with the family, including the $33,495 owed by the appellant. In the accounts for Hillcorp prepared to 30 June 2000, that $62,273 was treated as having been repaid from the payments made by Hilhurst Farms and Hill Nurseries.

Hillcorp lost some litigation with the Napier City Council and, as a result of its inability to meet the judgment debt, it was placed into liquidation in 2001. The liquidator gave notice to the appellant that the transaction involving the beetroot grader and the "current account transactions July 1999 $33,494.99 to your benefit" were being set aside as voidable, because they enabled the appellants to receive more towards satisfaction of debts than would otherwise have been received in the liquidation. In the High Court, the Master concluded that the transactions did not take place in the ordinary course of business and therefore should be set aside.

The Court considered that the impugned transactions did not in fact fall within the wording of s292. Conventional practice was to treat a voidable preference claim as aimed at the parties who are said to have been preferred (in this case, Hilhurst Farms and Hill Nurseries, on the liquidator's argument). The specific orders that the Court can make under s295 were consistent with this view. In any event, there were fatal difficulties with the argument advanced by the liquidator. The sale of the beetroot grader and the forklift could not be said to have enabled any person to receive more towards satisfaction of a debt than would be received in the liquidation. The appellant was not a creditor of Hillcorp at that time, but was instead a debtor. The effect of the transaction was to increase the indebtedness of the appellant to Hillcorp, and therefore could not be set aside under s292.

In relation to the second set of transactions, the argument was advanced for the liquidator that the payments by Hilhurst Farms and Hill Nurseries to Hillcorp had already been made at the time of the current account restructuring. Therefore, the reduction of those liabilities to allow for the in-substance setting-off of debts owed to

Hillcorp by other entities associated with the family (including the appellant) involved an in-substance assignment to Hilhurst Farms and Hill Nurseries of the relevant debts. If that was what happened then the restructuring would fall within s292(1)(a) as involving a transfer by Hillcorp to Hilhurst Farms and Hill Nurseries of property, namely the choses in action represented by the debts owed to Hillcorp by the family entities (including the appellant). However, the unequivocal evidence was that the relevant restructuring did not occur in that way. When Hilhurst Farms and Hill Nurseries injected funds into Hillcorp, they stipulated that some of the money so paid was to be treated as paid on behalf of the appellant and other entities that owed money to Hillcorp. A transaction like that clearly falls outside the scope of s292, which can have no application to a transaction in which a debtor (the appellant) of an insolvent company (Hillcorp) pays off its indebtedness. The appeal was allowed and an order made that the transactions not be set aside.

Price fixing

In *Giltrap City Ltd v The Commerce Commission* (2003) 7 NZBLC 104,009, the Court considered the elements and indicia of a price fixing arrangement, and the liability of an agent who enters into such an arrangement. In 1993 eight Auckland car dealers attended a meeting. The appellant MacKenzie, who was the dealer principal and chief executive officer of the other appellant, Giltrap City Ltd, attended that meeting. The Commerce Commission formed the view that those who attended the meeting had entered into a price fixing arrangement contrary to the combined effect of ss27 and 30 of the Commerce Act 1986 (the Act). The Commission commenced proceedings for pecuniary penalties against each of the eight individuals and the companies they represented. Each of the companies, with the exception of Giltrap City, agreed to pay a penalty of $50,000. On that basis the proceedings against the individuals, except MacKenzie, were not pursued. The proceedings also continued against Giltrap City. The High Court Judge determined that both MacKenzie and Giltrap City had contravened the Act and imposed a penalty of $150,000 on Giltrap City. No penalty was imposed on MacKenzie personally. Both MacKenzie and Giltrap City appealed.

Gault P and Tipping J in a joint judgment considered that before there could be an arrangement under s27 there must have been a consensus between those said to have entered into the arrangement. Their minds must have met - they must have agreed - on the subject matter. The consensus must have engendered an expectation that at least one person would act or refrain from acting in the manner the consensus envisages, that is, there must have been an expectation that the consensus would be implemented in accordance with its terms. This necessarily involved communication among the parties of the assumption of a moral obligation. Gault P and Tipping J thought that it was best to focus the ultimate inquiry on the concepts of consensus and expectation rather than mutuality, obligation and duty. They went on to say that the existence of the necessary consensus was to be judged by reference to what reasonable people would infer from the conduct of the person whose participation in the consensus was in issue.

In this case the Court held that MacKenzie had so conducted himself at the meeting that reasonable people, appraised of all the relevant circumstances, would take the view that he was part of the consensus. The next issue was whether MacKenzie,

being the servant or agent of Giltrap City, entered into the arrangement within the scope of his actual or apparent authority. If so, s90(2) of the Act deemed the conduct to have been engaged in also by Giltrap City. The Court concluded that MacKenzie was acting under sufficient general authority to manage the business of Giltrap City to give him implied authority to enter into the arrangement in issue, notwithstanding that it constituted a breach of s27 of the Act. MacKenzie's conduct was also that of Giltrap City in terms of s90(2) and Giltrap City therefore entered into the offending arrangement.

The Court held that MacKenzie was also liable as a principal for contravening s27. This was on the basis that s27 says that "no person" shall enter into a proscribed arrangement. MacKenzie did so. Hence, being a person, he contravened s27. Section 90(2) makes his conduct the conduct of Giltrap City also. There were therefore, by dint of s90(2), two principal contraveners of s27. Both the language of the enactment and the statutory policy that "no person" shall enter into a contravening arrangement resulted in both principal and agent having principal liability. The company was liable vicariously rather than by attribution.

The appeals brought by MacKenzie and Giltrap City against liability were dismissed. However, the Court did allow Giltrap City's appeal against the amount of the pecuniary penalty imposed, and a penalty of $100,000 was substituted.

McGrath J concurred with the general reasoning and with the result but added his views on three points in a separate judgment. First, he considered that the notion of a moral (or non-legal) obligation should remain an important touchstone for determining whether there was an arrangement or understanding under s27. Secondly, the subjective purposes of MacKenzie, in relation to Giltrap City's future conduct and whether it had any intention of acting anti-competitively, were irrelevant to the question of liability. Finally, the questions regarding s90(2) were straightforward questions of statutory interpretation which did not require analysis in terms of agency concepts.

Contract

Transaction entered into by an educational institution in breach of the Education Act

In *Trustees of the KD Swan Family Trust v Universal College of Learning* CA255/02, 23 September 2003, the Court considered the effect of a transaction entered into by an educational institution in circumstances where consent had not been obtained from the Chief Executive of the Ministry of Education as required by s192(4) of the Education Act 1989.

The Swan Family Trust had entered into an arrangement with the Wanganui Regional Community Polytechnic (WRCP). WRCP wanted to develop a sports centre in Wanganui. The land it had in mind was then owned by the Wanganui District Council (WDC) and the buildings by the YMCA. WRCP approached the Trust to fund the development. The arrangement that finally ensued was that the YMCA sold the buildings to the Trust; the Trust leased the buildings to WRCP for a period of 20

years with an option for WRCP to purchase; the Trust funded the development of the facility by making funds available to WRCP for development; WRCP purchased the land from WDC and granted WDC a mortgage equivalent to the purchase price; the land was then transferred to the Trust which took over the mortgage payments, but with WRCP remaining ultimately liable. The purpose of the last step was to avoid stamp duty on the sale of the land.

WRCP was subsequently disestablished and incorporated as the Universal College of Learning (UCOL). The terms of the lease were considered by UCOL to be onerous and in 2002 it sought to avoid the arrangement. As the Chief Executive's consent was required under s192(4) of the Education Act for the sale of assets, the grant of a mortgage, and the borrowing or raising of money, UCOL argued that the arrangement was void in whole or in part. Although consent was not required for the lease simpliciter, it was argued that the transaction as a whole was designed to "raise money" so consent was required. Alternatively, UCOL submitted that consent was required for the mortgage to WDC or to borrow money from the Trust to fund the development, and that the whole transaction was tainted by these failures.

The majority (Blanchard and Glazebrook JJ) held that the failure to obtain consent rendered any contract entered into in breach of s192(4) illegal, but that relief could be granted under the Illegal Contracts Act 1970. Keith J dissented on this point, and held that the failure to obtain consent had no effect on the contract. However, the Court was unanimous in finding that only part of the transaction had required consent. The overall transaction was not designed to raise money as UCOL had argued, but simply to allow WRCP to use a facility with the option to purchase it at market value if it so desired. Parts of the transaction did, however, require consent: the use by WRCP of the development funds it received from the Trust to reduce its overdraft, and taking of the mortgage. However, neither of these parts tainted the lease with illegality, as both were considered sufficiently separate and independent of the lease. The use of development funds was not considered part of the original arrangement, and not only was the mortgage legally independent of the lease but it was the subject of a separate grant and disregarding it did not alter the purpose or effect of the transaction between the Trust and WRCP. Finally, the Court observed that although the sale of assets generally required consent, the sale of land by WRCP to the Trust did not, because the immediate on-sale meant that WRCP never acquired a beneficial interest in the property.

Scope of solicitor's retainer as solicitor to the estate

In *Hansen v Young* [2004] 1 NZLR 37, the Court considered whether the appellant, a solicitor who had acted negligently in the administration of an estate, was acting at the relevant times in his capacity as solicitor to the estate or in his capacity as the trustee of the estate.

The will of the testator appointed the appellant and the respondent co-trustees of the estate. Following the death of the testator the trustees had met and retained the services of the appellant as solicitor to the estate. The solicitor was negligent in the administration of certain shares belonging to the estate, causing a loss of capital. The respondent sued the appellant in his capacity as solicitor to the estate. The issue for the Court was the scope of the appellant's retainer as solicitor to the estate.

The Court held that the Judge in the High Court, in finding that the retainer had been to act generally in the administration and management of the estate, including the administration of the shares, had potentially failed to apply the correct test. The Judge appeared to have placed significant weight on what the plaintiff or general public would have perceived a solicitor's role in the administration of the estate as being and the appellant's failure to explain to the plaintiff the different roles of trustee and solicitor to the estate. However, the issue was to what terms the parties, the respondent and appellant as trustees and the appellant as solicitor to the estate, had agreed. It was not sufficient for one trustee alone to form the impression that the retainer was for the general management of the estate: the appellant as trustee also had to be a knowing and willing party to a retainer on those terms. A retainer in the form found by the Judge could not, on the evidence, be sustained.

Employment

Duty of fidelity – damages for breach

In *Morris v Interchem Agencies Ltd* CA185/02, 3 July 2003, the appellant was a sales manager employed by the respondent company, who appealed against an Employment Court decision that he was not unjustifiably dismissed and that he had breached his contract by securing for himself an agency held by his employer before his resignation from the company**.** The appellant argued that the Employment Court erred in law in finding that he took the agency while still employed by the company and that, even if the arrangement to take the agency had been made before the termination of his employment, there was no breach of the duty of fidelity as he had not made the first approach. He also appealed against the quantum of damages awarded against him.

The Court reiterated that appeals from the Employment Court are on questions of law only. Accordingly, it was not enough to suggest that the Employment Court Judge may have been mistaken in relation to certain facts or that there was another more likely interpretation of the evidence. What had to be shown was that there was no evidence for the conclusion reached by the Employment Court or that no reasonable court could have come to the conclusion it did on the evidence before it. Here there was no error of law. Additionally, the Court rejected the appellant's argument that he had not breached the duty of fidelity. It was of no moment who made the first approach. The duty of the employee in such circumstances was to reject any such approach, report it to the employer along with any criticisms made of the employer and to work with the employer to rectify any perceived shortcomings.

The Court, however, found an error of law with respect to the calculation of damages. Damages in such cases were to be calculated on the basis of the loss of the chance to retain the agency. The chance of the employer retaining the agency had to be assessed on the assumption that the employee behaved properly by rebuffing any approach, reporting it to the employer and, during any period of notice, working with the employer to find a solution to any difficulties which may have led to the approach being made to the employee. A court would be justified in being conservative in making any assessment of the possibility that an employee might behave properly but

still take the business after he or she leaves upon working out his or her notice. Such an attitude was justified by a desire to ensure that a departing employee did not profit from a breach of the duty of fidelity. Despite a finding that the appellant did not owe fiduciary duties to his employer in respect of the agency, the Employment Court had not taken into account the fact that the appellant would have been free to resign and compete for the agency once his employment relationship was over. The question of damages was remitted to the Employment Court for reassessment.

Duty of good faith – consultation with employees

In *Auckland City Council v New Zealand Public Service Association Inc* CA112/03, 10 December 2003, the Court considered the scope of the duty of good faith owed by an employer in circumstances involving consultation or proposals that might impact on employees.

The appellant resolved to undertake a review of expenditure. It was contemplated that proposals arising from the review would be incorporated into the development of the annual plan the appellant was required to formulate. Work on the annual plan had already commenced, and the respondent union (representing approximately 360 members employed by the appellant) was among stakeholders being consulted. When the respondent learned of the expenditure review, it requested to be actively involved in that as well. However, the respondent was simply told the date the report would be released, and that discussions could be held once the appellant had reviewed the findings and agreed on its recommendations. Following the release of the review findings, the appellant accepted some of the recommendations, including the adoption of a target to reduce certain budgets by at least $2.5 million over three years. The minutes of this (public) meeting were circulated to staff the next day. A later communication detailing the proposed processes to staff was also sent to the respondent. It informed staff that they would have the opportunity to comment on the formulation of the draft annual plan in the coming months.

The respondent took issue with the appellant's refusal to engage in consultation generally in respect of the review of expenditure, other than as a stakeholder in the course of the annual plan development. A mediation in 2002 resulted in an agreed consultation process, of which there was no complaint. However, the respondent wanted to resolve wider issues of principle relating to the appellant's conduct prior to the mediated settlement, and brought proceedings in the Employment Court. The Employment Court concluded that in order to comply with its duty to deal with the respondent in good faith, the appellant was required to consult with the respondent about the implementation of those recommendations in the report that the appellant adopted, and which potentially affected the employment interests of the respondent's members. The duty of good faith on parties in an employment relationship applied to consultation about the employees' collective employment interests, including the effect on employees of changes to the employer's business, and to proposals by an employer that might impact on the employees.

On appeal, the Court considered the proper approach to consultation under s4. The Court emphasised that when applying general statutory provisions such as those contained in ss3 and 4 of the Act, it was important not to substitute for the words in the statute statements in judgments made in particular contexts. Conduct to which

obligations of good faith adhere in one context would not necessarily lead to the same obligations in another context. There could be no dispute that the parties to an employment relationship must deal with each other openly and in good faith. They must communicate and, where appropriate, consult in the sense of imparting and receiving information and argument with an open mind when that can still realistically influence outcomes. However, to adopt an approach calling for mandatory consultation at specified times risked inflexibility. What was practicable in the exigencies of particular business operations and workplaces must be kept in mind. Any general requirement of "energetic and positive displaying of good faith behaviour" went too far.

In this case the only evidence related to the recommendation to reduce certain budgets. It established that the appellant had embarked upon a process involving consultation with staff in the relevant department. There had been no consultation with the respondent because it was (mistakenly) believed that there were no members of the respondent employed in the department. If that belief had been correct, there could have been nothing about which the appellant and respondent had to deal with each other. As it happened, there was one union member in the department. However, it did not follow that any wide and general consultation with the respondent was required before it became apparent that the individual member's interests would be affected (at which point there was appropriate consultation). The obligations of an employer to an employee and to a union were not necessarily co-extensive.

As there was no evidence that the appellant had not acted in good faith towards the respondent in the period in question, the determinations of the Employment Court were set aside.

Equity

Scheme of variation of charitable trust

Trustees of the McElroy Trust v Objectors [2003] 2 NZLR 289 concerned an application by the trustees of a charitable trust for approval of a scheme under Part III of the Charitable Trusts Act 1957. Section 32 of the Act allows the High Court to approve a scheme of variation of a charitable trust if it is impossible or impracticable or inexpedient to carry out the purpose of the trust.

The McElroy brothers settled the McElroy Trust in 1956 for the endowment and management of accommodation for elderly persons and young children in need, but with special preference for the accommodation of elderly persons of any denomination living in Rodney County. There were also funds for the general purposes of the Warkworth Diocese of the Church of England. The assets of the trust were sold and the issue was whether clause 18, which provided that the proceeds of sale should be distributed to the beneficiaries set out above, should be varied by a s32 scheme. There was no question of varying the Warkworth Diocese aspect of the trust as nothing had happened to make it impossible, impracticable or inexpedient to give effect to this aspect of the trust. In respect of the remaining three-quarters of the trust proceeds, it was common ground that the Selwyn Foundation was the only

organisation answering the objectives of providing a home for the elderly within the Auckland Diocese of the Church of England.

The Court identified the essential question as whether the trustees had shown in terms of s32 that it was inexpedient to proceed as clause 18 dictated, and therefore appropriate to re-settle the trust fund upon the new trusts proposed by the scheme. The general connotation of "inexpedience" was that the original charitable purpose had become unsuitable, inadvisable or inapt. This was wider than that the original purpose could no longer be carried out. The concept of inexpediency introduced a value judgment and not simply an assessment of feasibility, but the question was not merely whether a new scheme would carry out the purposes of the trust better, instead it had to be inexpedient to carry them out. If it had become inexpedient to carry out the original purpose of the trust, a scheme of variation could be approved so long as it kept as close as reasonably possible in the new circumstances to the original intention of the settlor.

The Court concluded that the social change away from institutional care of the elderly towards care of the elderly in their own homes did not make it inexpedient for the original purposes of the trust to be carried out in favour of the Selwyn Foundation. It was an organisation operated by the Anglican Church within the Diocese of Auckland and which provided accommodation for the elderly along the lines which the settlors had in mind 50 years ago. The fact that society's approach to the care of the elderly had developed over the intervening years did not make it inexpedient to give effect to the settlors' wishes. Nor was there any inexpedience caused by the geographical constraints in the trust deed.

To the extent that the trust enabled the trustees to choose between care of the elderly and accommodation for the young, there was no inexpediency in making such a payment to a home or hostel for young children in need. Otherwise, a payment could be made to the Selwyn Foundation. There was no inexpediency in carrying out the purposes of the trust and therefore no basis on which the scheme could be approved under s32.

Family Law

Child abduction

Punter v Secretary of Justice CA111/03, 19 December 2003, was a successful appeal against a decision of the High Court dismissing an appeal against a Family Court order that the appellant's two children be returned to Australia under the provisions of the Hague Convention on the Civil Aspects of Child Abduction.

The parents had agreed under a shuttle custody arrangement that, until the children reached 18, they would spend two years in New Zealand with the mother followed by two years in Australia with the father. Five months into the first two year period in New Zealand the mother filed an application for custody in the Family Court and the father responded with an application for the return of the children under the Hague Convention. The Family Court Judge held that the mother, by applying for custody,

had wrongfully retained the children in New Zealand. The High Court upheld this decision and also held that the children's habitual residence remained Australia.

Blanchard J considered that the question of habitual residence was the logically prior question as any retention of the children could not have been contrary to the Convention if the children were not habitually resident in Australia. He did not, however, determine the question as the determination of habitual residence was a question of fact and the appeal was restricted to questions of law. Moreover, as the issue had been first raised in the High Court, the affidavit evidence was not directed to it and no factual findings had been made; it might have been better for the High Court to remit the matter to the Family Court. He observed, however, that decisions in other jurisdictions that had considered shuttle custody arrangements and the leading text supported a view that habitual residence would change with the cycle of the arrangement.

Blanchard J held that, assuming Australia was the children's habitual residence, there had, in any case, been no retention of the children in New Zealand contrary to the Convention. There had been nothing wrongful in the removal of the children to New Zealand. All that the mother had done was to ask the New Zealand Court to assume jurisdiction and to make an order allowing her to retain the children. The relevant case law supported this view.

Glazebrook J agreed with Blanchard J on the issue of retention and went on to make some observations about habitual residence. Reiterating that the inquiry about habitual residence was a factual one, Glazebrook J considered that the weight of authority required a settled purpose, that of the parents where young children were involved, which could be for a limited period only, and actual residence. What sufficed for an appreciable period of actual residence would depend on the circumstances. After traversing the relevant case law Glazebrook J said the most reasonable inference in shuttle custody cases was a settled purpose that there be serial habitual residences. This was likely to mean immediate loss of the previous habitual residence at the beginning of each agreed period in the new jurisdiction even if the period in the new one had not been long enough for it to have become a new habitual residence. She considered that the High Court Judge had erred in law by proceeding on a mistaken view of the principles and failing to take into account the whole of the relevant factual matrix.

Gault P would have dismissed the appeal. In his view the conclusions reached in the Family Court and the High Court were open. Although he considered that the High Court should not have allowed the question of habitual residence to be argued for the first time on appeal, the finding that the children's habitual residence was Australia was a finding of fact against which there is no right of appeal to the Court of Appeal. Assuming habitual residence remained Australia, it would frustrate the operation of the Convention if the Family Court was now able to consider the mother's custody application. A decision that the Convention does not apply because there will be no "retention" until the expiry of the period the father initially agreed the children could stay in New Zealand would allow the mother to both rely on and repudiate the agreement.

Family Protection Act 1955 – extent of moral duties

Wylie v Wylie & Ors CA231/02, 4 June 2003, concerned the ability of the Court to intervene under the Family Protection Act where there is alleged to have been a breach of the moral and ethical duty owed by a testator to claimants.

The testator's will provided that the appellant, the testator's only son, received his father's half interest in a block of the family farm. His mother received all the furniture and other household items, and the remainder of the estate was divided equally among the appellant and his two sisters. The High Court determined that there had been a breach of the moral duty owed by the testator to his wife and daughters. The Judge substituted an interest in the estate in favour of the mother for her life, with the residue to the appellant and his two sisters in shares of 60 percent, 20 percent and 20 percent respectively.

The Court observed that it had no authority to rewrite a will to achieve parity. It could intervene only if, and to the extent that, there was a breach of the moral and ethical duty that a just and wise testator can be held to owe the claimants in all the circumstances of the case. Beyond that, the Court had no jurisdiction to interfere. The will of the testator must be upheld even if the members of the Court considered that an even distribution would have been more in keeping with modern values.

In relation to the wife, the Court acknowledged that the law entitled her to generous recognition of her long and effective contribution to the marriage and to the creation of the family assets. However, the claim was limited to the extent of deficiency in terms of the statutory moral and ethical standards of proper "maintenance" considered in *Williams v Aucutt* [2000] 2 NZLR 479. The law did not entitle a spouse to more than was required to fulfil the testator's moral duty, and in this case the duty owed had already been discharged in a manner that would not diminish her standard of living. A proper understanding of the significance of a deed of appointment under the trust deed resulted in a conclusion different from that of the High Court Judge. The deed appointed the income of the trust to the wife for her life, and also granted her a right of continued residence in the matrimonial homestead.

The claim by the appellant's sisters was upheld, however, on the basis that there had been a clear breach of the moral duty owed to them. This case was not one where there was a large estate that allowed consideration of their claims without risk of competition with other claims. Instead, any provision made by the Court must be at the expense of some other persons to whom the testator owed a moral duty of support. In cases like this, all the Court could do was to see that the available means of the testator were justly divided between the persons who had moral claims, in due proportion to the relative urgency of those claims. A payment of $200,000 was considered a reasonable figure for each daughter.

In *Flathaug v Weaver* [2003] NZFLR 730 the High Court had ordered further provision of $90,000 for the testator's ex-nuptial daughter. She had discovered that the testator was her father only when she was 24 years old. There had been no contact between them until then, but a close and affectionate relationship developed. No provision for her was made in his will. After the division of shared property under the

Property (Relationships) Act, $550,000 was left in a discretionary trust for his children.

The Court noted that a claim for provision under the Family Protection Act for an ex-nuptial child fell to be determined on the same principles as any other claim. It rejected an argument based on *Re Wilson* [1973] 2 NZLR 359 that a discretionary trust should not be taken into account in assessing the competing moral claim of the legitimate children. It was equivalent to a direct testamentary provision in the circumstances. It was satisfied that a moral duty had been established, given the amount of the estate and the need for recognition of the claimant's status as a family member. However, the High Court had erred in considering that the amount provided for the legitimate children provided a basis for fixing the amount of the award. Taking into account the limited nature of the relationship between claimant and testator, which lacked shared family life and common endeavour, the moral duty was of a materially lesser order than that in cases involving lifetime relationships. Therefore, the Court considered that the lesser sum of $40,000 would be sufficient to discharge it.

Family Protection Act - limitation period

In *Price & Anor v Smith & Ors* CA261/02, 6 October 2003, the Court considered whether the equitable doctrine of fraudulent concealment could apply to claims made under the Family Protection Act 1955. Section 9 of that Act prevented the High Court hearing a claim against a deceased's estate under the Act unless made within 12 months of the grant of administration of the estate subject to a discretion to extend the time period, but only up to the date of final distribution of the estate.

The adult claimants, whose mother's estate had already been entirely distributed, were outside the statutory period but nevertheless sought an extension of time based on the equitable doctrine of fraudulent concealment. They argued that the executors and beneficiaries had concealed the fact of their mother's death and had therefore defeated their claim. The High Court allowed an extension, holding that the equitable doctrine of fraudulent concealment operated to postpone the time period, notwithstanding that there was no intention to conceal.

The Court allowed the executors' appeal on the basis that s9 left no room for the equitable doctrine of fraudulent concealment to apply. The doctrine was a creature of equity allowing postponement of limitation periods applying to equitable claims. Limitation periods were imposed on equitable claims voluntarily by the courts, which would ordinarily apply common law periods by analogy. However, the doctrine did not operate to defeat a directly applicable statutory limitation period because the courts did not have the power to override a statutory time period, especially when the claim itself was created and governed by statute. Moreover, allowing an open-ended discoverability regime would undermine the balance struck in the legislation between the efficient administration and distribution of estates and reallocations in recognition of moral duties.

Intellectual Property

Copyright in source code of computer program

In *Pacific Software Technology Ltd v Perry Group Ltd* [2004] 1 NZLR 164, the Court considered the copyright implications of a software developer's own code being embedded in the code for a computer programme developed on a commission. The issue in the case was whether the copyright in the source code of a computer program was owned by the Perry Group who commissioned the program from Pacific Software, or whether prior copyright in incorporated elements still subsisted in Pacific Software who contended that the source code contained "library" code developed independently prior to the commission.

The Court held that both in terms of the commission and of s21 of the Copyright Act 1994, the Perry Group, as the party who commissioned the source code which was developed for it, was first owner of copyright in the source code as written, having at least the right to utilise the program for the purposes for which it was developed. The program was an item of personal property and would pass to any successors, and could be assigned or adapted by the Perry Group. The exercise of these "usual" rights did not, however, displace the underlying ownership of Pacific Software in the library code.

The Court said it had to be kept firmly in mind that the situation involved two copyrights, not one, and it would be wrong to say that there was in effect a transfer of the library code to the Perry Group. This would be a draconian result that, if it had been intended, Parliament would surely have made it explicit in the legislation.

To give full weight to the position of the commissioning party, a purpose which Parliament did recognise, and to give the commission business efficacy, the Court considered it both necessary and appropriate to imply a non-revocable licence for the Perry Group to utilise the code and, further, a term that the licence inured for the benefit of any successor or assignor. That licence would then be enforceable by that third party under s4 of the Contracts (Privity) Act 1982.

The Court emphasised that this reasoning did not diminish the importance of sound industry agreements. Developers would be well advised to protect themselves by agreement otherwise the onus would be on them to demonstrate the existence and extent of alleged prior rights and the limits of any implied licence.

Trade Marks Act 2002 and comparative advertising

In *Benchmark Building Supplies Ltd v Mitre 10 (NZ) Ltd* [2004] 1 NZLR 26, the Court discharged an interim injunction restraining a form of comparative advertising by the appellant. The appellant displayed promotional brochures produced by the respondent, a competitor, outside its shops. The brochures were superimposed with bright orange stickers next to some of the products shown, stating the appellant's price with dollar amounts less than those offered by the respondent. The issue for the Court was whether this sort of comparative advertising infringed the copyright or trade mark rights of the respondent.

In relation to the copyright, the Court noted that the conventional approach to reproduction of works required some act of making something that did not exist before. By displaying the respondent's own brochures, the appellant had done nothing to reproduce the copyright works. Nothing had been copied, and even if a new work was created by applying the stickers to the brochures (and the Court doubted that), the representations of the copyright works remained unchanged. No new representations were made. There was no case of infringement by copying.

The next issue was whether there had been an infringement by adaptation of the works. The appellant's use of the brochures did not come within the specific forms of adaptation identified in the Copyright Act. The inclusive definition of adaptation was intended to provide for possible developments in technology, and was not an invitation for the courts to expand the concept of adaptation far beyond its long established meaning in copyright law. The use of the brochures involved no conversion of, or change to, any literary works.

The Court then considered whether there had been a breach of the author's moral right not to have a copyright work subjected to a derogatory treatment. This claim could not succeed. That right belongs to the author not the owner of the copyright. The respondent was not the author, as the evidence established that a number of individuals had contributed to creating the brochures and none of them were parties to the proceeding. The word "person" in the definition of author in the Copyright Act did not extend to bodies corporate except where the contrary is expressly stated. The moral rights of authors were provided to enable authors to protect the integrity of their works even though ownership passed to others. It would be contrary to the very purpose of those rights if the author's right accrued to those employing or commissioning the author, or purchasing the copyright in the works.

The issue of trade mark infringement could be dealt with by reference to s94 of the new Trade Marks Act 2002, which excludes comparative advertising from infringement. The appellant's use of the respondent's trade marks constituted comparative advertising within the scope of s94. The function of the trade marks as used by the respondent in its brochures was to identify or distinguish the retail source of the products advertised. When the appellant displayed the brochures, it did so with the intention that the respondent's trade marks perform precisely the same function as they performed upon the respondent's original distribution of the brochures. It could not be said, therefore, that the distinctiveness of the marks was in any way damaged. Nor could it be said that the appellant's use took unfair advantage of the distinctiveness or repute of the trade marks to any greater extent than more conventional forms of comparative advertising. There was no evidence that the appellant's activities, so far as they would otherwise constitute trade mark infringement, were inconsistent with honest commercial practice. Accordingly the interim injunction was discharged.

Land Law

Condition in a right of way

In *Wright v Tan* (2003) 4 NZ ConvC 193,783 the Court was asked to consider the meaning of a condition in a right of way that "no buildings be erected having a frontage wholly to the right of way". The condition had been imposed by the Auckland City Council and was notified on the land transfer title.

The Tans, whose land was subject to the condition, owned the middle of three lots (Lot 2) down one side of a right of way. Their property fronted the right of way, and originally also had frontage to an unformed paper road, although this road was closed off in 1981. The Tans purchased the property in 1999 as a vacant lot from the Youngs who retained the adjoining lot (Lot 3) fronting the street. The Tans had also obtained a narrow access strip over Lot 3 giving their lot frontage to the street.

The predecessors of the Youngs had owned Lots 2 and 3 as part of one title and had subdivided the land in 1939. One condition of the subdivision plan being approved was the right of way condition that no building be erected having a frontage wholly to the right of way. When the Tans began to build on Lot 2 the owners of the rear lot sought to prevent this contending that any building would breach the condition.

The Court held that the proposed building on Lot 2 would breach the right of way condition. After considering the common meaning of the word "frontage" and the relevant case law, the Court concluded that the condition referred to frontage of the building and not the lot. As a result, the access strip did not assist the Tans because the proposed *building* would front Lot 3, not the street. Without frontage to the street the building would breach the condition. The Court observed that it was a mystery why the Council had imposed the condition, but that it was a standard condition at the time and had probably been imposed without any real thought. The Tans could, however, apply to the court under s126G of the Property Law Act 1952 to modify or extinguish the condition.

Relief for encroachment

Relief for encroachment under s129 of the Property Law Act 1952 and the principle of non-derogation from a grant were considered by the Court in *Tram Lease Ltd v Croad* [2003] 2 NZLR 461. Tram Lease owned the freehold in two adjoining sites, one of which was subject to a perpetually renewable lease to the Croads who operated a shoe repair business from a building on the site. The lease was originally granted in 1936 and was most recently renewed by Tram Lease in 1999 shortly after it had become owner of the freehold. The Croads acquired the lease when they purchased the shoe repair business in 2000. Before Tram Lease had renewed the lease, it had renewed the lease on the adjoining site, which was not surrendered until 2002.

Tram Lease sought to demolish the southern wall of the shoe repair business because it extended onto the adjoining site, which Tram Lease wanted to develop. Although there was originally an easement providing for this, it had come to an end in 1957. The Croads sought relief for encroachment under s129 of the Property Law Act, but

also claimed that if the wall was demolished Tram Lease would be derogating from its grant and that relief was available to prevent this.

The Court held that jurisdiction existed under s129 to grant relief to the owner of a leasehold estate where the intention of the original parties was that the encroachment would be allowed. There was an "encroachment" notwithstanding that Tram Lease owned both sites. It would be for the High Court to determine whether any particular form of relief was just and equitable in the circumstances, as required by s129(2).

The Court also held that Tram Lease could be liable for derogating from its grant if it demolished the wall. The principle of non-derogation from the grant meant that no-one who grants another a right of property, whether by sale, lease or otherwise, may thereafter do or permit something which is inconsistent with the grant and substantially interferes with the right of property which has been granted. The principle embodied common honesty and fair dealing. As the purpose of the grant to the Croads was to confer secure possession, demolition of the wall would frustrate that grant if the building were to collapse. The fact Tram Lease could not have prevented the wall from being demolished at the time of the grant (when the Croads' lease was renewed) due to the adjoining lease, was of no moment because non-derogation did not depend for its operation on the construction of the document conferring the grant. Rather, the claim could rest on an implied restriction that was necessary to prevent the purpose of the grant being frustrated.

Tax and Revenue

Customs value on imported goods

In *Chief Executive of the New Zealand Customs Service v Nike New Zealand Ltd* [2004] 1 NZLR 238, the Court considered the customs value of goods imported by Nike NZ for the purposes of levying duties under the Tariff Act 1988. The issue was whether commissions paid by Nike NZ to its American parent company Nike Inc and an unrelated company Nissho Iwai American Corporation (NIAC), and royalties paid by Nike NZ to a subsidiary of Nike Inc, Nike International Ltd (NIL), had to be added to the value of imported goods for duty purposes.

The goods Nike NZ imported were manufactured by organisations not owned by the Nike group. Nike NZ would place an order with a division of Nike Inc in Hong Kong known as the Asian Pacific Apparel Office (APAO). Nike NZ could chose what and how much to order. APAO would then select the manufacturer, negotiate prices and other terms, arrange for shipping through its freight forwarder, and arrange for any variation of the orders. Another branch of Nike Inc would inspect the goods and issue a certificate in respect of them. Nike NZ was always named as purchaser. For these services Nike Inc would charge Nike NZ a commission of 7% of the manufacturer's price. NIAC's role was to arrange insurance and finance for the purchases by letter of credit and to confirm the order, all on behalf of Nike NZ. For its services, NIAC would be paid commissions ranging between 0.3% and 0.1%. Finally, Nike NZ would pay a royalty of 2.5% of net annual sales revenues to NIL, the owner of the group's intellectual property. The licence granted Nike NZ the non-exclusive right to

subcontract for the manufacture of licensed goods, and the exclusive right to sell the licensed goods.

The commissions would not form part of the customs value if, under cl 3(1)(a) of the Second Schedule of the Tariff Act, they were "fees paid…by the buyer to the buyer's agent for the services of representing the buyer overseas in respect of the purchase or goods". The Court held unanimously that the commissions paid to Nike Inc and NIAC fell within this clause and therefore did not form part of the customs value. Based on the services performed, Nike Inc and NIAC both acted as a buyer's agent, notwithstanding that Nike Inc was the parent company and had the ability to exercise significant control over the New Zealand entity, and that NIAC was not directly involved in the actual purchase of goods. The phrase "in respect of" was considered of wide ambit.

In relation to royalties, under cl 3(1)(a)(iv) of the Second Schedule a royalty formed part of the customs value only if the buyer had to pay it "as a condition of the sale of the goods for export to New Zealand". A majority (Keith, Blanchard and McGrath JJ) held that the royalties were paid as a condition of sale because of the control that could be exercised by NIL and Nike to ensure the payment of royalties. Gault P and Anderson J, dissenting, considered that the clause was not directed to a condition of the purchase of goods for importation, but to cases where the seller was obliged to pay royalties and required reimbursement from the New Zealand importer. This was not the case as far as Nike NZ was concerned, where royalties were paid for use of the trade mark and other rights and were payable on goods sold in New Zealand whether they were imported or manufactured locally.

Depreciation of trade marks as depreciable tangible property

Trustees of the CB Simkin Trust v Commissioner of Inland Revenue [2003] 2 NZLR 315 concerned the ability of the appellants to claim for depreciation of certain intangible property. Two trusts purchased trade marks from companies engaged in a business in which the marks were used. The purchases included the absolute right of use of the marks. The trusts then licensed the marks back to the respective vendor companies. The licences granted exclusive rights to use the marks for a period of seven years, subject to the payment of annual royalties. The trusts' residual rights in the trademarks were then sold, with the sales to take effect on dates corresponding with the expiry of the licences. The trustees sought to claim depreciation in two income years of the proportionate part of the write-off over the seven year period of ownership of the marks, based on the difference between the amount paid on acquisition and the amount specified as consideration for the sale at the end of that period.

The basis for the claims was that in the relevant periods the trusts owned the trade marks, and inherent in the ownership was the right to use the marks. It was said that the right diminished in value between acquisition and sale, and accordingly qualified for depreciation with sEG1 of the Income Tax Act 1994. Section EG1 permitted deduction of depreciation on any depreciable property owned by the taxpayer in that income year. "Depreciable property" was defined as, inter alia, any property of the taxpayer which might reasonably be expected in normal circumstances to decline in value while used to produce assessable income. It did not include intangible property

other than depreciable intangible property, which was defined as property listed in Schedule 17 of the Act. Schedule 17 included the right to use a trade mark. However, the Commissioner of Inland Revenue decided to disallow the deductions, and that was upheld in the High Court.

The Court dismissed the appeal for essentially the same reasons as the Commissioner and the High Court Judge. Schedule 17 described intangible property that has a finite useful life that can be estimated with a reasonable degree of certainty on the date of its creation or acquisition. Each of the items in the Schedule was to be interpreted in light of that description. There was a deliberate policy of describing in some cases the property itself and the right to use that property (such as patent rights and copyright in software), and in other cases only the right to use the property (such as trade marks), in order to restrict depreciation in the case of trade marks to cases involving a right of use. If the right to use was merely that inherent in ownership, then in the case of patent rights or software copyright there would be no need to specify it separately the right of use separately.

In this case the right to use the trade mark was enjoyed by the licensee not the licensor. In theory the licensor had the right to use as an incidence of ownership, but in fact it had no right of use exercisable during the term of the licences. This interpretation of the Schedule was entirely logical. Registered marks might be renewed indefinitely, and were not property that might reasonably be expected in normal circumstances to decline in value while used so as to meet the definition of "depreciable property". As the trusts' ownership rights were not rights to use the trade marks within the Schedule 17 meaning, it did not avail the trustees that there was a finite period of ownership and a disparity of consideration between acquisition and disposal.

Whether taxpayer affected by tax avoidance arrangement

In *Commissioner of Inland Revenue v Peterson* [2003] 2 NZLR 77 and *Peterson v Commissioner of Inland Revenue* (2003) 21 NZTC 18,069 the Court considered two appeals relating to the taxation implications of investments in special partnerships established to participate in the production of motion pictures. The issue in both appeals was whether the Commissioner could reassess the income of the taxpayer to counteract a tax advantage as a "person affected" by a tax avoidance arrangement.

Mr Peterson claimed as a deduction from his taxable income his share of losses of special partnerships. The partnerships were formed as a vehicle for investment in two motion picture films. The partnerships claimed as expenditure loans said to have been applied to the filmmaking. However, although the loans were drawn down, they were in fact repaid immediately via intermediaries. The arrangement falsely inflated costs for the purpose of increasing loss for tax purposes. Mr Peterson was not a party to the circular movement of money, nor did he have any knowledge of it.

The Commissioner disallowed the expenditure, and the Court considered that the Commissioner had been entitled to reassess Mr Peterson's income. Including illusory loans in costs constituted an avoidance arrangement under s99 of the Income Tax Act 1976. It was irrelevant that a taxpayer was not a party to, nor had knowledge of, the tax avoidance arrangement. The issue was whether the taxpayer was a person

affected. In this case the tax advantage obtained by the taxpayer was derived directly from the very arrangement in which the loan funds were treated as a cost to the partnership. The Commissioner's appeal was allowed and the taxpayer's appeal was dismissed.

Tort

Negligent misstatement

In *Attorney-General v Carter* [2003] 2 NZLR 160, the Court considered the tort of negligent misstatement. The Ministry of Transport (the MOT) and the Marine and Industrial Safety Inspection Services Ltd (M&I) issued two certificates of survey for the ship Nivanga under s217 of the Shipping and Seamen Act 1952. The plaintiffs eventually purchased the vessel but shortly afterwards it was sold for scrap. The plaintiffs claimed that the survey certificates had been issued negligently in that the condition of the Nivanga at the relevant times did not justify their issue. They sued the MOT and M&I for a variety of financial losses said to have been incurred as a result of relying on the allegedly negligent and erroneous survey certificates. The issue for the Court was whether a common law negligence claim and a claim for negligent breach of statutory duty could be maintained.

The Court said that whether it is fair, just and reasonable to hold that a duty of care is owed by defendant to plaintiff in a situation not covered by authority is conventionally addressed in terms of proximity and policy. In cases of negligent misstatement, the proximity inquiry generally focuses on the inter-dependent concepts of assumption of responsibility and foreseeable and reasonable reliance. The Court considered that the idea of one person assuming, in the sense of coming under, a responsibility to another in tort, had value when understood in the sense that in certain circumstances the law requires responsibility to be assumed. The expression "deemed assumption of responsibility" expresses this process of thought.

If the defendant had, or was deemed to have, assumed responsibility to the plaintiff to be careful in what is said or written, thereby creating proximity, it would usually, subject to policy considerations, be fair, just and reasonable to hold the defendant liable for want of care. When a defendant's assumption of responsibility was not voluntary, the law would deem the defendant to have assumed responsibility and find proximity accordingly if, when making the statement in question, the defendant foresaw or ought to have foreseen that the plaintiff will reasonably place reliance on what is said. Whether it was reasonable for the plaintiff to place reliance on what the defendant says would depend on the purpose for which the statement was made and the purpose for which the plaintiff relied on it.

If the necessary proximity had been established in this way, there was a prima facie duty of care. The second inquiry was whether policy considerations negated or confirmed that prima facie duty. When, as in the present case, the environment which brings the parties together is legislative, the terms and purpose of the legislation will play a major part in deciding the issues which arise.

In this case the Court thought that it could not reasonably be said that the MOT and M&I assumed or should be deemed to have assumed responsibility to the plaintiffs to take care in issuing the certificates not to harm their economic interests in the Nivanga. Hence the necessary proximity between the parties was absent. The statutory environment was such that the purpose of the certificate was entirely different from the purpose for which the plaintiffs claimed to be entitled to place reliance on it. The purpose of the survey requirement was the safety and seaworthiness of ships. There was nothing in the legislative scheme or in the individual sections suggesting that survey certificates were intended to be issued or relied on for economic purposes. Also, in none of the capacities in which the plaintiffs claim to have suffered loss were they the person or within the class of persons who were entitled to rely on the certificates. Had it been necessary to address policy issues, the Court considered that the plaintiffs were in difficulty on that limb of the enquiry as well. The MOT and M&I were in the position of regulators of the safety of shipping in New Zealand and should be free to perform their role without the chilling effect of undue vulnerability to actions for negligence. The safety focus of the survey regime also points away from the imposition of a duty of care to guard against economic loss. Accordingly, the Judge's decision to strike out the causes of action based on common law negligence was upheld.

Turning the question of negligent breach of statutory duty, the Court agreed with the approach taken by the House of Lords in *X (minors) v Bedfordshire County Council* [1995] 2 AC 633 that there was no such cause of action as negligent breach of statutory duty. This cause of action should have been struck out as not maintainable. If the statute itself created a duty to take care, a breach of that duty would result in a breach of statutory duty simpliciter, not a negligent breach of statutory duty. The statutory duty involved in the present case was the duty to issue the relevant survey certificates. The MOT and M&I were not, in statutory terms, obliged to take care in doing so. Any question of an implied duty to take care was to be assessed in the context of whether a common law duty of care existed. Hence there could be no breach of statutory duty in issuing a certificate negligently but, if at all, only in issuing it erroneously. This cause of action should also have been struck out on the basis that as the statutory environment did not support a common law duty of care, it could not logically support the view that Parliament intended there should be a cause of action under the statute for economic loss deriving from the negligent issue of a certificate.

Spoliation of evidence

In *Burns v National Bank of New Zealand Ltd* CA159/02, 26 September 2003, the Court considered whether a tort of spoliation of evidence should be recognised as part of the law of New Zealand. Mr and Mrs Burns alleged that the Bank's failure to discover certain documents in earlier proceedings brought against it resulted in the Burns suffering loss in that they would not have settled the proceedings or would at least have settled on more favourable terms. Their statement of claim sought, inter alia, damages for spoliation of evidence.

The Court held that an independent tort of spoliation should not be recognised in New Zealand. A tort of spoliation would extend tort law into the area of litigation-related misconduct during the course of proceedings, an area which had been seen as not properly within the established litigation based torts and the Court considered that a

large measure of caution should be exercised before overturning such a long-standing policy choice. In addition, the existence of the tort might encourage over-complete discovery which can increase costs, serve to obscure the truly relevant documents and undermine the aims of the reforms recommended by the Law Commission to limit the discovery process. Recognition of the tort as an interference with a property right would also mean that a defendant would have difficulty seeking compensation based on the tort as it would be difficult to point to a chose in action or probable expectancy to protect.

Even assuming that the problem of destruction or concealment of evidence was widespread in New Zealand the Court considered that the recognition of an independent tort was not the answer. It was unlikely to have any great deterrent effect and it was not the time for the courts to be creating new remedies when the Law Commission had so recently recommended strengthening existing remedies and the matter was under consideration by the Rules Committee.

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B IMPORTANT CRIMINAL CASES

Elements of offence

Aggravated burglary

The issue in *R v Panine* [2003] 2 NZLR 63 was whether unlawful entering is an essential element of aggravated burglary in terms of s240A of the Crimes Act 1961. By reference to the legislative history of the provision the Court held that it is not.

The Court considered that the original form of the Bill and its amendments supported a construction that the crime was completed upon entering a building or ship with intent coupled with the use of a weapon. In addition, the penalty for an offence under s240A was not disproportionately severe in terms of s9 of the New Zealand Bill of Rights Act 1990. It could not be said that the combination of a person entering a building or ship with intent to commit a crime and having a weapon with him or her could not reasonably justify a term of up to 14 years with potential terrorist cases providing an obvious example.

The Court also commented that while statements reported in Hansard may sometimes be of help in interpretation they were almost inevitably of less significance than the precise language used by parliamentary counsel.

Director's liability for company employee breaches of the Securities Act (Contributory Mortgage) Regulations 1998

In *Assistant Registrar of Companies v Moses* (2003) 9 NZCLC 263,278, the Court considered the liability of directors of broker firms for actions of the broker under r41 of the Securities Act (Contributory Mortgage) Regulations 1998. The regulation provided simply that "a broker or a director of a broker" who contravened the regulations would be liable.

The Court held that had it been intended to make the director liable for the actions of a broker, the drafter would have been expected to use different wording and structure. That structure would generally include the distinct and plain listing of the directors amongst those who may be criminally liable without fault by that person and the creation of statutory defences. Such wording and structure was used elsewhere in the Securities Act 1978 in relation to director liability. The Court also rejected the argument that this interpretation would leave the reference to directors in r41 superfluous: r40 imposed a distinct obligation on directors to give notice of breaches of the Regulations.

Fraudulent use of a document

In *R v Johnson* [2003] 3 NZLR 491, the Court of Appeal considered whether the offence of fraudulent use of a document can apply in respect of any document or only one inherently capable of being used to obtain pecuniary advantage. The accused was convicted of fraud, including 19 breaches of s229A of the Crimes Act 1961. The documents were principally loan applications made by the appellant to lending

institutions, but also included financial statements, an agreement for sale and purchase, a deed of lease and a driver's licence. The appellant used the documents to obtain loan moneys. He appealed against conviction, arguing that the words in s229A "any document that is capable of being used to obtain any privilege, benefit, pecuniary advantage, or valuable consideration" referred to a document that could by itself be exchanged or redeemed for a benefit. Since the loan application and supporting documents could not obtain a loan themselves, and could only be used for the purpose of obtaining loans, the documents were not "capable" of obtaining a benefit. The Crown opposed the appeal, submitting that the wording of s229A did not require that the document have intrinsic worth. The Court of Appeal held that section 229A of the Crimes Act 1961 encompassed both documents "inherently capable" of being used to obtain a pecuniary advantage or benefit and those that were "situationally capable", meaning that they were not of themselves capable of conferring a benefit but were in fact used to that end.

Murder - party liability

R v Rapira [2003] 3 NZLR 794 concerned appeals against conviction and sentence by the seven young offenders who were involved in the murder and aggravated robbery of a pizza delivery driver. Two of the appellants pretended to be customers who had ordered a pizza, while the others hid. The victim was struck on the side of the head with a baseball bat, and the appellants left the scene with the food and drink from his vehicle. Some time later two of the other appellants observed the victim staggering around injured. They cut his belt bag and took money from him. Unable to get assistance, the victim died as a result of the blow to the head. The appeals against conviction were advanced on a wide range of grounds.

The Court first addressed the knowledge required by s66(2) of the Crimes Act 1961 of parties to murder and culpable homicide. The Court held that the essential question for establishing guilt of murder under s168 of the Crimes Act was whether each accused had knowledge that intentional infliction of grievous bodily injury by another party to the common intention, of robbing the driver, was probable. Intention to kill or knowledge that death was likely to ensue was not necessary for the liability of the secondary party under s168.

The next issue was whether a verdict of manslaughter was available for a secondary party where a principal offender was convicted of murder under s168. The Court considered that where the principal was guilty of murder, secondary parties were guilty of manslaughter under s66(2) if they knew that the infliction of physical harm, which was more than trivial or transitory, was a probable consequence of the prosecution of the common purpose of robbing the driver. It was not necessary for death to be intended or foreseen by a secondary party. It was possible that a secondary party could be convicted of manslaughter where the principal offender was convicted of murder. Different foresight or intent as to consequences within the prosecution of the same common purpose was reflected in the hierarchy of culpability provided by the legislation, following a continuum of foreseeable harm. It was only if the principal stepped outside the common design in a way totally unforeseen that issues as to the application of s66(2) arose. Lack of knowledge of the principal's intent to inflict grievous bodily harm affected the culpability of the secondary parties for murder but not their guilt of manslaughter.

A further issue related to the proper directions to be given to a jury where the Crown had to prove in accordance with s22 of the Crimes Act that a person under the age of 14 years knew either that the act constituting the offence was wrong, or that it was contrary to law. The Court considered that the jury had to be satisfied beyond reasonable doubt that an accused under the age of 14 knew that he was doing wrong or acting contrary to law in all the essential ingredients of the offence which the Crown was required to prove. The trial Judge had correctly directed the jury on the requirement of s22 that it could not infer knowledge of wrongfulness from the participation itself, but that it could draw on its knowledge of the understanding of 12 year olds as long as the focus was on the particular accused. The evidence that a young accused understood that he was doing wrong might include evidence of previous convictions and criminal behaviour, and evidence of previous criminal behaviour was not excluded by virtue of the fact that the accused could not be prosecuted for the earlier behaviour by reason of age. The trial Judge was not required to use any specific language in directing the jury regarding the accused child's capacity to appreciate that the act was wrong or contrary to law. The trial Judge had correctly instructed the jury in the language of the Act.

In relation to the appeals against sentence, the Court observed that the presumption of life imprisonment for murder under s102 of the Sentencing Act 2002 was not displaced in the circumstances of the case. The test was whether the sentence of life imprisonment was manifestly unjust. This was an overall assessment that had to be made on the basis of the circumstances of the offence and the offender. The use of "manifestly" required the injustice to be clear. The assessment of manifest injustice fell to be undertaken against the register of sentencing purposes and principles in the Sentencing Act, and in particular in the light of ss7, 8 and 9 of that Act. The standard of manifestly unjust was likely to be met in exceptional circumstances only. Although youth was a factor to be properly taken into account in sentencing, where the offending was grave the scope to take account of youth might be greatly circumscribed. Youth of itself was not a sufficient reason to make life imprisonment manifestly unjust if the offender had the necessary intent or knowledge of consequences to be guilty of murder. In the case of a young offender sentenced to life imprisonment, use of the power under s25 of the Sentencing Act for early consideration of parole might be appropriate where, through developing maturity and positive responses to correction, the ten year non-parole period ought to be reconsidered in the interests of justice.

Offences under s233(1)(b) of the Fisheries Act 1996

The issue in *R v Armstrong & Ors* CA194/03, CA230/03, CA231/03, CA232/03, CA233/03 & CA234/03, 15 September 2003, was whether s233(1)(b) of the Fisheries Act could be invoked to prosecute people who took and sold fish without a permit or other authority. The section created an offence if fish were taken or otherwise dealt with "knowingly, for the purpose of obtaining any benefit under this Act". Two District Court Judges had held that the unauthorised taking of paua and rock lobster was not obtaining a benefit under the Act, and therefore that depositions evidence did not disclose necessary elements of charges against a group involved such activities. The Crown appealed.

The Court held that the ordinary meaning of the phrase "for the purpose of obtaining any benefit under the Act" was any benefit which existed by virtue of, or as a result of the application of, provisions of the Act. The Crown had contended for a wider meaning, on which the phrase encompassed any benefit which was regulated by the Act, such as the taking of fish. The Court however considered that this meaning was untenable. The context and legislative history suggested that the purpose of the qualifying phrase, which was added late in the legislative process, was to ensure that the conduct caught by the provision had a sufficient degree of seriousness. The Crown's contention would not have served this purpose. In any event, the words could not bear such a meaning.

It was acknowledged that the Court's interpretation left the section with little practical effect. The Court considered that the legislature had proceeded in error, enacting words which were inapt to serve their purpose. However, it was unclear what they had intended, so the Court could not rectify the drafting error. It recommended legislative clarification.

Possession of precursor substances

In *R v Joll* (2003) 20 CRNZ 144, the Crown successfully appealed by way of case stated against a ruling by a District Court Judge. The respondent had been found to be in possession of a large quantity of medication tablets that contained the substance ephedrine, an essential chemical for the production of methamphetamine. The Judge concluded that, for the purposes of s12A(2)(b) Misuse of Drugs Act 1975, an accused must intend to personally use a precursor substance for the manufacture of a Class B drug. It was therefore insufficient for the Crown to establish that the respondent intended that someone else would use it in that way, and the Judge directed the jury to return a verdict of not guilty.

The Court considered that s12A(2)(b) was clear. The person in possession of the precursor substance must intend that it be used in the specified ways (in this case in the manufacture of methamphetamine). The section does not, however, identify any person by whom the substance is intended to be so used. The use of the passive "is to be used" in subsection (2), in contrast with words such as "with the intention of using it", strongly pointed away from an interpretation that the manufacture must be by the person in possession. The focus of the section was on those who gather precursor substances, but whose roles fall short of attempts to commit the substantive offences of manufacturing or dealing in controlled drugs. There was no policy reason why the culpability should be any different because the intended use is to be by another person.

The Crown was entitled to an order for a new trial under s382(2)(b) Crimes Act. The evidence against the respondent was compelling and the prospects of conviction at a new trial high. The original verdict in the District Court was directed, and there was nothing to suggest that any undue prejudice would result to the respondent from a direction for a new trial.

Evidence

Evidential Breath Tests

In *Police v Tolich* (2003) 20 CRNZ 150 (heard together with *Police v Hunt*), the respondents, Ms Tolich and Mr Hunt, were convicted of driving with excess breath alcohol. In each case the offending in question occurred in 2002, after s9(1)(b) Land Transport (Road Safety Enforcement) Amendment Act 2001 came into force. Before that amendment, the police had been required to inform subjects that the test "could of itself be sufficient evidence" for conviction. The amendment changed "sufficient" to "conclusive". However, the police standard form warning did not change in response to the statutory amendment. Both Ms Tolich and Mr Hunt returned a positive evidential breath test result and were advised in accordance with the unchanged form. The respondents contended that the advice did not comply with s77(3) Land Transport Act 1998 and that the non-compliance could not be saved by reference to s64(2) of the Land Transport Act 1998.

The Court held that the words "sufficient" and "conclusive" had to be examined with reference to their context and the information or advice that, in conjunction with related words, they convey or connote. The phrases "the test could of itself be sufficient evidence to lead to that person's conviction" and "the test could of itself be conclusive evidence to lead to that person's conviction" were cognitively identical. Each phrase indicated conditionality and each indicates that the test could lead to the person's conviction. The word "could" so qualified both the alternative words in question as to render their contextual meaning the same. A liberal approach had to be given to s64(2). It was not contended by either respondent that they were prejudiced by the failure to use the new statutory wording, nor was there any evidentiary basis for such an argument.

Disclosure of evaluative material to defence

R v Taylor CA130/02, 17 December 2003, concerned an application for disclosure post-trial to support the appellant's appeal, one ground of which was that there had been inadequate disclosure by the Crown. The appellant sought a review of documents that were not disclosed pre-trial and also sought disclosure of various charts that police had prepared as part of their investigation into the murder for which the appellant had been convicted at trial.

The Court reiterated that the discretion to require production of documents for an appeal will not be exercised lightly. With regard to the non-disclosed documents, the appellant had fallen far short of the threshold: the likely existence of information cogent to the inquiry of whether a miscarriage of justice had occurred. The Crown Solicitor's office had reviewed the deletions before trial and no issue was raised by the defence, either before or during the trial, apart from an assurance that the deletions were done according to proper principle.

With regard to the charts, the Court noted that evaluative material or "work product" (as it has been termed in North America) had in the past been held to be exempt from disclosure by courts in this country and there was no evidence of the courts' requiring disclosure of such material in other jurisdictions. The Court pointed out that the

purpose of disclosure was to ensure that the defence has access to primary material held by police to the extent required by the relevant statutes (such as the Crimes Act, the Official Information Act, the Privacy Act and the New Zealand Bill of Rights Act) and the common law. Requiring disclosure of additional material of the type sought could unduly inhibit the police in their investigations and be unworkable in practice. In an adversarial system it was not for the Crown to perform evaluative and analytical work for the defence although there might be the very rare case where the sheer volume of material could compromise an accused's right to adequate facilities to prepare a defence. The Court therefore left open the possibility of pre-trial applications being made for disclosure of such material where, in the particular circumstances of the case, the interests of justice so required.

In the present case however, the Court was not prepared to make an order for disclosure. While there was a large volume of material, electronic disclosure allowed the material to be searched electronically and there would now be major practical problems in "sanitising" the charts by removing information based on informant reports.

Hearsay evidence

In *R v Howse* [2003] 3 NZLR 767, the appellant appealed against his conviction for the murders of his two step-daughters. For his appeal against sentence see p115 below.

On at the appeal against conviction, the Court found that an undesirable amount of evidence relating to the appellant's prior bad conduct and disposition which was more prejudicial than probative was led and was apt to mislead the jury from a dispassionate analysis of the evidence and an assessment of its true worth.

The appellant submitted that statements made by the two victims to various people alleging that the appellant had sexually abused them were inadmissible hearsay. The Court commented that it was essential in any discussion of hearsay to identify the purpose for which the evidence is led. The fact that the words are said or written may be significant in itself. But the words may also assert the occurrence of some event, the happening of which is in issue. This duality arose in this case. The fact that one of the deceased girls told her friends that her step-father was abusing her had relevance to motive once it was established that the appellant was aware of the making of the allegation. If evidence was led to prove the fact that allegations were made, consideration must necessarily be given to whether the same evidence could also be used before the jury to prove the truth of the allegations. Evidence was always admissible to prove the fact that words were spoken if that confined fact is relevant. Whether the evidence may also be used as proof of the truth of the words spoken engages the hearsay rule. The question became whether the evidence should be admitted for that purpose also. If the evidence was not admitted as proof of the truth of what has been said then the Judge must direct the jury very carefully as to the use they may and may not make of the evidence. If the risk is too great that the jury will use the evidence inappropriately, despite proper judicial direction, the primary evidence should be excluded as involving too much potential prejudice as against its probative force.

The Crown appeared to be saying that the primary purpose of the evidence was to prove that the allegations were made. But it was apparent that the Crown also intended to use the evidence to support the proposition that the appellant had indeed been abusing the girls. In relation to that second dimension, the evidence was inadmissible unless it qualified for admission under the *R v Manase* [2001] 2 NZLR 197 criteria, subject to an overriding assessment of probative value versus prejudicial effect. The Court found that the allegations did not meet the threshold requirement of sufficient apparent reliability and therefore should have been excluded as evidence of the truth of the allegations. The deceased girl's diary entry to similar effect was also inadmissible. A prima facie miscarriage of justice justifying a new trial had been shown.

Turning to the summing up, the Court considered the Judge's directions on the use of the hearsay evidence were insufficient. On the basis that the evidence was not admissible as proof of the truth of the allegations, the Judge should have given a clear and firm proper use direction. Even if the evidence was admissible as proof of the truth of the allegations, the Court considered the Judge should have invited the jury to exercise considerable caution before accepting it for that purpose.

Despite the expressed concerns, the Court, considering that no substantial miscarriage of justice had actually occurred, applied the s385(1) proviso. The Court was sure that even if the problems with the trial had not occurred, the jury would without doubt have convicted the appellant. The appeal against conviction was accordingly dismissed.

Judges' rules – failure to show accused the record of his interview

In *R v Crawford* CA257/03, 29 July 2003, the Court considered the effect of failing to show the appellant a record of his interview. The appellant was jointly charged with murder. He had come under suspicion as a result of a conversation with an informant, who claimed that the appellant had confessed to helping a co-accused dispose of the body. Later, the appellant was arrested for drunk driving. He was taken to the interview room where police steered discussion to the deceased's disappearance. The police did not take notes. The day after the interview the two detectives present and a third police officer discussed the interview and a record was made. The appellant was not shown the notes until they were obtained as part of pre-trial discovery. The appellant gave evidence denying the officers' record of the conversation was correct. He also said he would not have spoken to police if they had taken notes during the interview.

The Court noted that the record corroborated a statement made by the informant. The Court also noted that the police were not intending to call the informant, but were seeking to obtain information from the appellant which would substantiate what the informant had said about his conversation with the appellant. A large part of the record was more probative in relation to the case against the co-accused than against the appellant. It was also very prejudicial to the co-accused.

The Court concluded that it would be unfair for the statement to be used given the possibility of unreliability and the lack of an opportunity for the appellant to check what was said. In this regard it was relevant that the appellant was clearly a suspect at

the time of the interview and that the interview was used to strengthen the case against him. In relation to the comments concerning the other accused, there was a further issue of the admissibility of such evidence against a co-accused charged jointly. For reasons of fairness the evidence should have been excluded.

New Zealand Bill of Rights Act – unreasonable search and seizure

R v Magan CA252/03, 29 September 2003, concerned the unlawful search of a bag undertaken during an otherwise lawful police search of residential property occasioned by a domestic dispute. The bag was found to contain methamphetamine. The police involved said that they had acted to secure the situation and ensure that there was nothing dangerous in the bag (which had been involved in the dispute).

It was accepted that the search was unlawful. The Court held that it was nonetheless reasonable. It noted that in determining the reasonableness of a search, a balance had to be struck between privacy and other competing public interest values. This raised questions of fact and degree. Here, the privacy interest was diminished or outweighed by several factors. First, entry onto the premises was clearly justified and occurred in a situation of urgency. Secondly, the search of the bag was perhaps unnecessary in hindsight but in the circumstances of the moment, it was understandable for the police to have checked the bag to ensure that there was nothing dangerous in it. Thirdly, the apprehension of danger itself diminished the significance of the failure to comply with the law. Finally, the intrusion did not involve the use of strenuous force. Therefore, there was not a highly serious intrusion on the appellant's privacy.

The countervailing public interest was also an important one: the need for the police to protect the public by intervening promptly and effectively in confrontations including domestic disputes. It was appropriate to accord the police some margin of appreciation in dealing with such situations. In all these circumstances, the search was reasonable. The appeal was therefore dismissed.

New Zealand Bill of Rights Act – right to refrain from making a statement

R v Kokiri CA190/03, 1 October 2003, concerned the scope of the right to refrain from making a statement in s23(4) of the New Zealand Bill of Rights Act 1990. The appellant had agreed, after speaking with his lawyer, that he would not make a statement. His lawyer informed the police of his decision. After the lawyer left, an officer approached the accused and struck up a conversation about the charge of manslaughter he faced. The appellant then agreed to make a statement. His lawyer was neither contacted nor present. The High Court ruled the statement admissible.

While the Crown accepted that the appeal should be allowed, the Court discussed the principles involved in this type of case. The High Court had misread the combined effect of two decisions on s23(4), *R v Kau* CA179/02, 22 August 2002, and *R v Neho* CA84/03, 26 March 2003. *Kau* suggested that the police could not question a suspect once he had refused to make a statement. The High Court had read *Neho* as suggesting that this was not an absolute rule and that a balancing exercise was required to determine whether continued questioning was appropriate. The Court

explained that this was not the case. *Neho* emphasised that *Kau* had to be read as a whole. It did not qualify the principle expressed in it.

The Court accepted that there was a clear breach of the right to refrain from making a statement as the accused had been inappropriately manoeuvred into a situation where it was prised out of him while he was in a shaken state. The Court turned to the question of whether the statement should nonetheless have been admitted on the principles enunciated in *R v Shaheed* [2002] 2 NZLR 377. The Court noted a number of factors. First, the Court said that the right to silence was fundamental and carried significant weight in the balancing process. Secondly, the impropriety of the tactics used by the police was relevant. Thirdly, the statement was not central to the case and there were concerns about its reliability. Weighing these factors, the Court concluded that the probative value of the statement was insufficient to justify admitting the evidence.

New Zealand Bill of Rights Act – right to be informed of right to counsel

In *R v Ji* [2004] 1 NZLR 59 the Court excluded evidence that was obtained in breach of the right to silence and discussed and highlighted as a matter for future consideration the question of whether an accused must be told that counsel are available for free. The appellant was a Chinese national with limited English who was detained for questioning in respect of an incident with a motor vehicle causing the death of his estranged girlfriend. He was questioned over a lengthy period through a Mandarin/English interpreter, but no videotape of the interview was made and no notes were taken in Mandarin. The appellant was not informed his girlfriend had died. When this was revealed to him after several hours of questioning, he became distressed and said he wished to say no more but he was pressed to answer further questions for a period lasting several more hours. Eventually he was informed that he could receive legal advice at no cost (having previously been informed of the right to a lawyer but not that this was free).

The Court held that the absence of video-taping and a record in Mandarin fell below best practice. Pressing the appellant to continue when he had indicated he did not wish to answer any more questions amounted to breach of both the Judges' Rules and the New Zealand Bill of Rights Act. As a consequence, all of the interview after that indication was excluded.

The Court reviewed the authorities on the right to be informed of the right to counsel. The Court observed, without deciding, that the practical realities for indigent persons, who may be deterred from asking for legal advice unless they are aware it is free, together with the statutory objectives of the Legal Services Act 2000, made a strong argument that police should be required to volunteer information about the free service in order to give full effect to the right. The majority of the Court indicated a preference for the view that providing this information was not "facilitation" of the right to counsel, which this court in *R v Mallinson* [1993] 1 NZLR 528 held was not necessary, but rather was integral to, in the words of the Court in *Mallinson*, a "fair opportunity for the person arrested to consider and decide whether or not to exercise that right."

Res gestae – re-examination as to credit

R v Meynell CA180/03, 13 November 2003, concerned an appeal against a conviction for murder. The appellant had been convicted of murdering the son of his de facto partner. The principal question at trial was whether the appellant, his partner or some visitor had injured the boy. The Court discussed several issues. The first was whether evidence of prior assaults on the victim in the days before his death were admissible as falling within the res gestae. The Court held that despite the lapse of time, the evidence was admissible in the circumstances. The real question was whether the evidence was legitimately probative, to an extent which outweighed the prejudicial effect of the evidence. Because the alleged crime had occurred in the context of an ongoing relationship between the victim and the appellant, it was held that the evidence was admissible as indicating the character of that relationship. This could be taken into account in assessing whether the appellant or his former partner had caused the injuries to the victim.

Secondly, the Court considered the scope of permissible re-examination. It adopted Australian authority suggesting that a party is entitled to re-examine to explain away facts elicited in cross-examination, unless as a matter of discretion the Trial Judge excludes the evidence on the basis that its prejudicial effect outweighs its probative value. Evidence of prior assaults on the mother was therefore admissible, as it justified her explanation that she had made an earlier statement helpful to the appellant because she was in fear of him.

Similar fact evidence

In *R v Bull* CA313/03, 17 November 2003, the appellant had been indicted on 15 counts involving sexual offending against three teenage boys. The appellant denied that anything improper took place and he sought severance of the counts involving one complainant. The Court concluded that the overall pattern of the appellant's alleged offending demonstrated sufficient specific similarity between the cases to make the evidence clearly more probative than prejudicial. The coincidence of each of the three complainants giving similar accounts of the appellant's modus operandi, with no suggestion of collaboration, strongly suggested that each complainant was telling the truth and was reliable in his account of what happened to him. The evidence of the other complainants was of course relevant only to what they made of the credibility of the complainant under consideration. With the giving of an appropriate jury direction there would be little residual risk of illegitimate prejudice to the applicant. Therefore it was not conducive to the ends of justice to sever the counts in relation to one complainant. The appeal was dismissed.

When considering similar fact evidence and evidence of prior misconduct, the Court said that the ultimate inquiry is always whether the evidence in question is more probative than prejudicial. The word "prejudicial" in this context meant prejudicial in an illegitimate way, which is by inviting or suggesting a process of reasoning that the law did not allow. Evidence that was legitimately prejudicial to the accused was probative evidence. To be probative or legitimately prejudicial, the evidence must be relevant in the sense of logically tending to prove a fact or facts in issue. However, evidence which proves no more than offending of a generally similar kind on another occasion is not legally probative of the facts of the instant case.

To be admissible, at least in a case such as the present, evidence of similar offending requires a sufficient degree of specific similarity as to timing, circumstance, manner or otherwise, in order to elevate it to the point at which the law will treat it as having acceptable relevance. The Judge must always seek to identify what feature or features of the events that occurred on the other occasion or occasions give those events sufficient specific similarity to the instant allegations to constitute the necessary legal relevance. In a case of the present kind, where there was no question of identification and the issue was whether the conduct alleged occurred at all, the probative force of similar fact evidence was not as direct proof, in the sense that if the accused has behaved in a certain way on another occasion, he must have done so on the occasion now under consideration. Rather the probative force of the similar fact evidence lay in the support which it gave to the credibility of the instant complainant because of the unlikelihood, absent collaboration, that the relevant specifics of that complainant's allegations had been manufactured when the accused is said or can be shown to have behaved in that specific way on another occasion. It did not matter whether one spoke in terms of mere propensity not being enough, whereas specific propensity is enough, or used other terminology. That was of less importance than demonstrating a clear appreciation of the permissible reasoning process and bringing it home to the jury.

Criminal procedure

Amendment of informations

In *Blakemore v Waitakere District Court & Anor* CA25/03, 22 September 2003, the Court considered the District Court's power to amend an information after a plea of guilty had been entered but before sentencing. The appellant, who was charged with a number of offences relating to the cultivation of cannabis, had been proceeded against summarily and had pleaded guilty following a status hearing. The District Court Judge did not enter a conviction but rather remanded the appellant for sentencing. The Police subsequently wished to make an application for seizure of certain assets under the Proceeds of Crime Act 1991 and applied to the District Court to have the information amended to lay the offences indictably. The Court amended the information using its power under s43 of the Summary Proceedings Act 1957.

The Court noted its earlier decision in *Jones v Police* [1998] 1 NZLR 447 that the power of amendment ran beyond the point when the Judge reserved a decision and lasted until the guilt of the accused was determined. The entry of a guilty plea by the accused did not, under s67 of the Summary Proceedings Act, equate with a conviction: *Collector of Customs v Woolley* [1980] 1 NZLR 417. Accordingly, the power to amend continued past the plea of guilty and up until a conviction was entered.

The Court also rejected the appellant's submission that the Court's power in this case had been exercised for an improper or collateral purpose. The Proceeds of Crime Act was designed as a part of the penalty to be imposed on certain offenders. It was not in any way collateral to the criminal prosecution, but rather integrally linked to it.

Name suppression

In *Re Victim X* [2003] 3 NZLR 230 the Court considered several issues relating to the grant of name suppression for victims of crime under s140 of the Criminal Justice Act 1985.

Soon after the arrest of three men on charges related to an intended kidnapping, the intended victim had successfully applied in the High Court for name suppression. An initial application by media to have the order set aside failed. The charges proceeded to trial before a jury in the High Court. A few days into the trial, the trial Judge issued a minute directing that the issue of name suppression be reconsidered taking into account "the change of circumstances", particularly fact that the intended victim was now to give evidence at the trial. Following oral argument, the Judge set aside the order. The intended victim sought to appeal.

The Court first considered whether it had jurisdiction to hear the appeal, sitting either as High Court judges or as the Court of Appeal. The Court concluded that it did not. In general a High Court judge could not rehear or review a final order in the absence of a legislative provision to that effect. Section 140 conferred no power on the High Court to rehear or review a final decision to set aside a suppression order. Once that order was set aside, there was no power in that Court to revive it. Nor was an appeal to the Court of Appeal available under s66 of the Judicature Act 1908. Section 66 did not allow appeals in criminal matters: *Ex Parte Bouvy (No 3)* (1900) 18 NZLR 608 (CA). The name suppression removal order was made by a Court exercising jurisdiction in a criminal case and under a provision that required criminal proceedings for the order to be made. There was accordingly no basis for bringing the appeal within s66.

The Court nonetheless went on to consider the merits of the appeal. The Court emphasised that the proper starting point in considering name suppression applications is the principle of open justice. This principle required that there be no restriction on publication of information except for compelling reasons or in very special circumstances. The Court also emphasised that it was not necessary to consider what the public interest in disclosure required in the individual case: the principle of open justice was established and was to be applied in all criminal cases.

The Court noted that there was no evidence that disclosure would compromise the administration of justice. The Court characterised the appellant's objection as that insufficient weight had been placed on privacy interests in considering whether sufficient reason for overriding the open justice principle existed. The Court noted that this submission faced the difficulties inherent in challenging the exercise of discretion. The Court concluded that the Judge had conducted a thorough assessment of the privacy interests in the case and had taken into account the relevant provisions of the Victim Rights Act 2002. No error capable of correction on appeal had been shown. The Court also rejected a submission that s16 of the Victim Rights Act could be read so widely as to require suppression of the victim's name unless the name was relevant to the facts in issue.

Principles applying to section 347 orders

In *Parris v Attorney-General* [2004] 1 NZLR 519, the Court outlined the correct test for making a s347 order and discussed its application. The appellant was charged with threatening to kill her partner and with wounding him with intent to cause grievous bodily harm. At trial the issue was whether the appellant had formed or had the capacity to form the intention necessary to sustain the charges. This was the subject of expert evidence. Witnesses called for the appellant laid a foundation for defence counsel to submit to the jury that the Crown had not proved the necessary intent in each count beyond reasonable doubt. In rebuttal evidence the Crown expert indicated, at one stage, that he accepted that it was reasonably possible that the appellant did not have the necessary intent. On the basis of this evidence, defence counsel submitted to the trial Judge at the conclusion of the defence case that the jury could not properly convict. The trial Judge discharged the appellant under s347 of the Crimes Act 1961. The Crown sought judicial review of this order. The High Court Judge set aside the s347 order and directed a retrial. The appellant appealed to this Court.

The leading authority, *R v Flyger* [2001] 2 NZLR 721, was discussed and clarified. The Court suggested that it was helpful in s347 situations generally, to correlate the exercise upon which the Judge is engaged in determining a s347 application with the function of the Court of Appeal when considering an appeal on evidentiary grounds. Section 385(1)(a) of the Crimes Act 1961 provided that if the verdict of a jury is unreasonable or not supported by the evidence the appeal was to be allowed. Hence when faced with a s347 application, whether on the depositions, at the close of the Crown case, or after defence evidence had been heard, the Judge could usefully be guided by the same concepts. There should be s347 discharge when, on the state of the evidence at the stage in question, it was clear either that a properly directed jury could not reasonably convict, or that any such conviction would not be supported by the evidence. In most cases these two propositions were likely to amount to the same thing. The Court noted that it was vital to appreciate the proper compass of the word "reasonably" in this context. The test must be administered pre-trial or during trial on the basis that in all but the most unusual or extreme circumstances questions of credibility and weight must be determined by the jury. The issue was not what the Judge may or may not consider to be a reasonable outcome. Rather, and crucially, it was whether as a matter of law a properly directed jury could reasonably convict. Unless the case was clear-cut in favour of the accused, it should be left for the jury to decide.

In this case, although the jury was obliged to carefully consider the expert evidence, they were not obliged to accept it or any aspect of it. It would not be unreasonable in a case like the present, involving assessment of intention, for the jury to find itself unpersuaded, even if there was a consensus among the medical witnesses, that automatism was a reasonable possibility. Had the trial Judge directed himself correctly in law he could not have been satisfied that this was a proper case for a s347 discharge.

Screening of complainant

In *R v Wihongi* CA432/02, 6 May 2003, the Court remarked on the appropriateness of screening the complainant, while he or she is giving evidence, from the accused. The Court noted that the trial courts' inherent power to regulate the manner in which evidence was given was not disputed. However, the power to screen witnesses from the accused should be invoked sparingly. In the case of a mature complainant, rare circumstances would be required to justify a departure from the accused's right to see and hear trial witnesses.

The Court was not concerned by the exercise of the Judge's discretion in the present case. Had there been evidence of a regional or national easing of restraint in the exercise of the discretion to screen witnesses, an exemplary response might have been required. However, there was no evidence of that trend.

Sentencing jurisdiction of District Court on reference from the Youth Court

In *R v P* CA59/03, 18 September 2003, the Court considered the jurisdiction of the District Court in sentencing young persons ordered to appear for sentence by the Youth Court under s283(o) of the Children, Young Persons and their Families Act 1989 (CYPF Act).

The appellant, who was charged with purely indictable offences, had indicated a desire to plead guilty at his initial appearance before the Youth Court. Following a family group conference at which no agreement was reached, the Youth Court Judge ordered the appellant to appear for sentencing in the District Court under s283(o) of the CYPF Act. Although that power was only exercisable as a result of the appellant being offered and accepting Youth Court jurisdiction under s276 of the CYPF Act, no indication of that offer was recorded on the informations and counsel were unable to assert that it had been made. In the District Court, the appellant was sentenced to five and a half years imprisonment.

On appeal, the Court emphasised that the election of a young person charged with a purely indictable offence to be dealt with in the Youth Court fundamentally changes the nature of proceedings: *R v M (an accused)* [1986] 2 NZLR 172. Whereas the young person was formally being proceeded against by indictment, following the election the offence is heard and determined in a summary jurisdiction. The ordering of the young person to appear in the District Court for sentence did not alter the nature of the jurisdiction. The purpose of the transfer was simply to make available a wider range of sanctions (particularly imprisonment) than the Youth Court could impose. This was to be contrasted with the process if an offer under s276 of the CYPF Act was not made and the young person pleaded guilty under s153A of the Summary Proceedings Act 1957 at the preliminary hearing. In that case there was an explicit provision lifting the cap for a District Court to impose sentences above the summary maximum of 5 years: District Courts Act 1947 s28F(3). The Court noted that the removal of that cap in 1991 was not reflected in the CYPF Act.

The Court therefore concluded that the District Court was limited to a summary jurisdiction and as such did not have the power to impose a sentence exceeding the 5 year summary maximum. The Court remitted the proceedings back to the District

Court and suggested that it consider amending the sentence under s77 of the Summary Proceedings Act or consider remitting the proceeding back to the Youth Court to inquire into whether a s276 offer should be made.

Solicitor-General appeal following acquittal – exclusion of evidence

R v Stephens CA455/02, 24 March 2003, was an unsuccessful appeal by the Crown on a question of law. The respondent was arraigned on an indictment containing four counts of alleged sexual offending against a young boy. The respondent's conduct towards the complainant was brought to the notice of the police and as a result a member of the Child Abuse Team went to the respondent's address to speak with him. The respondent admitted touching the boy but denied more serious conduct. A complaint was not made until four years later when the boy's mother noticed conduct between the respondent and her son. At trial the Crown sought to admit evidence of member of the Child Abuse Team (T) to whom the respondent had made his admissions four years earlier. However T's evidence was excluded on the grounds of involuntariness. In coming to this decision the Judge was influenced by a psychologist's report that was not formally in evidence.

On appeal, the Crown submitted that the Judge had wrongly excluded T's evidence and had it not been excluded there would have been a high likelihood of conviction. The offending was of a serious nature and the fortuitous exclusion of evidence amounted to a substantial miscarriage of justice.

The Court began by observing the universal diffidence to double jeopardy, stating that the acquittal of a subject was not to be set aside lightly. The Court held that the question of whether a substantial wrong or miscarriage of justice had been occasioned will involve considerations of the nature of the excluded evidence, its cogency and credibility, its relationship with other evidence, its causative impact on the verdict of acquittal, and the consequential conduct of the defence in view of the rejection of evidence. Even if a substantial wrong or miscarriage of justice had been occasioned at trial, there was still a discretion in s382(2) of the Crimes Act 1961 whether to direct a new trial. In the present case, the Court was not satisfied that if the impugned evidence had been placed before the jury the respondent would necessarily have been convicted. The Court also did not exclude the possibility of a new trial where the evidence in question might be excluded because the respondent's mental characteristics, the circumstances in which the admissions were made and the passage of time might collectively justify discretionary exclusion of the evidence on grounds of unfairness. The appeal was dismissed and no new trial was ordered.

Witness summonses – access to Breathalyser instrument manual

In *Livingston v Institute of Environmental Science and Research Ltd* (2003) 20 CRNZ 253, a Court of five refused an appeal from the ESR's successful applications to set aside the witness summonses issued against it by the appellants. The background to these appeals was the Court's earlier decision in *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740 that the manufacturer's technical manual for the Intoxylizer evidential breath testing device was held by the ESR as an independent legal entity and the Police could not be compelled to discover it by the drink drive

accused, the appropriate procedure being to issue a summons under s20 of the Summary Proceedings Act 1957.

The Court rejected the Crown's submission that there was no defence based on the malfunctioning of a particular device, which would have made the manuals irrelevant and inadmissible on that ground alone. The Court held that there was a very narrow defence in respect of alleged offences prior to amending legislation in 2001. In this case, however, the manual was not relevant to the appellants' cases. An actual fault had to be identified as no general challenge for the purpose of a fishing expedition is available.

The Court also held that the summonses were issued for the improper purpose of obtaining discovery of documents held by third parties that were inadmissible. It was implicit in the taking out of summons that the documents ordered to be brought to court were relevant and otherwise admissible in the proceedings. There was no justification for invoking that procedure to ascertain whether the documents are in fact relevant and otherwise admissible. In addition the summonses could have been set aside on the basis of s35 of the Evidence Amendment Act (No 2) 1980, as there was evidence of a special relationship between the ESR, its consultant and the manufacturers and evidence that the manuals would be withdrawn if disclosed to the defence with severe consequences for the breath-alcohol regime. Finally, given the lack of relevance of the manuals and the public interest factors, this was not a case where a decision on a witness summons should have been left to trial.

Sentencing

Appellate jurisdiction – consideration of sentence in full

In *R v Hadley* [2003] 2 NZLR 88 the appellant was convicted of various sexual offences against his daughter. He was sentenced to eight years imprisonment on one charge of attempted sexual violation by rape, and concurrent lesser terms on other offences including six years on each of two convictions for sexual violation by digital penetration. On the eight-year sentence for attempted rape the Judge imposed a minimum period of imprisonment of five years. It was common ground there was no jurisdiction to impose the minimum term as the offence of attempted rape was not a qualifying offence.

The appellant argued that as his appeal was directed solely to the minimum-term aspect of the eight-year sentence, then all the Court could do was quash the invalidly imposed minimum-term order. The Crown contended that s385(3) of the Crimes Act 1961 was wide enough for the Court to impose a substitute minimum term (albeit shorter) on the two offences of sexual violation by digital penetration which were qualifying offences.

The Court held that the use of the words "sentence" or "part of a sentence" in s385(3) of the Crimes Act 1961 meant that Parliament must have intended to allow this Court to adopt an approach that was sufficiently flexible to accommodate the Crown's contention. It was conventional and usually necessary in sentencing appeals for the

appellate court to put itself in the position of the sentencing Judge. If some aspect of two or more sentences imposed on a single occasion was found defective, it would be wholly unrealistic to take the view that the sentencing Judge's original intention could not be achieved, if appropriate and to the extent possible, by a re-arrangement of the ingredients of the total effective sentence. The rationale for this conclusion was that an appeal against one sentence necessarily puts in issue all related sentences. The Court therefore had jurisdiction to impose a minimum-term order in relation to the six year sentences for sexual violation by digital penetration. They were clearly related to the eight year sentence and hence necessarily came in issue on an appeal directed only to an ingredient of the eight year term. The appeal was allowed and, as an order could not be longer than two-thirds of the length of the term to which it applies, a four year minimum period was imposed in respect of each of the two concurrent terms of six years imprisonment.

Considerations in sentencing - offers to make amends

In *R v Fisher* CA169/03, 15 September 2003 (on the papers), the Court considered the relevance of offers to make amends under s10 of the Sentencing Act 2002.

In considering the appellant's offer, the sentencing Judge had said "I do not see that it is appropriate for you to go into debt to do that. Given your existing debts that simply is not an appropriate way of making reparation." The Court observed that such an offer under s10 of the Sentencing Act was a mandatory consideration in sentencing; so long as the offer was accepted by the victim and not insincere, unacceptable or unrealistic, it had to be taken into account. Thus, the Judge's view that it was simply not appropriate for the appellant to make financial amends, based on his view of what was appropriate for the appellant in his circumstances was irrelevant.

Considerations in sentencing– immigration factors

R v Aurora & Aurora CA 428/02 & CA429/02, 27 March 2003, was a partly successful appeal against sentence. The appellants were fined $51,000 for various offences under s29A(1)(c) and s32(1)(a) of the Passports Act 1992 and for the fraudulent use of documents under the Crimes Act 1961. The appellant and his wife fraudulently procured the issue of birth certificates and then used them to support fraudulent applications for the issue of passports. In the Court of Appeal, the appellants submitted that the Judge's sentence was too harsh in light of the appellants' changed circumstances, specifically that the appellants would be being returned to India with nothing. The Court held that the fines should be adjusted to ensure that the appellants had some capital with which to rehabilitate themselves in India.

Considerations in sentencing - guilty plea

In *R v Orchard* CA 123/03, 24 October 2003, the Court considered whether sufficient credit had been given to a guilty plea entered in respect of a large number of convictions. The appellant had been sentenced to 7 ½ years imprisonment with a minimum period of imprisonment of 5 years following over 600 convictions relating to documentary fraud. The Court considered that the recidivist tendencies of the appellant and the volume of the offending would have justified a starting point higher

than the 9 years adopted by the Judge. However, 9 years was within the appropriate range. The allowance made for guilty pleas was however insufficient. A significant credit should have been allowed given the length of time that would have been taken by a trial. A reduction of 25 percent was allowed.

Considerations in sentencing - vindicating feelings of victim

In *R v Tuiletufuga* CA 205/03, 25 September 2003, the Court examined a number of sentencing considerations including vindicating the feelings of victims and whether an aggressive reaction following the use of pepper spray by police should be looked at in mitigation. The appellant had been carelessly discharging an air rifle, resulting in the attendance of the police. The appellant resisted arrest and the police used pepper spray. This enraged the appellant and he assaulted a constable. The Court was concerned that the Judge had wrongly failed to recognise, as a mitigating factor, that the appellant's anger and aggression was contributed to by the anguish of being sprayed with a toxic substance and had taken into account, as aggravating factors, certain features of the offending that were inherent in the offence. The Court also considered that the sentence was too high when compared to the more serious categories of offending in the established authorities. The Court also commented that it was wrong in principle to impose heavy sentences in order to vindicate the feelings of victims.

Murder – whether life sentence for murder manifestly unjust

In *R v O'Brien* CA107/03, 16 October 2003, the Court considered the relevance of a mental disorder in relation to a conviction for murder and mental disorder and age in relation to the discretion not to impose a life sentence under s102 of the Sentencing Act 2002. The appellant was aged 14 years at the time of the murder. She had struck the victim in the head with a hammer seven or eight times after he was unable to be persuaded, by the appellant and her accomplices, to leave his vehicle. The victim's body was then rolled down a bank of the Waitara River and, although blows caused deep unconsciousness which was a substantial and operative cause of death, it was likely that death was caused by drowning. The appellant's case was that she was guilty of manslaughter, not murder, because her causative acts were not done with murderous intent.

The appellant's grounds of appeal included a submission that because of the appellant's limited intellectual capacity, there was a reasonable possibility that she did not really appreciate the likelihood that death might ensue from her conduct. This was supported by evidence collected for the purposes of sentencing indicating that the appellant had some intellectual impairment. The appellant also submitted that, given her young age and intellectual impairment, the imposition of a sentence of life imprisonment was manifestly unjust.

The Court held that the new evidence lacked cogency in that it did not bear on the question of ability to prognosticate and merely disclosed a conduct disorder. Section 167(b) of the Crimes Act was concerned with actual knowledge of likely consequences coupled with recklessness (although the Crown relied on both s167(a) and s167(b) of the Crimes Act in respect of murderous intent, the latter was more apt).

Of itself, the quality of the appellant's intellect did not raise the inference of an inability to know that death was likely if a person was struck several times on the head with a hammer. On the other hand there was uncontradicted evidence that the appellant actually envisaged the possibility of killing and the jury was entitled to infer that with knowledge of such a likelihood the appellant was reckless as to whether death ensued or not.

In respect of the sentence, the Court held that low intellectual capacity, unrelated to the mental elements of criminal responsibility, was seldom likely to justify a departure from the statutory presumption of life imprisonment. The circumstances of the present case demonstrated premeditated brutality for the purposes of stealing the victim's car for joyriding. The only relevance of youth and intellectual state, therefore, was that they might have caused a reduced sense of responsibility for planning and carrying out a brutally murderous attack in order to steal a car for a joy-ride. But there was nothing about the circumstances of the offence or the offender that would make a sentence of imprisonment for life unjust.

In *R v Mayes* [2004] 1 NZLR 71 the Court considered whether a minimum period of imprisonment could be imposed with a determinate sentence for murder where the murder was committed before the commencement date of the Sentencing Act 2002. The Court also considered when it was appropriate to depart from the presumption of a life sentence for murder under s102 of the Sentencing Act.

The appellant was in an “on again, off again” relationship with a woman for several months. At times he was physically abusive towards her. There was also evidence that she forced herself on him and took advantage of him. On the night in question, the couple were involved in an altercation at the appellant’s house, and the police attended. After reassurances there would be no further problems, the police left. Subsequently, another altercation took place whereby the appellant made a frenzied attack on the woman using a fishing knife, resulting in her death. He claimed the victim had been threatening him all night and said she was going to arrange for him to be killed by a gang.

The appellant pleaded guilty to murder. At the trial before the High Court, evidence of the appellant’s mental disability was put before the Court. His mental disability stemmed from an accident some years ago in which he was thrown through the windscreen of a car. He exhibited aggressive behaviour after coming off support systems in hospital and was diagnosed with “mania following severe head injuries”. His mental difficulties were exacerbated by physical disability and were complicated by his history of drug and alcohol abuse.

The sentencing Judge found that notwithstanding his disabilities, the appellant’s culpability was still very high. However, the Judge found that his culpability was affected by his mental condition. The Judge considered the question of risk and found that the appellant would be unlikely to ever again find himself in the extreme situation that occurred in this case. The Judge determined, under s102, that a sentence of life imprisonment would be manifestly unjust and imposed a determinate sentence of 12 years with a minimum period of imprisonment of eight years.

The Crown appealed the determinate sentence imposed for murder. It argued that the case for departing from the presumption of life imprisonment for murder must be obvious and beyond doubt and that s102 of the Sentencing Act was intended as a legislative safety valve for those rare cases where there would be an objective and shared community sentiment that life imprisonment would be plainly unjust. The Crown further argued that the sentence of life imprisonment had to be manifestly unjust given the circumstances of both the offence and the offender.

The Court considered that this was not one of the rare cases where the statutory presumption of life imprisonment was displaced. The murder was brutal; the appellant's reaction to it was callous; he was under the influence of alcohol at the time, in breach of a bail condition; the degree of static risk would not change and the dynamic risk was not likely to be manageable to such an extent that amenability to lifetime recall should have been displaced.

The Court also noted that by virtue of s152 of the Sentencing Act, a minimum period of imprisonment in relation to a determinate sentence of imprisonment, as provided by s86 of the Act, could not be imposed for an offence committed before the commencement date of the Act except in respect of a "serious violent offence". Murder was not within the statutory definition of a "serious violent offence".

Murder – mandatory minimum period of imprisonment

In *R v Parrish* CA295/03, 12 December 2003, the Court considered the application of s104 of the Sentencing Act 2002, and the circumstances in which a sentencing Judge may depart from the mandatory period of imprisonment set out in that section. The appellant was convicted of murdering his wife, and was sentenced to life imprisonment with a minimum period of imprisonment of 13 years. He appealed on the basis that the sentence was manifestly excessive.

The Court emphasised that s104 was couched in mandatory terms. Therefore, if one of the circumstances prescribed in the section was present, the imposition of a minimum period of 17 years imprisonment or more was mandatory. The Judge was expressly directed to impose such a minimum period, under s103, unless satisfied that it would be manifestly unjust to do so. A determination of manifest injustice required an assessment of an offender's personal circumstances alongside the circumstances of the offending, and in light of sentencing purposes and principles. *R v Rapira* [2003] 3 NZLR 794 made it clear that only in exceptional circumstances could the starting point of 17 years be departed from.

In the appellant's case, at least four of the prescribed circumstances in s104 were present: calculated planning; unlawful entry into the victim's unit; a high level of brutality and callousness; and the vulnerability of the victim. The sentencing Judge had, however, considered only the appellant's personal circumstances when assessing where the interests of justice lay. The Court considered that in fact there were no circumstances of the offending that could have justified a departure from the mandatory minimum term in s104. Even in cases with more powerful mitigating circumstances, the requirement to impose the mandatory term of imprisonment of 17 years might not be displaced if the mitigating factors had no direct bearing on the offence itself. In the present case, the sentence of 13 years was not manifestly

excessive. It was merciful, and a minimum period of 17 years would not have been disturbed on appeal.

Murder - minimum period of imprisonment

In *R v Howse* [2003] 3 NZLR 767 the appellant appealed against his conviction for the murders of his two step-daughters (pp100-107 above) and the 28 year minimum period of imprisonment imposed as excessive.

Because the offending took place before the coming into force of the Sentencing Act 2002, the case was governed by s103 without reference to the 17 year mandatory minimum period of imprisonment under s104. The Court stated that the primary focus of the sentencing court should be to compare the culpability of the case in hand with the culpability inherent in cases which are within the ordinary range of offending which attracts the statutory norm of ten years. This should be assessed in a broad and realistic way. The primary question was how much more than the statutory norm the instant offending requires in order to achieve the necessary additional punishment, denunciation and deterrence. It would be inappropriate to adopt too mathematical an approach, whether by reference to number of victims or otherwise. Nonetheless it was considered entirely reasonable to regard the number of victims as relevant to overall culpability.

However, it is still necessary for there to be reasonable relativities between individual cases themselves. In short, the proper approach is to apply the primary comparison between instant offence and datum as the first step, and then to use any relevant individual comparators as a check. The Court considered that the period of 28 years imposed by the Judge was higher than was justified on primary comparison with the ten year statutory norm and was too high when its relationship with the 20 years imposed in *R v Lundy* (2002) 19 CRNZ 574 was brought to account as a check. A minimum period of imprisonment of 25 years was substituted.

Preventive detention – minimum period of imprisonment

In *R v Johnson* CA 221/03, 23 October 2003, the Court dismissed an appeal against a sentence of preventive detention and discussed the matters to be taken into account in fixing the minimum period of imprisonment. The appellant was sentenced to preventive detention after pleading guilty to two charges of sexual violation by rape, two charges of sexual violation by unlawful sexual connection, one charge of assault with intent to commit sexual violation, and one charge of indecent assault. He submitted that preventive detention should not have been imposed and that the sentencing Judge could not have been reasonably satisfied that the appellant was likely to commit another qualifying offence upon release as required by s87(2)(c) of the Sentencing Act 2002. He further submitted that the starting point for the minimum sentence was excessive.

The Court held that the High Court Judge was correct in sentencing the appellant to preventive detention given that the seriousness of offending had increased in each case. The Court went on to suggest a method that might be used when deciding, in a case requiring preventive detention, whether a minimum term exceeding five years

was required. First, the court should consider what finite term may have been appropriate after taking into account all of the aggravating and mitigating factors and then, having regard to the gravity of the offence, consider what the minimum period might properly be in relation to the finite term. In this case, the starting point for rape was eight years and after taking into account aggravating factors the term would increase to 19-20 years imprisonment. The guilty plea would reduce this finite period to 15 years, which would mean a maximum of 10 years non-parole period. The Court held therefore that the imposition of a minimum period of 15 years was too high and a minimum period of 11 years was substituted.

Rape – minimum period of imprisonment

In *R v M* [2003] 3 NZLR 481, the appellants, M and D, were sentenced to terms of imprisonment for sexual violation by rape and in both instances minimum periods of imprisonment were imposed under s86 of the Sentencing Act 2002. Both appealed against the imposition of the minimum terms. The appeal concerned the proper construction of subs(2) of s86 ("the sufficiently serious criterion") when read in the light of subs(3) ("the out of the ordinary range of offending test") and the framework of s86 as a whole. The issue was whether the sufficiently serious criterion could be fulfilled on a generic basis or only on an individual and comparative basis.

The Court held that the undeniable proposition that rape was an inherently serious offence did not of itself establish the sufficiently serious criterion. The Court held that it was clear from the method of expression in s86(2) that Parliament was directing the Court to consider the circumstances of the offence actually committed rather than the inherent seriousness of the crime in generic terms. It did not follow that those cases which were not sufficiently serious for the purposes of subs(2) were regarded as not serious at all, it was simply that in comparative terms they were not sufficiently serious to fulfil the subs(2) criterion. Moreover, in view of the comparative exercise envisaged by subs(3), which while not an exhaustive definition of what fulfils subs(2) nonetheless coloured the thinking behind the criterion, it would be inconsistent to view subs(2) as involving stand alone concepts such as generic or inherent seriousness. Support for the individual and comparative approach was found in the universality of s86, that is, its application to a wide range of offences, not just sexual offending.

The Court noted the problem that in terms of numbers of years, the gap between the sentence imposed and the normal one-third non-parole period increases as the sentence imposed increases. That may tend to lead to a perception that as offending increases in seriousness, the standard one-third non-parole period is inadequate. That consequence, if it exists, is however, an inevitable concomitant of a proportionate formula; it cannot be allowed to improperly colour the Court's approach to the sufficiently serious formula.

Turning to the facts of the cases at hand, the Court ruled against M's appeal against his minimum term order of five years, imposed with a nine year sentence of imprisonment. The Court found that this case of multiple sexual offending, including rape, against his teenage stepdaughter going back over considerable duration and involving a significant breach of trust, on any view of the sufficiently serious criterion justified greater punishment, denunciation and deterrence than would be achieved by

the normal one-third non-parole period. The Court did not seek to analyse the case in terms of the out of the ordinary range of offending criterion.

D had been convicted of one charge of rape of a woman while she slept who was essentially a member of D's wider family. The Judge had sentenced the appellant to a term of eight years imprisonment with a minimum period order of four years. The Court was not disposed to lay down a hard and fast rule that no rape case attracting an eight year sentence after trial can ever qualify for a minimum period order. Here, however, it was common ground that there were no significant aggravating or mitigating factors. Hence, once the Crown's generic argument was rejected, it could not be said that the circumstances of the offence were sufficiently serious to justify a non-parole period of more than one-third of the sentence. D's appeal was therefore allowed and his minimum term order quashed.

Sentencing levels - kidnapping

In *R v Wharton* (2003) 20 CRNZ 109, the appellant was convicted of assault with intent to injure, and one count of kidnapping. The complainant was the appellant's former partner. The appellant was sentenced to 2½ years imprisonment on the charge of assault with intent to injure, and to 4½ years imprisonment on the kidnapping charge. The appellant and the complainant had been in a relationship for about seven years. It became a violent relationship and the complainant obtained a protection order. The appellant was arrested for assault, breach of a protection order, and threatening to kill the complainant in July 2002. The appellant was on bail for the July charges when the offending leading to the kidnapping charges occurred. The appellant lured the complainant back to his home under the false pretence that her young son was in some difficulty. When the complainant attempted to leave, the appellant assaulted her and she remained at his home overnight. The appellant appealed only against the sentence of imprisonment on the kidnapping charge, on the basis that it was manifestly excessive in terms of s85(1) of the Sentencing Act 2002.

Under s85 the sentencing Judge was required to consider the totality of the offending. While the most serious offence might normally be that which carries the greatest maximum penalty, it may only become a more serious offence through the totality of circumstances surrounding it, which, as in the present case, involved the commission of the so-called lesser offence of assault with intent to injure. The term of 4½ years imprisonment was excessive when measured against other sentences for kidnapping and detention in relatively comparable cases. The detention of an ex-partner or ex-spouse was no less serious than detention of others and deterrent sentences are required for offenders who terrorised former female companions through kidnapping, threatening, assaulting, and the like. Nevertheless, the aggravating features in this case did not take it into the category of cases, discussed in the judgment, which require a sentence in the range of 4-5 years imprisonment. The sentence of 4½ years imprisonment was beyond the permissible boundaries. The appropriate sentence to reflect the totality of the crimes was a term of 3½ years imprisonment on the charge of kidnapping.

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