COURT OF APPEAL REPORT FOR 1997

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JUSTICE KEITH

INTRODUCTION

1997 : review, reform and consolidation

The Court planned the programme for the year on the basis of projections about the numbers and categories of cases. The actual numbers appear in the next section. Proactive caseflow management (not yet fully achieved) allows for monitoring of appeals; and on the criminal side appeals involving child complainants, pre-trial rulings, short sentences and bail matters are separated out and given special priority. Among the advantages of the case management tracking arrangements are greater flexibility and readier oversight and easier management of uneven workflows and of variations from predictions. The faster the turnover time and so the shorter the case stays in the appeal process the easier it becomes to case manage the workload. The number of cases extant is reduced and the special problems associated with backlog are removed or diminished. But, like every change process, restructuring of offices and reorganisation of processes take time to bear fruit. They also require a great deal of consultation and planning.

The key management principle is the setting of time goals for the disposal of cases and developing processes to facilitate meeting those goals. In 1997 the Court worked towards the establishment of goals recognising that the great bulk of cases can reasonably be disposed of within a set period but that for a variety of reasons a small percentage of cases will require more time. Generally the Court is able to give a fixture within two to three months of setting down in civil cases and of completion of legal aid processes in criminal cases. In some cases much earlier fixtures are given, particularly where there is any expressed urgency. A striking example concerned the decision on behalf of Northland Health Limited not to provide or to continue to provide dialysis for a patient. The High Court decision was announced in Whangarei on the morning of Friday 10 October, the appeal papers were lodged early in the afternoon, we began the hearing shortly after 5pm, heard extensive submissions from counsel, and announced the decision dismissing the appeal shortly before midnight (see further pp8-9 below).

Case management is designed to provide for the efficient, expeditious and fair dispatch of cases. The first period involved is from setting down to hearing. The second is from hearing to delivery of judgment. Currently most appeals are decided on the day or within two to three weeks. Outstanding judgments are reviewed at the monthly Judges' meeting. In the vast majority of cases there is a single judgment but inevitably, and appropriately in an appeal court, there are some cases which are susceptible to different views expressed in separate judgments.

As mentioned in last year's Report of the Judiciary, the court embarked on a fundamental and comprehensive review of the structures, processes and accommodation of the court. The results of those reviews continued to be implemented in 1997.

Features of the changes to the court office include:

- a new court office structure with positions designed to emphasise active management of cases;
- the introduction of systems and processes to facilitate active management of each case right through the appeal process to its conclusion; and
- adaptation of the existing computer system to support the case management approach.

These changes have enabled monitoring and regular reporting on the progress of cases to ensure they move through the system expeditiously.

The related changes to the Practice Notes and Court Rules are mentioned later (pp 25-27).

Personalia

Justice McKay retired on 7 March 1997 and Justice Tipping took up his appointment to the Court on 1 June 1997. Justice Gault sat on the Judicial Committee of the Privy Council from 1 October until the end of the year.

High Court Judges as visiting judges or members of the divisions added the equivalent of about 2.5 Judges to the Court.

The Rt Hon Sir Thaddeus McCarthy attended one of the Court's social occasions at which his 90th birthday was celebrated and at another, the occasion of the 40th anniversary of the first sitting of the permanent Court, he presented the Court with a photograph of the the last Court of Appeal to sit under the old regime in 1957. (He was a member of that last court.) The President's speech at the latter celebration is attached as appendix I. It provides evidence of continuity and change.

Before the beginning of argument on 8 July 1997, the Solicitor-General, Mr John McGrath QC, and a former Attorney-General and Prime Minister, the Rt Hon Sir Geoffrey Palmer, congratulated the President on his becoming the longest serving member of the permanent Court of Appeal.

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CASE STATISTICS

The Court determined 513 cases in 1997 (571 in 1996, 606 in 1995). Of these 157 criminal appeals were dealt with ex parte and without reasons unless written submissions were received from the appellant (217 in 1996, 226 in 1995). There were a total of 289 sitting days and Courts of five or more Judges sat on 60 cases (41 in 1996, 39 in 1995). The average sitting day was 3 hours 19 minutes (3 hours 33 minutes in 1996 and 4 hours 21 minutes in 1995). Judgments in nine cases, eight civil and one criminal, were carried over to 1998.

As at 1 January 1998 125 criminal appeals were awaiting hearing compared with 131 as at 1 January 1997. Other than the two appeals placed on hold pending the outcome of the judicial review of the legal aid decisions in relation to them, the oldest appeal was filed on on 31 July and was heard on 24 November 1997. The comparable date for the previous year was 5 February. Ninety were scheduled for hearing early in 1998. Only 28 of the outstanding cases were filed before October 1997; of those only three did not have a hearing date by the end of the year.

The tables below include figures back to 1993 for comparative purposes. They include cases heard by the Divisions.

Criminal Appeals

	Appeals or applications for leave filed	*Determined*	*Dealt with ex parte*	*Allowed*	*Dismissed/ abandoned/ no jurisdiction*
1993	550	519	151	110	405
1994	538	499	194	82	417
1995	582	606	226	125	481
1996	512	571	217	98	473
1997	508	513	157	98	415

The number and outcome of applications for leave to appeal by the Solicitor-General against sentence were:

	Heard	*Allowed*	*Dismissed*
1993	31	14	17
1994	16	9	7
1995	26	23	3
1996	21	16	5
1997	20	14	6

Legal aid application figures were:

	Granted	*Refused*	*Total*
1993	146	231	377
1994	147	213	360
1995	141	266	407
1996	95	275	370
1997	144	188	332

Civil Appeals

	Motions filed	*Heard*	*Allowed**	*Dismissed**
1993	304	181	66	92
1994	302	178	46	119
1995	287	181	50	113
1996	305	164	56	117
1997	303	160	58	94[#]

* Judgment not always delivered in year of hearing

\# Includes one adjourned sine die

Privy Council Appeals

	Applications for conditional leave filed	*Appeals and petitions determined*	*Allowed*	*Dismissed*
1993	19	7	3	4
1994	24	10	3 (+ 3 in part)	4
1995	27	8	2	6
1996	18	9	2	7
1997	13*	14	4	10

*This figure refers to applications heard not filed

One notable feature of the 1997 figures is that of the 14 matters heard in 1997 only five were from five judge courts - notwithstanding the fact that the availability of five judge courts in appropriate cases had been well publicised for much, if not all, of the relevant time. Only one of those five judge matters succeeded - and on a ground not invoked as a basis for the grant of leave to appeal and without the Privy Council reaching the merits.

The 1997 Privy Council decisions are as follows:

Date PC Judgment	Parties	Result	Whether NZ Judge sat	CA Judge No.
16.1.97	Tainui Maori Trust Board v Waitangi Fisheries Commission cases	Allowed	No	5
11.2.97	Sunflower Services Ltd v Unisys New Zealand Ltd	Allowed (3:2)	No	3
4.3.97	Peng Aun Lim v McLean & Wiley	Allowed	No	3
21.7.97	NZ Forest Products Ltd v NZ Insurance Co Ltd	Allowed	Henry J	3
29.7.97	Grayson & Taylor v R	Dismissed (petition)	No	5
7.10.97	De Morgan v Social Welfare	Dismissed (petition)	No	5
7.10.97	Sears v Attorney-General	Dismissed (petition)	No	5
7.10.97	Hyde v Lewis	Dismissed	No	3
30.10.97	BNZ Finance v Nash	Dismissed	Gault J	5
30.10.97	Madden v UDC Finance Ltd	Dismissed	Gault J	3
20.11.97	Cussons (NZ) Pty Ltd v Unilever Plc and Unilever NZ Ltd	Dismissed	Lord Cooke	3
30.10.97	Taylor v Vogel	Dismissed (petition)		3
24.11.97	Countrywide Banking Corp v Dean	Dismissed	Gault J	3
8.12.97	Nippon Credit Bank Ltd v Air NZ Ltd	Dismissed (3:2)	No	3
	TOTAL HEARD **TOTAL DISMISSED** **TOTAL ALLOWED**	**14** **10** **4**		
	Appeals from Courts of more than three judges	**5**	**(1 allowed)** **(4 dismissed)**	
	Appeals from Courts of three judges	**9**	**(3 allowed)** **(6 dismissed)**	

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MAJOR CASES

The following selection takes account of the apparent importance of the issues in legal, social and economic terms and the interest of the public and the media. There is also an attempt to provide a coverage of subject areas. No doubt others would make a different selection (see eg *Leitch* on preventive detention p29). The selection may also help highlight different views of the judicial process.

The summaries cannot of course be substituted for the judgments. They are difficult to prepare, especially when the court divides as it did in four of the following cases.

The selection does not give a real sense of the regular run of demanding cases which turn on a close examination of the facts and the careful application of undisputed law, such as references by the Governor-General under the Crimes Act 1961 s406 or disputes about breach of contract or the validity of wills.

Health: the lawfulness of clinical decisions

Sitting as a matter of urgency (see p3 above), the Court was asked to decide two questions in *Shortland v Northland Health Ltd* CA 230/97. The first of these was whether the decision to remove Mr Williams from dialysis and the subsequent decision not to place him on a dialysis procedure were unlawful because they were contrary to good medical practice.

In respect of what constituted "good medical practice", counsel for the appellant relied primarily on the criteria adopted in *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235. In that case doctors and the Area Health Board were seeking a declaration that they would not be guilty of culpable homicide under the Crimes Act 1961 if they withdrew a life support system which maintained the breathing and heartbeat of a patient suffering from an extreme case of Guillain-Barré syndrome. The decision would not be unlawful provided it was made in conformity with "good medical practice". The criteria by which the practice was to be measured in that case were in summary: (1) a decision in good faith that withdrawal of the life support system was in the best interests of the patient; (2) conformity with prevailing medical standards and with practices, procedures and traditions commanding general approval within the medical profession; (3) consultation with appropriate medical specialists and the medical profession's recognised ethical body; (4) the fully informed consent of the patient's family. Before proceeding to consider the application of these criteria to the case before it, the Court cautioned that criteria framed for one situation were not necessarily applicable to another.

The first two criteria were generally agreed to be relevant to Mr Williams' situation although the appellant did not accept that the second had been adhered to. The Court, however, found that it was simply not arguable on the evidence to suggest that the decisions did not conform with the prevailing standards.

The Court stated that the third criterion, which required consultation with a formal ethical body, could not be a mandatory requirement in all cases. The present case, they said, essentially raised issues of clinical judgment, not ethics. Similar reservations were expressed over the general applicability of the fourth criterion. It should not, they said, be regarded as applying to medical conditions irrespective of the circumstances. To require the consent of the patient's family to the cessation of a particular form of treatment, or to a decision not to give a particular form of treatment, gives the family the power to require treatment be given or continued irrespective of the clinical judgment of the doctors involved. The law could not countenance such a general proposition. And, while it may have been an appropriate criterion to apply in the context of the proposed removal of a life support system, it could not apply to a decision not to put a patient on long term dialysis following a period of assessment which demonstrated that long term dialysis was clinically inappropriate.

The second major submission of the appellant was that the decision was unlawful because it was a breach of s8 of the Bill of Rights Act since the action would arbitrarily deprive Mr Williams of his right to life. The Bill of Rights question raised a number of issues, although, in the end, it was decided on the basis of just one, whether the actions of Northland Health would "deprive" Mr Williams of his life. The conclusion was that they did not. Attention was first turned on s151 of the Crimes Act 1961. The positive duty placed on Northland Health under that provision, to supply Mr Williams with the "necessaries of life", was equated to the first and second sentences of article 6(1) of the International Covenant on Civil and Political Rights and the understanding of them as elaborated by the Human Rights Committee in its General Comment on that provision. The Court held that the careful clinical assessment process undertaken by Northland Health, which involved both a range of professionals and family members, was sufficient to meet the duty under s151. Therefore, in the present context, it could not be said that Northland Health's actions in refusing to provide dialysis treatment would "deprive" Mr Williams of his life in terms of s8 of the Bill of Rights.

Refugees and the role of reasonableness

Another case in which there was a high degree of media interest was that of *Butler v A-G* CA 181/97. The appeal was from a decision refusing judicial review of the refusal by the Refugee Status Appeal Authority to give the appellant status as a refugee. Mr Butler arrived from Northern Ireland as a visitor in May 1991. While he was originally granted a visitor's permit in fact such a grant was in breach of the Immigration Act since Mr Butler had been sentenced to a disqualifying term of imprisonment which he had not disclosed. Following discovery of this by the Immigration Service, Mr Butler applied for refugee status.

The Refugee Status Appeal Authority agreed that Mr Butler had a well founded fear of persecution if he stayed in Northern Ireland but it did not consider that such fear was well founded were he to relocate to Great Britain, nor in the views of two members of the Authority, was the fear well founded if relocation was to the Republic of Ireland (of which he was also a citizen). (They also all agreed that he could be confined

safely in prison in Northern Ireland, given that he had yet to serve an 18 month sentence.) It was in respect of the Authority's views on relocation that counsel for the appellant focused his argument. He submitted that the Authority failed to take account of the reasonableness of such relocation, a consideration which must include the rights of the family.

There were three reasons why this submission was not accepted by the Court. The first was that the issue of reasonableness was not presented in the case to the Authority. The issue of the reasonableness of relocating to other parts of the United Kingdom did not, in the absence of the matter being raised by the interested party, stand out as requiring decision, notwithstanding the special responsibility those making a decision in this area have to see the law is complied with. In the circumstances, the Court stated it could not be an error of law for the Authority not to have addressed the issue.

The Court went on to outline two further reasons why the appeal was not upheld. The first of these was that although "reasonableness in the circumstances" was not treated as a distinct test, the issue of the reasonableness of relocating was addressed by members of the Authority. The second was based on the nature and scope of the Convention itself. The "reasonableness" test was not a stand alone one which required an unconfined inquiry into all the social, economic and political circumstances of the application, including the circumstances of members of the family. Instead, it is narrowly focused on the persecution and protection of the particular claimant. Rather than being seen as free standing (as more recent decisions of the Authority appear to suggest), the "reasonableness" element must tie back to the definition of "refugee" and the purposes of the Convention. The relocation element is inherent in that definition, not distinct. The question is whether, having regard to the Convention's purposes, it is unreasonable in a relocation case to require claimants to avail themselves of the available protection of the country of nationality.

No right to marry: a breach of the Bill of Rights Act?

Whether or not the refusal by the Registrar of Births, Deaths and Marriages to grant marriage licences to three lesbian couples was unlawful because it was a breach of the non-discrimination provisions in s19 of the Bill of Rights Act was the issue confronting the court in *Quilter & Ors v A-G* CA 200/96.

The five judges were unanimous that the Marriage Act 1955 could not be interpreted so as to permit same-sex couples to marry. The reasoning behind this decision was principally outlined by Tipping J with whom, on this point, the others all concurred. Accordingly, in terms of s4 of the Bill of Rights, the plaintiffs' appeal had to fail. The members of the Court went on to consider the question whether the limit so imposed by the Marriage Act was a breach of s19.

The divergence of views expressed by members of the Court on that issue is an indication of the complexity of the issues raised by this case including the principle of non-discrimination both generally and as manifested by s19 of the Bill of Rights Act.

A useful starting point for this discussion are the two points raised by Keith J (who

said that the s19 provision was not breached) at the beginning of his judgment. He first drew attention to the nature of the non-discrimination principle and in particular to the fact that not all distinctions are discriminatory. In order to avoid equality becoming an empty concept a contextual application of the principle is therefore required. The second issue was whether the phrase "on the grounds of" in s19 of the Bill of Rights Act required the Court to look at the reason or purpose behind the decision or effect of it.

Turning to this second point first, both Tipping and Thomas JJ were very clear that it is the effect of the decision complained of that must be taken into consideration. If the decision has the effect of making a distinction on one of the prohibited grounds then it is prima facie discriminatory. A denial of the right to marry was in the opinion of both Judges prima facie discriminatory, albeit that Thomas J did not stop at that point and went on to argue that such discrimination existed in terms of the Act.

Keith J, by contrast, did not reach the question of justification; his judgment turned on the nature and scope of s19. He places that provision in its historical and international context. With this as the background, he reaches two main conclusions. The first of these was that since s19 was deliberately cast more narrowly than its counterparts under the Canadian Charter, the United States Constitution and the ICCPR, all of which contain concepts of equality rather than just non-discrimination, and, since none of those provisions have been interpreted as guaranteeing a right to enter into marriage with someone of the same sex, there was less argument that the New Zealand Bill of Rights Act should do so. A second conclusion was that in enacting the Bill of Rights, Parliament never intended s19 to have such an effect. This is evidenced by the fact that if s19 could be used to support a right to same-sex marriage it would be a remarkably indirect way of making a major change, not only to a fundamental social, religious, public and legal institution, but also to all the vast range of incidents that arose from marriage. In his view, Parliament would never have intended that such major changes be made by so indirect a route.

Thomas J, on the other hand, has a different view of the role of s19. He states that Parliament has charged courts with the responsibility of upholding the fundamental rights and freedoms of its citizens, including the right to non-discrimination. While any change to the law must properly be left to Parliament, nonetheless, Thomas J said it would be a serious error not to proclaim a violation if and when a violation is found to exist.

The other two judgments were briefer. Richardson P stated, without expanding, that s19 of the Bill of Rights Act did not require the same recognition to be given to same-sex marriages as is given to heterosexual marriages. Gault J agreed there was no breach of s19. Unlike Tipping and Thomas JJ who, in finding there was discrimination, concentrated on the effect of the decision, Gault J focused on the Registrar's reasons for declining a marriage licence. There would have been no different reaction, he said, had the appellants been male or heterosexual. The difference in treatment needs to be directed to the prohibited ground. In this case, it was not. Gault J also stated that it made no difference that the appellants were being denied a choice. Denial of choice always affects only those who wish to make the choice but it is not, he said, for that reason discriminatory.

The judgments call on a wide range of material from national and international sources, a matter touched on later (pp32-33, 34-38).

Social workers liable in tort or equity?

Ms Gardner gave her son up for adoption shortly after his birth. She alleges that at the time she was given certain undertakings by a social worker as to the nature of the family he would be adopted into and, that if the adoptive parents died or divorced no-one else could take him without her consent. The statement of claim avers that Mr Prince's adoptive family life was not happy and that as a result he suffered deprivation, distress and abuse. He is now in prison. Both mother and son made claims directed to the adoption process. In addition Mr Prince claims that Social Welfare failed, or failed adequately, to investigate a complaint made to them about his adoptive parents when he was aged 14.

At issue in *Attorney-General v Prince* [1998] NZFLR 145 is whether the Crown may be liable in tort or in equity for errors or failings on the part of social workers in performing their statutory duties under both the Adoption Act 1955 and the Children and Young Persons Act 1974. The Judges were all in agreement that the causes of action, both of birth mother and of her son, in relation to the adoption should be struck out. The reasons for this were set out in the judgment delivered by Richardson P on behalf of himself, Thomas and Keith JJ with whom the other Judges, on this point, concurred. Given there was common ground that sufficient proximity existed on which to base a duty, not surprisingly the judgment focused on the policy considerations which supported or negated its imposition.

Richardson P identified two major policy considerations supporting the imposition of a duty. The first of these was that errors in carrying out the law should be remedied. In his view very potent counter considerations would be required if this principle were to be overridden. The second reason supporting the imposition of a duty was that as professionals social workers could be expected to exercise reasonable care in carrying out their duties. Associated with this was the issue of reliance. As pleaded, the mother explicitly relied on the representations of the social worker and the son implicitly relied on the social worker exercising reasonable care.

Notwithstanding the identification of these factors, they were outweighed by the view that the imposition of a duty of care would be inconsistent with the policy and scheme of the Adoption Act 1955. A number of factors led to this conclusion. First, under the Act, it is the court and not the social worker that makes the ultimate decision on an adoption. Imposing a common law duty of care on social workers would cut across that statutory regime. Secondly, the legislation did not contemplate any subsequent appraisal of the performance of the adoptive parents or the well-being of the child. Allowing a claim in negligence would therefore undermine the intended finality of the adoption. That a claimant could seek damages on the basis that her consent to the adoption was induced by misrepresentations but at the same time could allow the adoption to stand unchallenged was another factor which weighed against a duty being

imposed. The final major consideration which negatived the imposition of a duty was that the secrecy provisions of the Act did not envisage the disclosure of what would be essential information in determining negligence suits.

Other reasons also pointed against the imposition of a duty. These included: the incongruity of allowing a suit by a child against their adoptive parents for bad parenting when children generally could not bring such a negligence suit against parents; and the problems with disentangling the factors that contributed to the decision of the adoption court, all of which occurred some time ago. Difficulties with causation not to mention the highly speculative quantification of any losses arising were also considerations.

A different conclusion was reached by the majority on the issue of a duty arising under the Children and Young Persons Act 1974 in relation to the complaint made to Social Welfare when Mr Prince was 14 years old. Differences between the statutory scheme of that Act and the Adoption Act 1955 led to this conclusion. The Children and Young Persons Act was welfare legislation where the interests of the child or young person were the first and paramount consideration. Positive duties to take preventive action and investigate complaints were placed on the Director-General and social workers under the Act, duties which, in the view of the majority, were consistent with the imposition of a duty of care.

Henry J disagreed. He identified a number of reasons which in his view pointed strongly against the imposition of a duty. Such factors included the fact that removing or remedying the status of being in need of care, protection or control lay ultimately with the Court and was a process that involved inter disciplinary input; that there were likely to be difficult areas of judgment and evaluation with a possible need for prompt decisions; and that potential tortfeasors may act defensively to the possible detriment of the young person. The width of the duty was also an issue that weighed with Henry J.

In a separate judgment, Tipping J acknowledged the force of many of these factors but, in the final analysis, he agreed with the others that the overriding policy factor was the positive duty placed on the Director-General. Tipping J said that the law should, to the greatest possible extent, reflect the reasonable expectations of the society it serves. It would, in his view, cause legitimate concern to that society if a breach of an express public duty afforded no private remedy to a person for whose benefit the public duty existed in the first place.

The tax consequences of money obtained through crime

The issue before the Court in *"A Taxpayer" v Commissioner of Inland Revenue* (1997) 18 NZTC 13, 350 was whether money embezzled from an employer was taxable income in the hands of the thief. The Commissioner argued that all monies stolen from the employer and not repaid were income and therefore taxable. In making this submission the Commissioner relied primarily on a decision of the United States Supreme Court *James v United States* (1961) 366 US 213, a decision subsequently followed in Canada. Upholding the taxability of sums embezzled by a union official,

the majority in the Supreme Court held that the concept of income under the law was broad enough to encompass all "accessions to wealth, clearly realised, and over which the taxpayers have complete dominion."

Richardson P, in a judgment delivered on behalf of himself, Keith and Elias JJ, referred to the elusiveness of income as a concept, the meaning of which, he said, in the absence of a comprehensive statutory definition, must be sought in purposes and policies underlying the legislation. In that regard, Richardson P commented it was not surprising, given New Zealand's legal history, that English courts were looked to for guidance. American cases, on the other hand, had to be read in their own economic or social context. To illustrate this point Richardson P referred to the expression "all profits or gains derived from any business" in s 65(2)(a) of the Income Tax Act 1976. Unlike the United States, this expression has never in New Zealand been considered to extend to capital gains.

Richardson P identified the crucial point in this case as being whether the misappropriations had the character of "income derived" within the meaning of the Income Tax Act 1976. He held that income derived means more than just received. The amount must have "come home" to the taxpayer, not only beneficially, but in a way in which the amount may be counted as a gain completely made. Since an embezzler is liable to return or repay the stolen property and the innocent party retains the right to trace the property or its proceeds there is no gain. Legal rights and obligations, he said, cannot be ignored in determining what is income for taxation purposes. Richardson P also stated that while it may be unpalatable for the embezzler to receive a tax benefit from losses made from his criminal activity, this could not affect the character, for tax purposes, of the original misappropriations.

In his view other reasons supported such a conclusion. First, to hold otherwise would be inconsistent with the statutory scheme relating to deductions. If the gross amount was taxable then any monies returned, voluntarily or involuntarily, would have to qualify for deduction which was inapt to cover deductions of that kind. Secondly, excluding stolen money from the tax net was consistent with wider public policies. Richardson P considered that fines, reparations, and confiscations under the Proceeds of Crimes Act 1991 were the appropriate ways to deal with the result of criminal offending of this nature. There was no public policy justification for defeating or reducing the victim's call on the funds by an intermediate tax claim.

In a separate judgment Tipping J concurred. He too distinguished the US decision in *James*. Since it was based on different statutory wording and intent it was, in Tipping J's view, inappropriate to introduce the *James* approach into New Zealand tax law. Tipping J held that the stolen money in this case was not taxable because it was not income in the taxpayer's hands. From the moment it was stolen it was held in trust by the taxpayer for his employer. Nor did he consider it represented a profit or gain from any business. The taxpayer was carrying on the business of trading on the futures exchange and he stole the money to inject into this business. It was, in Tipping J's view, artificial to say that the taxpayer was also running a second business of stealing money. The other bases on which the Commissioner sought to rely were similarly dismissed.

Tax on inducements

The taxpayers in *Wattie and Lawrence v Commissioner of Inland Revenue* (1997) NZTC 13,297 were partners in the accounting firm Coopers & Lybrand. As an inducement to enter into a long term lease with restrictions placed on its assignability, the firm received a $5 million lump sum payment. The issue arising was whether the payment was income and therefore taxable. The High Court held that the payment was effectively a form of rent subsidy and therefore represented taxable income. The taxpayers appealed.

Notwithstanding the fundamental disagreement between the parties, Blanchard J, who delivered the decision of the majority, identified substantial areas of accord. First, the parties agreed that the transaction was not a sham. It was a genuine transaction and not in the nature of tax avoidance capable of being struck down under s 99 of the 1976 Act. Secondly, the parties agreed that the Court must ask, in terms of the test in *Hallstroms Pty Ltd v Federal Commissioner of Taxation* (1946) 72 CLR 634 (adopted by the Privy Council in *BP Australia Ltd v Commissioner of Taxation of the Commonwealth of Australia* [1966] AC 224), what the receipt was calculated to effect from a practical business point of view. Thirdly, as the transaction was concerned with the acquisition by the firm of an asset, it was necessary to examine the nature of that asset in relation to its business. Lastly, Blanchard J stated that the parties were agreed that the result was not to be determined by the economic consequences for the taxpayers of the receipt. Rather, it was the commercial effect produced by the transaction that was important. Having identified the areas of agreement, his Honour then went on to consider the issues in dispute.

The first conclusion reached by the majority was, applying that test in *Hallstroms*, that the payment was not a form of rent subsidy. Blanchard J stated that Coopers & Lybrand had to be induced to accept the burden of the lease since, in practical terms, it would give up its freedom to go elsewhere. The lack of a right of assignment was identified as being a particular burden given the penalty that would ensue should they want to surrender the lease. Blanchard J accepted that the partners would have taken a great deal of persuading to make the commitment contemplated by the terms of the lease. The form of persuasion in this case was the up front payment. In economic terms Blanchard J acknowledged that the sum obviously had rental equivalence and could be looked upon as a subsidy. However, he stated that it was well established that economic equivalence does not determine the character of the payment for tax purposes. The conclusion of the majority was that the $5 million was a negative premium. It was a capital item in the same way as in *McKenzies* [1988] 2 NZLR 736, a payment by a lessee to obtain surrender of a lease was a capital item.

The second ground on which the Commissioner submitted the payment was taxable, was that it was a profit or gain arising either in the ordinary course of business or, if not, was a profit or gain arising as an ordinary incident of the business. Blanchard J stated there was considerable difficulty with this submission. His Honour said the majority agreed with the findings in the High Court that the firm's ordinary business did not include the acquisition and disposition of leases; transactions with leases related to the structure of the business, not its operation. The business of a

professional firm, Blanchard J said, does not include its dealings with its lessor which are necessary if the firm is to be suitably housed.

The Commissioner's third ground similarly failed. The Commissioner argued that even if the Court found that the profit or gain did not arise in the ordinary course of business, it was nonetheless income in accordance with ordinary concepts. Support for this view, the Commissioner submitted, could be found in the decision of the High Court of Australia in *Commissioner of Taxation for the Commonwealth of Australia v Myer Emporium Ltd* (1987) 163 CLR 199, where the Court stated that a gain made otherwise than in the ordinary course of business, which nevertheless arises from a transaction entered into by the taxpayer with the intention or purpose of making a profit or gain, may well constitute income. In rejecting this submission, Blanchard J stated that the Court in *Myer* plainly recognised that not every receipt from an extraordinary business event will give rise to a liability for taxation. The situation in *Myer* was simply the classic example of gains made in carrying out a scheme for profit being assessable. But that was not the situation in the instant case. As Blanchard J noted, it was conceded that the present case did not sit comfortably within that concept.

While the majority upheld the appeal, Thomas J had a different view. He considered that commercial reality required recognition of the fact that the consideration paid to the lessee for the benefit of the lease was not the rent stipulated in the lease, but the rent offset by the benefit of the inducement payment. The link between the payment and the level of rent was far too carefully worked out to permit isolation of the payment. It was not, in his view, a collateral or incidental advantage but part of the consideration for the lease.

Indefeasibility of title

The Court was required to consider the scope of indefeasibility of title under the Land Transfer Act 1952 in two cases. In *Duncan v McDonald* [1997] 3 NZLR 669 the question was whether an illegal mortgage is rendered enforceable by registration. The McDonalds wished to participate in a lucrative "investment" involving fraud on the Nigerian government. Mr Duncan was a trustee for an estate. In return for a handsome "fee" to be paid out of the profits, and obviously in breach of trust, he advanced the funds required for the scheme out of the estate. The McDonalds granted a mortgage in favour of the estate to secure the advance. The Nigerian scheme was in fact a fraud on all New Zealand participants, the money advanced was irretrievably lost, and the estate sought to enforce the mortgage.

Two preliminary issues arose. On the first, the court held that the failure of the pleadings to directly raise the issue of the McDonalds' guilty knowledge did not preclude the judge's finding on this point because the issue plainly arose in the case. For the same reason, no prior warning was required of this finding. The second preliminary finding was that the mortgage was rendered illegal by the shared illegal purpose of the McDonalds and Mr Duncan regardless of whether the latter's guilty knowledge could be imputed to the estate.

On the main issue, the Court held that as s6 of the Illegal Contracts Act is expressly "subject to the provisions of ... any other enactment", registration prima facie rendered the illegal mortgage valid to the extent of the charge, excluding only the personal covenant. However, this was subject to an in personam claim against the mortgagee on the basis of its knowledge of the entire transaction's illegality. Until removed from the register, the mortgage was valid as a source of title for any third party transferee, but the court would restrain the mortgagee personally from enforcing it. This was subject in turn to any relief from the effects of the illegality which the Court might grant under s7 of the Illegal Contracts Act.

In considering the appropriate relief, the Court assessed the relative blameworthiness of the parties. The estate as a wholly innocent victim should not have to bear any part of the loss. The McDonalds carried part of the blame, but the larger share fell on Mr Duncan. The High Court had ordered the mortgage to be enforceable only to the value of $75,000 rather than the full sum secured of $285,000 together with interest. This order was varied to the effect that should the estate be unable to recover the balance from its trustee personally, the mortgage would be fully enforceable both as to the charge and as to the personal covenant.

Davies v Laughton [1997] 3 NZLR 705 came before the Court on an application to discharge an interim injunction restraining a mortgagee sale. The issue was whether registration rendered a mortgage by way of guarantee enforceable in spite of a unilateral variation which would otherwise vitiate a guarantee. The Laughtons provided a mortgage by way of guarantee for their son's purchase of a business from Mr Davies. The mortgage was expressed to be collateral with two other securities: a debenture over the business and a mortgage over the son's home. After the mortgage had been executed but before it came into effect, the mortgagee unilaterally procured a variation whereby effectively a different debenture securing a far higher amount was substituted as one of the collateral securities. Moreover, that debenture was later varied to secure a further obligation to provide letters of credit. It was the son's failure to provide these letters of credit which eventually caused the mortgage to be called upon. The High Court upheld the injunction, holding that there was an arguable case that the mortgage was unenforceable.

This Court affirmed that decision on slightly different grounds, finding the solution in the in personam exception to indefeasibility. The mortgage was validated by registration, but the mortgagee personally could be restrained from enforcing it because his action in unilaterally varying the guarantee created an equity in favour of the mortgagors. The further argument that a unilateral variation did not invalidate a guarantee if it occurred prior to the guarantee coming into effect as in this case, was dismissed as making a mockery of equity.

Black boxes and New Zealand law

The status and role of the Convention on International Civil Aviation 1944 (commonly known as the Chicago Convention) in New Zealand law was the main issue for the Court in two appeals heard together, *NZ Airline Pilots Association v A-G* [1997] 3 NZLR 269. In the first, the Police contended that they were entitled to obtain by search warrant the transcript of the cockpit voice recorder (and the digital flight data recorder) in order to determine whether offences of manslaughter were disclosed. The High Court held that a judicial officer had the power to issue a search warrant but could not exercise that power without regard both to the Chicago Convention (and in particular paragraph 5.12 of annex 13) and to public interest immunity. The Court of Appeal agreed that there was no jurisdictional bar to the issue of a search warrant but disagreed that regard must be had to the Convention or to public interest immunity.

Turning first to the status of the Chicago Convention, this Court held neither the Convention as a whole or paragraph 5.12 of annex 13 were part of New Zealand law. An examination of present and past legislation showed that rather than giving effect to the Convention as a whole, the laws more generally permitted the making of rules and regulations designed to give selective effect to particular provisions of the Convention and annexes. While there were broad similarities between paragraph 5.12 and s14(3) of the Transport Accident Investigation Commission Act 1990, there were also significant differences, differences that led to the conclusion that the paragraph itself was not part of our law. Unlike paragraph 5.12, s14(3) only protected the use of the cockpit voice recorder until the investigation was complete; allowed the Commission to release information, rather than requiring a decision of a judicial authority; and, did not require any consideration of the adverse impacts set out in the paragraph, such as the possibility that information may not be openly disclosed, before release could be ordered.

Not only was paragraph 5.12 not part of New Zealand law but, the Court held that it did not have the effect in international law contended for. In essence, the Airline Pilots' submission was that paragraph 5.12 precluded the cockpit voice recorder being used for any purpose other than accident investigation. The Court, however, did not consider the matter to be that straightforward. It pointed to numerous examples within the Convention, including within paragraph 5.12 itself, which showed that States had considerable flexibility in determining the extent to which information was protected. Furthermore, the Convention contemplated parallel proceedings to the accident investigation and New Zealand had filed a notice of difference indicating that the records covered by that paragraph, such as the transcript of the cockpit voice recorder, might be disclosed for the purposes of such proceedings.

This then left the issue of whether or not paragraph 5.12 or public interest immunity were factors to be taken into account in issuing a search warrant for the cockpit voice recorder transcript. The Court held they were not. Provided the conditions in s198 of the Summary Proceedings Act 1957 are met, the power to issue a warrant is not qualified in any way. That is not to say that evidence obtained will always be admissible in legal proceedings, but that is a separate question and one that requires the facts of the particular case to be taken into account. Such an examination could

not be sensibly be undertaken at the stage of an issue of a search warrant. Making a decision at that early stage would require the use of a class approach, when a content approach is called for. The Court said the same argument applied to public interest immunity. In such cases, there was a need to examine the issues and consequences in the particular case before the public interest could be said to uphold the objection to release.

The Airline Pilots gained no assistance from paragraph 5.12 in their second appeal either. The Court held that the paragraph envisaged information being presented in the form of appendices and it was within the powers of the Transport Accident Investigation Commission to append to their report substantial extracts from the transcript of the cockpit voice recorder.

Consent to proceed: the role of r426A

In *McEvoy v Dallison* [1997] 3 NZLR 11 the Court was required to settle the test applying under r426A of the High Court Rules. More particularly, the question facing the Court was whether the test is directed at furthering the function of case management by facilitating the Court's control and conduct of proceedings before it, or whether it encompasses a wider discretion and is to be exercised in accordance with the principles developed for rules such as rr477 and 478, which might be thought analogous.

The background to the appeal was this. The appellants had filed and served a statement of claim in May 1991. This alleged that the proceeds from a property sale had, contrary to the wishes of the appellants, been placed by the appellants' solicitors with Kearns Ltd, a company that had subsequently gone into receivership. Causes of action were pleaded in contract, negligence, breach of fiduciary duty and conflict of interest. As a result of the money from the sale being placed with Kearns, the appellants had been unable to repay bridging finance on a property purchased by them and proceedings had been commenced against them by the mortgagee. An application for consolidation of all proceedings was were filed by the appellants at the same time as their statement of claim. A period of nearly two years elapsed before a notice of proceedings was filed in January 1993. No further action was then taken until the beginning of 1996 when consent to proceed under r426A was sought.

The High Court denied leave. The Judge stated that in exercising the overall discretion conferred by the rule all relevant factors needed to be taken into account. These factors included: the length of the delay; justification or explanation for the delay; possible or actual prejudice to the defendants; and, the strength or weakness of the plaintiff's claim. The application of these criteria, the Judge concluded, did not favour the grant of leave. The case was said not to be particularly strong and there was no satisfactory explanation for the lengthy delays, delays which, in the Judge's view, meant that an application under r478 would have been successful.

On appeal, this Court, held that the High Court had applied the wrong test. Based on the rule itself, the first question to be addressed was whether there was a "proper issue

to be tried in the proceeding." In examining the meaning of this phrase the Court said that the applicant is required to do no more than demonstrate the issue is one which is sufficient to warrant resolution by the Court. It cannot be thought that such a rule envisages an examination of the merits, whether of the facts or law. Such matters were better examined in the context of rr477 and 478.

Once the Court is satisfied there is a proper issue to be tried, the Court possesses a general discretion whether or not to grant leave, a discretion that must be exercised in accordance with the purpose or policy underlying the rule. On this point, the clear view of the Court was that the purpose or policy was to promote the objective of case management. Given the wide variety of circumstances that may arise, it was not appropriate to delineate all relevant factors. However, the Court did say that a consideration of the prior history of the proceeding, the delay, including its length, and any explanation were things to be taken into account in ensuring that proceedings are disposed of in a fair, timely and efficient manner. Other factors, such as the prejudice to the opposing party if the proceedings continued, could not be entirely excluded from consideration, if only because it is an objective of case management to ensure just treatment of all litigants before the Court. Delays in the system generally may, the Court said, effectively deny other litigants a speedy determination of their claims.

While holding that the policy or purpose underlying r426A was to promote efficient case management, the Court stated that the rule had to be applied consistently with the fundamental principle of a citizen's right of access to the Courts. It has been frequently recognised that the objective of efficient management of the Court's business must not be permitted to prejudice a party's right to a full and fair disposition of his or her cause. The dictates of fairness must prevail over the demands of efficiency. It would therefore be inappropriate if a high threshold test would bar him or her from the judicial process. Substantial rights were not to be defeated by procedural means.

The appeal was upheld and leave granted.

Legal aid for the Human Rights Committee

The respondent in *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129 had lodged a claim with the Human Rights Committee set up under the International Covenant on Civil and Political Rights. The Committee found the communication admissible and the respondent applied to the Wellington District Legal Services Committee for legal aid in support of the substantive claim. The issue before the Court of Appeal was whether the appellant's refusal to grant legal aid was unlawful.

Section 19(1)(e) of the Legal Services Act 1991 provides for the grant of civil legal aid in respect of proceedings in "any administrative tribunal or judicial authority". The question for the Court, therefore, was whether the Human Rights Committee falls within this definition.

Keith J delivered judgment on behalf of himself and Richardson P, Gault and Blanchard JJ. The judgment began with the history and content of the rights contained in the ICCPR and then considered the character, procedures and powers of the Human Rights Committee. Three salient features of that Committee and its work were noted. First, the Committee is not called a court or tribunal and the drafting history shows this choice of a lesser title to have been a conscious one. Secondly, the process for the Committee to follow is not that expected of a judicial body or tribunal. Subject to certain limits on the type of communication admissible, a communication to the Committee need not take any particular form. Although processes have been developed by the Rules of Procedure and the practices of the Committee, they are not obviously those of a court or tribunal like body. Thirdly, the "views" of the Committee are not legally binding in the same way as decisions of a domestic court; they are forwarded to the State party concerned for consideration. These factors, it was held, raise real doubts whether the Committee could be characterised in any general sense as an administrative tribunal or judicial authority.

The judgment then proceeded to consider the Court's approach to the role of international obligations in statutory interpretation. *New Zealand Airline Pilots Association v A-G* [1997] 3 NZLR 269 was quoted for "the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations". The difficulty for the respondent was that there was no clear obligation in the Covenant to provide civil legal aid; evidence showed that many other countries do not provide financial assistance in the present situation. And although non-obligatory international material may provide part of the context in which legislation might be read (*Van Gorkom v Attorney General* [1977] 1 NZLR 535, 542-543), the Court does not see its interpretive role as extending beyond this and into determining what New Zealand's response to such material should be.

Finally and critically, the judgment examined the wording of the Legal Services Act 1991. It was clear from this wording that Parliament had not intended the Act to cover proceedings before the Human Rights Committee. The analysis of the terms of the relevant provision in context and by reference to its purpose led the Court to the conclusion that the section listing the bodies in respect of which legal aid could be granted was limited to Courts, tribunals and related bodies which are created under New Zealand law, by and with the authority of Parliament, and which Parliament in a careful way lists or indicates. One factor supporting that conclusion was that the Minister of Justice or the Attorney-General must agree before civil legal aid may be granted in respect of appeals to the Privy Council. Parliament is unlikely to have so restricted legal aid for appeals to London and yet have intended to make it available for appeals to New York.

In a separate judgment, Thomas J opined that the Committee's function might be sufficient to clothe it with the mantle of a "judicial authority". Given, however, that Thomas J agreed with the other members of the Court on the interpretation of s19(1)(e) he did not need to pursue this opinion to a firm conclusion.

Judicial review of the Advertising Standards Complaints Board

In *Electoral Commission v Cameron* [1997] 2 NZLR 421 the Commission sought judicial review of a decision of the Advertising Standards Complainants Board which had found that two of the Commission's advertisements, carried out as part of a public education programme on MMP, breached the Advertising Code of Practice. The breaches arose from the failure of the adverts to make the public aware of the exceptions that existed to the general message being put across.

The Board is an unincorporated body constituted under the rules of the Advertising Standards Authority Inc, a body representing the major interests involved in the advertising industry. The Authority formulated the Code of Practice following consultation with interest groups. The Code was used by the Board in dealing with complaints. Industry practice was such that where complaints were upheld the advertising ceased. There was unanimity among the parties that in general the decisions of the Board were amenable to judicial review. One argument supporting that was the exercise of powers of a broad regulatory regime with coercive effect A more direct route was provided by s4 of the Judicature Amendment Act 1972.

The Court held that the Board lacked jurisdiction over the Commission's advertisements. Notwithstanding the wide concept of advertising embodied in the Advertising Code, it was not sufficiently broad to cover the advertisements of the Electoral Commission. The Commission's advertisements were not, in the words of the Code, promoting the interests of any person, product or service. The Commission was entitled to a declaration to that effect. While this was the basis of the Court's decision the Court went on to make some comments on some of the broader questions raised.

It suggested that decisions of unincorporated bodies, like the Board, who exercise regulatory functions may not easily fall for examination on the conventional grounds of illegality, irrationality and procedural impropriety. Like Lord Donaldson MR in *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146, the Court considered a more flexible approach was required. Such an approach in this instance required regard to be given to the statutory functions and powers conferred on public authorities and to apply a somewhat lower standard of reasonableness than "irrationality" in the strict sense. The Board needed to be careful it did not substitute its views for those of an expert body charged with particular responsibilities.

Witness anonymity

The conviction of Nomads gang leader, Mr Hines, also raised interesting issues for the Court, *R v Hines* [1997] 3 NZLR 529. The conviction arose out of an incident at the Mountain Rock Music Festival where it was alleged Mr Hines stabbed a member of a rival gang several times in and around the throat. A man in a portable toilet a few metres away witnessed the whole incident. The question raised was whether that man, who came to be known as Witness A, could give evidence against Mr Hines without disclosing to the defence his name, address and occupation.

A majority of the Court held that he could not. Two issues about the role of the Court are addressed in their judgments. The first is in what circumstances the Court of Appeal may review its own decisions and the second, the respective roles of Parliament and the courts.

The question of when the Court of Appeal should review its own decisions arose because the Court of Appeal had already considered the issue of witness anonymity in *R v Hughes* [1986] 2 NZLR 129. In that decision the Court held that undercover police officers could not give evidence without disclosing their true name and address to the defence. In considering whether this decision was open to review, all five judges adopted what was said in *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404, 414-415. In that passage Richardson J indicated that the Court will ordinarily follow its earlier decisions but will be prepared to review and affirm, modify or overrule an earlier decision where it is satisfied that it should do so but will not attempt to categorise in advance the classes of case in which it will intervene.

Richardson P and Keith J, in their joint judgment, delivered by the President, went on to say that there were three considerations in determining whether it is appropriate for the courts to fashion a new rule which were particularly relevant in this case. First, they said that the appropriateness of any review will be influenced by the subject matter and its closeness to the court's function. Thus, relevant to the present case was judges' considerable experience in assessing fair trial questions. Secondly, in making value judgments the court is seeking to apply underlying community values and not the judge's personal values. Recognising the worth of the individual and the human rights of all members of society still leaves considerable room for differences of approach to a range of access to justice questions, particularly those involving balancing different values.

The third consideration of particular relevance was whether the particular question is appropriate for judicial resolution. They said that the larger the public policy context the less inclined court's should be to intervene. In such circumstances courts are less well equipped to weigh the considerations and to attempt to resolve any moral quandaries involved. That is especially so where the consequences of the decision reach beyond the limits of the case and beyond a particular response to a particular issue.

In deciding public policy through litigation the courts also face the practical problem of obtaining relevant information and assessing it. Further, court processes do not allow public policy to be developed in the systematic way that is regarded as desirable elsewhere in government.

After considering the discretion to excuse disclosure of identity in s344C of the Crimes Act 1961, the legislative response to *Hughes*, implications in the Oaths and Declarations Act 1957, a draft paper of the Law Commission and New Zealand and overseas cases going against *Hughes*, Richardson P and Keith J concluded that they were not persuaded to depart from in *Hughes*.

Blanchard J reached the same result. Although he said that he would favour a departure from *Hughes* if the decision were under review, he thought that such a

review was premature when the Law Commission was soon going to report to the Minister of Justice on the issue. He said that legislation based on a consideration of this report would be the soundest means of making any reform on the law of witness anonymity and expressed a hope that it would be dealt with more expeditiously than had been the recent trend.

In their dissenting judgments, Gault and Thomas JJ said that the right of an accused to cross-examine Crown witnesses, including the right to have the name and address to enable investigation, is not absolute. Both noted that the right had already been eroded by Parliament and the courts on a number of occasions and that the New Zealand Bill of Rights Act 1990 confers competing rights on witnesses. Further, both questioned whether the existence of an absolute right to know a witness' identity was in fact supported by a majority in *Hughes*.

Gault and Thomas JJ were of the view that the Court should depart from the approach taken in *Hughes*. They said that it was appropriate for the courts to make such a change as the rules of procedure and evidence relating to the administration of criminal justice have traditionally been within the realm of the common law and therefore fit squarely within the courts province. They did not agree that the courts should defer to the Commission responsibility for alleviating the injustice.

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NEW PRACTICE NOTES AND RULES

In 1996 new provisional Practice Notes for civil and criminal appeals were introduced. The objectives were:

- to facilitate the presentation and consideration of appeals by specifying in each Practice Note the steps to be taken and the information to be provided in advance of the hearing;
- to seek the co-operation of counsel in the early identification of those cases appropriate for five Judge courts;
- to enable the President to make an early assessment of the general importance of the appeal and the time likely to be required for its disposal;
- to allow Judges to become familiar with focused, written submissions and other relevant material in advance of the hearing;
- thereby to reduce hearing time and enable Judges to have more time out of court for consideration of cases and writing judgments;
- to reduce the volume of unnecessary paper before the Court.

The Bar Associations and the New Zealand Law Society were supportive. It was common ground that the provisional Practice Notes were substantially achieving their objectives. Following a limited review in the light of experience to date the new Practice Notes were issued in final form late in 1997 and came into effect on 1 January 1998, [1997] 3 NZLR 392, 513.

The new Court of Appeal (Civil) Rules 1997 and Court of Appeal (Criminal) Rules 1997 were made in the course of the year with the expeditious assistance of the Rules Committee and the Parliamentary Counsel Office. They came into force on 1 October 1997. They replaced rules made in 1955 and 1946 when of course the permanent Court had not been established.

Both sets of rules aim to simplify and streamline the appeals process. Much of the kind of detail contained in the old rules has been deliberately omitted. Instead, the Court or a Judge or the Registrar may be able to set standards such as those contained in the Practice Notes; see eg r13 of the Civil Rules below.

Among the changes in the Civil Rules are:

- All appeals and cross appeals are to be brought within 28 days; the distinction between interlocutory and final orders is no longer relevant (rr5, 8).
- Appeals are brought by notice of appeal instead of by the motion procedure (r7).
- An appeal is treated as having been abandoned if the appellant has not applied for a fixture and filed the case on appeal within six months of bringing the appeal.

Provision is made for extensions of the period allowed for applying for a fixture and filing the case on appeal (r10).

- Any party may apply for a fixture. Leave is no longer required (r12).

- The Court may determine the form of documents used in appeals (r13).

- Four copies of the case on appeal are to be filed, unless the Registrar otherwise directs (r14). The former requirements relating to certified copies, the form of cases stated, and cases removed to the Court no longer apply. The contents of the case on appeal are now covered by the Practice Note (Civil).

- The rules about bringing evidence before the court have been altered:

    (a) The Practice Note (Civil) deals with the exclusion of unnecessary or irrelevant evidence from the case on appeal.

    (b) There is now no provision for a party to apply to the Court below for an order directing that certain evidence be omitted from the case on appeal.

    (c) No distinction is drawn between notes of evidence and Judge's notes.

    (d) The old rules relating to the transmission of exhibits and evidence as to directions given by a Judge are not carried over. (r17)

- Judgments are to be delivered in open court (r20). The new rule is consistent with current practice and with rule 4 of the New Zealand (Appeals to the Privy Council) Order 1910 which enables an application for leave to be made when judgment is delivered. As the practice notes indicate the Court generally does no more than announce the result. Counsel need not attend.

- Costs, expenses, and disbursements are fixed in the Court's discretion without any reference to a formal scale (r21).

- Provision is made for the repayment of a judgment debt and interest where an appeal against such a judgment is successful (r22).

- The rules for the admission of further evidence enable the special examiner procedure in rr369 to 376 of the High Court Rules to be used (r24).

- The Court's inherent power to make orders and give directions as it thinks necessary for the just resolution of the case is set out (r25).

The changes in the Criminal Rules include:

- The former procedure, which required applications to be brought by motion, has not been carried over. Applications for bail have also changed and are now to be made separately in writing (rr4, 5 and 6).

- The provisions specifying the documents the Registrar must obtain on receipt of a notice of appeal have been updated and simplified. Such documents include the trial court file and any material relevant to rulings on pre-trial matters or bail

applications. If the summing up is required this must be requested as soon as practicable (r8).

- Rules 19 to 24 relate to bail. Attention is drawn to r23 which makes it clear that the Court of Appeal may revoke or alter an order concerning bail whether the order was made in this Court or the High Court.

- Rule 25 provides for the examination of witnesses otherwise than before the Court and applies the examiner procedure under r372 of the High Court Rules.

- Rules 27 and 28 apply to applications referred to in s393 of the Crimes Act 1961 regarding matters that may be determined by a single Judge of the Court such as the power to give leave to appeal. The new rules remove the need to use a numbered form in the Schedule in such cases. Instead, the notices and applications under those rules need only be in writing.

The practices reflected in and based on the new Practice Notes and Rules have produced real improvements in the scheduling, hearing and deciding of appeals. Cases can be and are prepared for hearing more expeditiously. Counsel and the Judges are in general better prepared at the beginning of argument, the argument is more focused, and the preparation of judgments is considerably facilitated. The objectives set out above (p25) are being achieved.

It may be that some of the practices could be adopted with appropriate modifications for appeals to the High Court.

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COMMENTS ON RECURRING CRIMINAL ISSUES

1. Records of rulings and reasons for them

The argument and determination of appeals is made difficult if rulings and the reasons for them are not recorded. Even if an associate or secretary is not available a tape recording or the Judge's own note (which in some cases might well be prepared in advance in any event) should be made, so that it can later be included in the record.

The need to keep a record also applies to all responses and other interactions with the jury. The same need applies to interactions with counsel.

2. Summing up and the self defence issue

The Court has often said that in summing up Judges should relate their directions to the jury to the facts of the case. Any use of standard directions is to be appropriate for the case in hand.

R v Abashidze CA 498/96 provides a good example of the directions being tailored to the facts. It also bears on the question of the Judge referring to self defence in the summing up. The Crown alleged that Mr Abashidze struck the complainant with a bottle several times, causing a wound to his head which required stitches. Mr Abashidze, on the other hand, contended that he had hit the complainant in self-defence, but only with his fists. He denied using a bottle at all. The Judge directed the jury in these terms:

> Now, Mr Abashdize is not charged with assault because it is accepted that he was acting in a form of self-defence if he used his fists only. The issue is did he wound and did he use a bottle to cause that wound. That is the only issue.

This Court, in upholding the conviction, rejected the submission that the defence of self-defence should have been put to the jury. The defendant had not claimed to be using the bottle in self-defence, he denied using a bottle at all. Counsel for Mr Abashidze argued, however, that this was one of those cases where even though defence had not raised the issue of self-defence (with respect to the use of the bottle) for tactical reasons, nonetheless, the Judge should have put the issue to the jury. The Court disagreed. The evidence of Mr Abashidze meant there was an insufficient evidential foundation to require the defence to be put to the jury. While the critical question is not whether the issue has been directly raised, the defence only need be put to the jury where self-defence is a credible possibility on the facts. Compare *R v Tavete* [1988] 1 NZLR 428.

3. Directions about evidence of complaint

Too often we see the standard direction about recent complaint evidence when the true basis for the admission of the evidence is not as recent complaint evidence. Counsel should clarify why the evidence is being led. Sometimes it is because the defence wants it as evidence of prior inconsistent statements, sometimes it is to meet a clearly signalled defence of recent invention. In such cases the direction must be fashioned accordingly.

4. Similar fact evidence

The test for admissibility is easy to state but frequently difficult to apply. The probative value must not be outweighed by the illegitimate prejudice. Of course evidence simply of propensity is probative in a sense. But more than that is needed. The assessment is fact specific. Two useful tests are first to have counsel identify just what the evidence is probative of and then ensure that it truly is in issue; the second is to contemplate just how the jury might be directed as to the use of the evidence should it be admitted. Unless it can be taken as tending to prove what is actually in issue its probative value will be low. It is not enough that it goes to credibility in a general sense nor is it enough that it might meet a defence for which there is no apparent basis: see *R v Wilson* CA41/98, judgment 10 March 1998.

5. Small points to watch

Remember that s10 Evidence Act 1908 gives a statutory right to cross-examine on prior inconsistent statements.

Ensure that when jury questions seek repetition of evidence in tape recordings or transcripts that there must be an appropriate balancing by reference to relevant cross-examination; see *P* in appendix II, p3.

Take care not to inadvertently pressure juries in the course of long deliberations with reference to possible discharge within any specific period. It is best to stick to the approved formula: *R v Accused* [1988] 2 NZLR 46.

6. Preventive detention

A court of five heard *R v Leitch* (1997) 15 CRNZ 321 because it was considered timely to review sentencing in the field of preventive detention.

The first point the Court made was that s75 of the Criminal Justice Act 1985 speaks for itself. It is a stand alone provision. No particular assistance was to be drawn from the legislative changes since 1906. Making it clear that the statutory test was not to be burdened by the notion that preventive detention was a sentence of last resort, the Court nevertheless said that any consideration of whether to pass a such a sentence

will ordinarily involve a determination of whether the protective purpose of preventive detention could reasonably be met by an available sentence of imprisonment. The Court also held that if a finite sentence arrived at in accordance with ordinary sentencing principles would not be adequate for the protection of the public, it is permissible to consider a sentence of greater severity. The scope for more severe sentences is not, however, unlimited, being constrained by the need to maintain the integrity of general sentencing principles. (See also the discussion of *Leitch* appendix II, pp8-9 and *R v Heta* CA458/97, judgment of 5 March 1998.)

7. Minimum periods

It will be recalled that in *R v Parsons* [1996] 3 NZLR 129 the Court commented that the power under s80 of the Criminal Justice Act 1985 was being exercised in more cases than was intended by the legislation. Last year, the Court again had occasion to consider the imposition of a minimum term (*R v Sibley* CA 290/97). While the sentence in this case was upheld, the judgment itself is a useful reminder of the appropriate approach to that section.

The Court reiterated its position, previously expressed in *Parsons*, that the power to impose a longer minimum non-parole period is designed to be exercised only in an exceptional case which is so horrendous or repugnant as to justify additional denunciation. The purpose of s80 is denunciation. It is not designed to give additional public protection; that is the function of the Parole Board.

In *Sibley* the Court sets out five propositions which are relevant to the exercise of the sentencing discretion in s 80:

1. Denunciation of a particularly horrible crime is the principal purpose of s80. Subsidiary purposes are additional punishment and deterrence.

2. The section involves a two stage approach. At stage one the question is whether to extend the minimum non-parole period at all. At stage two, if reached, the question is how long the extension should be.

3. At stage one the focus is on the circumstances of the offence. The circumstances of the offender are material only to the extent that they are directly relevant to the offence: *Wilson* [1996] 1 NZLR 147. At stage two, the Court is required to impose the minimum period it considers to be justified having regard to all the relevant circumstances, including those of the offender.

4. At stage one it is necessary to identify the circumstances which are said to make the case exceptional and then to ask whether those circumstances are such that the normal non-parole period should be extended.

5. An assessment at stage one that the case calls for an extended period should not be lightly reached. The need for extra denunciation must arise clearly from the exceptional circumstances. As it was put in *Wilson* the case must be able to be recognised immediately as one calling for an extended period.

8. Sentencing notes

The Court would like to draw sentencing Judges' attention to the assistance gained by the inclusion of the facts in sentencing notes. While the facts are normally able to be gleaned from other information on the file, it is not always the case. On occasion, and in particular in instances where the accused pleads guilty at an early opportunity, such information may be lacking. There may be no summary of facts or deposition statements from which the factual background to the appeal can be ascertained. Including, as a matter of course, a brief statement of the facts in sentencing decisions would be of considerable assistance to the Judges who hear the case on appeal. They are after all part of the factors on which the sentence is based - and other relevant factors do not always get the particular attention they deserve in the explicit reasons in the sentencing notes. The result can be an unnecessary grant of legal aid, an unnecessary hearing and a confirmation of the original decision when matters are again fully before the court and fully appreciated.

The facts on which the sentence is based are of particular importance when the degree of culpability depends on what view is taken of the evidence given at trial. The sentencing Judge is entitled to form a view not inconsistent with the verdict and, where that is done, it should be clearly stated so that any appeal is considered in the appropriate factual setting.

Again, where there have been verdicts both of guilty and not guilty any appeal on the ground of inconsistent verdicts can be greatly helped by an indication from the Judge who heard the evidence of grounds upon which the verdicts can be reconciled.

9. Bail pending appeal

In several cases in recent years bail has been granted pending the determination of an appeal. There are several reasons why this may appear desirable, including severe doubts whether imprisonment is the appropriate sentence or whether the conviction is sound (in which case the doubts may also be expressed by delaying sentencing until the appeal is disposed of). Very recently the Court, in a judgment given by the Chief Justice, said this:

> We take the opportunity to express concern about the granting of bail pending the hearing of an appeal, which has the potential to arouse false expectations. In *Moananui v R* (1984) 1 CRNZ 231 the High Court held that admission to bail pending appeal is unusual, and only to be granted in exceptional circumstances, for example the overwhelming likelihood of the success of the appeal and the injustice that would arise through delay. See Adams on Criminal Law, para CA 397. Rather than apply for bail the preferable course would be for appellant's counsel to seek an expedited hearing of the appeal.
>
> (*R v Wayne Whiunui* CA450/97 25 February 1998)

(See also *Second appeals* under the next heading (p33).)

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COMMENTS ON RECURRING CIVIL ISSUES

1. Direct referral to the Court of Appeal

While in some circumstances direct referral will be appropriate, it is important that the power not be exercised too freely. The assistance to the parties, their counsel and this Court of having the legal issues formulated and tested at first instance, and of the High Court's decision and reasoning on those issues is substantial. As well, if there are issues of fact that need to be determined, it will usually not be appropriate for the case to be referred to this Court, notwithstanding the apparent inevitability of the legal issues coming by way of appeal.

Two cases heard in the first week of sitting in 1998 provide good examples of the difficulties that can arise. The first of these was a summary judgment application for damage caused to the property of a neighbouring occupier by a burst water main, *Autex Industries Ltd v Auckland City Council* CA 198/97. The notice of opposition to the application relied on developments in other jurisdictions to the effect that the rule in *Rylands v Fletcher* was no longer good law. On that basis the defendant successfully sought to have the application removed to this Court. However, while the argument that the rule in *Rylands v Fletcher* as represented in this country by the decision in *Irvine v Dunedin City Council* [1939] NZLR 741 is no longer good law because of changes in relevant circumstances (to use a general word) as well as changes in the law elsewhere, is undoubtedly an appropriate question for the Court to resolve, the defendant (as its counsel came to realise) may well want to consider what evidence it should adduce. A majority of the Court considered that in the overall circumstances a summary judgment should not be entered in favour of the plaintiff. Costs were awarded to the plaintiff.

The second case in the first week of sitting that came as a direct referral was *Southpower v Commerce Commission* CA 196/97. It became apparent very early in the hearing that the issues which the defendant wished to raise were in no sense ripe for resolution in this Court. The application was refused without reasons being given.

2. Evidence relevant to policy matters

In *Attorney-General v Prince* [1998] NZFLR 145 counsel for the respondents (the plaintiffs) submitted that courts should be slow to strike out novel categories of duty at an early stage. (As noted above the proceedings alleged negligence in respect of adoption and care responsibilities, p12). Part of his reasoning was that where the hypothetical facts cover a range of factual possibilities, deciding wide public policy questions may lead to an unfocussed approach because the inquiry is then set against too broad a factual canvas. Empirical evidence and other expert evidence properly tested at trial may help the court in making the right public policy choices.

The President in the main judgment accepted the force of those submissions which were, he said, highlighted by the application by the Solicitor-General to call evidence

about the current resources, responsibilities and social work practices of the Department of Social Welfare. The President stated that assessment of public policy concerns must be solidly founded in the relevant legislation, other relevant material, or the experience of the courts. In some cases aspects of policy may require the kind of analysis and testing of expert evidence, including evidence of economic and social analysis, that is available only at trial.

If policy issues are presented as being relevant to the determination of the current state of the law, its clarification, development and administration, careful consideration must be given at trial to the evidence and other material which may bear on them. The broad terms of s42 of the Evidence Act 1908 should be kept in mind. Another case in which this matter arose was *Hines* (anonymous witnesses) (pp22-24 above).

3. Second appeals

In *Waller v Hider* CA200/97 the Court made some comments about second appeals. It stressed that upon a second appeal it was not engaged in the general correction of error. Its primary function was to clarify the law and determine whether it had been properly applied in the Court below. Not every error of law was of sufficient importance, either generally or to the parties, to justify the pursuit of litigation on a matter that has already been twice considered and ruled upon by a Court. Moreover, where the disputed matter is entirely or largely one of fact, the task of the applicant under s 67 of the Judicature Act 1908 is harder. Seldom will an issue of fact be of public importance and would only be of sufficient private importance if the amount at stake is very substantial or if the decision reflects seriously on the character of the would-be appellant. See also reference to *Waller v Hider* in appendix III, p6.

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INTERNATIONAL LAW ISSUES

International law issues arise increasingly in litigation. In the case of the Court of Appeal in 1997 such issues included aviation (both safety and liability for damage to goods), child abduction, criminal law (including search and seizure, confronting witnesses, "equality of arms", retrospectivity, sentencing and legal aid), human rights (including the right to life, the status of the Human Rights Committee and discrimination in the same sex marriage case) and refugees.

In recent years there have also been cases about contracts, customs, double taxation, foreign state immunity, immigration and Maori issues in which reference was made to international law. Since our exports and imports each equate to almost 30% of our GDP, since about 4,000,000 people travel in and out of New Zealand each year, and as the world increasingly "globalises" the courts can expect more cases involving international law.

What follows are notes on issues which can arise.

1. Finding the relevant texts

In New Zealand the process is now helped by the *New Zealand Consolidated Treaty List* (1997 2 vols), which among other things refers to the available sources of the hundreds of treaties to which New Zealand is and has been party, and the two Law Commission reports, *A New Zealand Guide to International Law and its Sources* (1996 NZLCR 34) and *The Treaty Making Process* (1997 NZLC R45). One indication of the broad and pervasive effect of international law is the list of about 200 Acts with possible implications for New Zealand treaty obligations, included in the 1996 Report.

2. The status of the text in international law

The text may have recommendatory force (eg a UN General Assembly resolution) rather than being binding (especially a treaty, however named), and even if binding on some states it may not be binding on New Zealand (for instance because New Zealand has not accepted the treaty). As well, provisions within a treaty regime may be of varying force, eg *New Zealand Air Line Pilots' Association v Attorney-General* [1997] 3 NZLR 269, 274-289. The status of documents which were originally recommendatory is not always clear cut since they might later be considered to have declaratory or customary international law force (or to be evidence of that law), as might a treaty to which New Zealand is not a party, eg *Governor of Pitcairn v Sutton* [1995] 1 NZLR 426, 433 (where a draft convention was considered along with national legislation and decisions). Even if not directly applicable, they might also be relevant to choices to be made in the clarification and development of the common law, eg *Attorney-General and New Zealand Rail Corporation v Dreux Holdings Ltd* (1997) 7 TCLR 617.

3. The official text

Most major multilateral texts have several equally authentic language texts, although in New Zealand at least it has been unusual for anything to be made of the non-English versions. The original (1929) Warsaw Convention is an exception - it is only in French, see *Emery Air Freight Corporation v Nerine Industries* [1997] 3 NZLR 723, 735 (about exporting bulbs to Amsterdam!). And of course Treaty of Waitangi cases draw on both language versions. Article 33 of the Vienna Convention on the Law of Treaties (helpfully reproduced in the 1996 Law Commission report) gives guidance about the interpretation of a multilingual text: the texts are presumed to have the same meaning and if the ordinary rules of interpretation (see 4 below) do not remove any differences, the meaning which best reconciles the texts having regard to the object and purpose is to be adopted.

4. The law of treaties

The just mentioned Convention attempts to state the rules about the formation, performance and termination of treaties in 80 succinct propositions, concerning for instance the basic obligation to comply with treaties in good faith, *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 682, *Air Line Pilots* case at 289 and *Wellington District Legal Services Committee v Tangiora* [1998] 1 NZLR 129,136, and the general rules of interpretation including the use of subsequent practice, *Commissioner of Inland Revenue v J F P Energy Inc* [1990] 3 NZLR 536, 50 (referring to articles 31 and 32), *Butler v Attorney-General* CA 181/97 13 October 1997 (referring to article 31(3)(b)). The first "general rule of interpretation" stated in article 31(1) is that a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

5. The status or relevance of the text in New Zealand law

The traditional treatment distinguishes between customary international law and treaties. According to Blackstone

> the law of nations ... is here adopted in its full extent by the common law, and is held to be a part of the law of the land *(Commentaries,* Book IV, ch V).

For recent views which recognise as well that the law can change see *Trendtex Trading v Bank of Nigeria* [1977] QB 529, 553-54 ("international law knows no rule of *stare decisis")* and 579; cf 571-72; and *Controller and Auditor-General v Davison* [1996] 2 NZLR 278, 314: "Precedents handed down from earlier days should be treated as guides to lead, and not as shackles to bind."

But treaties are another matter. While the making of a treaty is an executive act, the performance of its obligations, if they entail alteration of the existing domestic law,

requires legislative action. The stipulations of a treaty, duly ratified by the executive, do not have the force of law by virtue of the treaty alone, *Air Line Pilots* case [1997] 3 NZLR at 280-81 citing Lord Atkin in *Attorney-General for Canada v Attorney-General for Ontario* [1937] AC 326, 347. The Refugees Convention presents a current instance of a difficulty arising from that rule, eg *Butler's* case, pp9-10. And the rule has always been recognised as having some limits (as indicated in 7 below).

6. The nature and roles of customary international law in New Zealand law

As the name indicates, this body of rules arises from practice and an acceptance or understanding that the practice is binding (see also 8 below). As treaties and other explicit agreed texts internationally, and legislation nationally, have broader application, the room for customary international law lessens - or appears to. (The discussion under this head overlaps with that under the next.)

It might nevertheless:

- have direct application (as with the law of sovereign immunity invoked successfully in the *Pitcairn* case, but not in the *Winebox* case);
- be used to read down legislation of apparently general import in accordance with the presumption that Parliament does not intend to contravene international law (the *Pitcairn* case can be seen in that way);
- be used to give positive content to relevant statutory language (eg the cases in 8 below).

7. The roles of treaties in New Zealand law

Treaties may be relevant to the constitution, to the interpretation and application of legislation and to the clarification and development of the common law. Treaties, along with the common law, were seen as having a direct *constitutional role* earlier in the century and the constitutional issue has of course arisen, although it has not been pressed, in the courts in recent years in relation to the Treaty of Waitangi.

The presumption that *legislation*, so far as its wording allows, should be read consistently with relevant treaty obligations has been restated, eg in the *Airline Pilots* case at 289.

The treaty text might help give content to a statutory expression, *R v Gardiner* (1997) 15 CRNZ 131, 134; and *Tangiora* [1998] 1 NZLR at 134-136. It might help emphasise the importance of a certain right or interest, eg *R v Johnston* [1998] 1 NZLR 20 (cross examination). With other texts, it might indicate a principle or

value running beyond its strict limits, eg *Fulcher v Parole Board* (1997) 15 CRNZ 222, 251.

The relationship between treaties and legislation is affected by a number of matters including the drafting of the legislation:

A. it might simply set out the treaty and give it the force of law, as with the Warsaw Convention considered in the *Nerine* case;

B. it might use some of the language of the treaty, but then vary it as with the Child Abduction Convention, with possible problems as a result, as appears in *Gross v Boda* [1995] 1 NZLR 569 and the cases preceding it;

C. while intending to give effect to the treaty it may use some of its wording or substantially depart from it and might also not indicate its treaty origin - with possible dangers for the interpretation and subsequent modification of the treaty - cf *R v Decha-Iamsakun* [1993] 1 NZLR 141 where the definition of slavery in the 1926 Convention might have been seen as having greater authority and utility than dictionary definitions;

D. it might have no direct connection with the treaty - having, for instance, been enacted before the treaty was drafted or accepted (as in *Cashman v Central Regional Health Authority* [1997] 1 NZLR 7 where the Court was asked, in interpreting the Employment Contracts Act definition of employee to have regard to a draft ILO Convention); consider also the discussions in *Tavita v Minister of Immigration* [1994] 2 NZLR 257, *Puli'uvea v Removal Review Authority & Attorney-General* (1996) 2 HRNZ 510 and *Rajan v Minister of Immigration* [1996] 3 NZLR 543 about the relevance of treaty obligations to the exercise of broadly stated administrative powers and the judgment in the *Airline Pilots* case relating to the search warrant power; the proposition that treaties can give rise to legitimate expectations accepted by the High Court of Australia in *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353 is yet to be fully developed in argument in the Court of Appeal although see *NZ Maori Council v Attorney-General* [1996] 3 NZLR 140, 184-185.

(See the list in *Airline Pilots* case [1997] 3 NZLR at 284-285 of the ways in which the Chicago Convention is implemented.)

The drafting of the New Zealand Bill of Rights Act 1990 contains elements of A and B. In the first place it does not include all the provisions of the Covenant; there is for instance no direct equivalent of article 17 relating to privacy. But this does not mean that that provision and interpretations of it or like provisions "have no influence on the question of the reasonableness of conduct falling within s21 of the Bill of Rights" prohibiting unreasonable search and seizure, *R v Gardiner* (1997) 15 CRNZ 131, 134. Secondly, other provisions of the Covenant are not fully

replicated in the Bill of Rights but may still be relevant to the interpretation, as appears from the judgments in *Quilter v Attorney-General CA* 200/96, 15 December 1997 (the same sex marriage case). Thirdly, the Bill of Rights does not incorporate the differing specific limitation and exception provisions included in several but not all of the articles of the International Covenant on Civil and Political Rights; rather the Bill has the single, apparently generally applicable, provision of s5. But the varying limitation provisions in the Covenant might still help in particular contexts, eg *Re J (an infant) : B and B v Director General of Social Welfare* [1996] 2 NZLR 134, 145 and *TVNZ v Attorney-General* [1996] 3 NZLR 393, 395-396.

Treaties and decisions made under them might also be relevant to the clarification and development of the *common law*, eg. *R v Hines* [1997] 3 NZLR 529, 548, and see 2 above.

8. Finding the other sources

In 1874 Mr R Stout as counsel, in successfully disputing the jurisdiction of the New Zealand courts over a killing on an American barque on the high seas, cited Phillimore, Wheaton, Vattel, Story and Kent, *R v Dodd* (1874) 2 CA NZ 598. Johnston J, who wrote the judgment of the Court of Appeal in that case, in another judgment given 10 years later quoted the first three authors, along with Austin and the United States Supreme Court, when determining the meaning of the word "State" in the Naturalization Act 1870 and holding that Samoa at that time did not fall within that term, *Hunt v Gordon* (1884) NZLR 2 CA 160, 198-204. What does this say about the learning of bench and bar - then and now?

The Law Commission in its 1996 report gives some modern help to the wider range of sources with two short case studies of the birth and life of two treaties. The judgments in the same sex marriage case, *Quilter v Attorney-General,* also give some sense of the possible range of material which might be considered relevant. This provides a link to the earlier discussion of the material which is or might be relevant to arguments of principle and policy in the development and clarification of the law (pp 32-33 above).

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