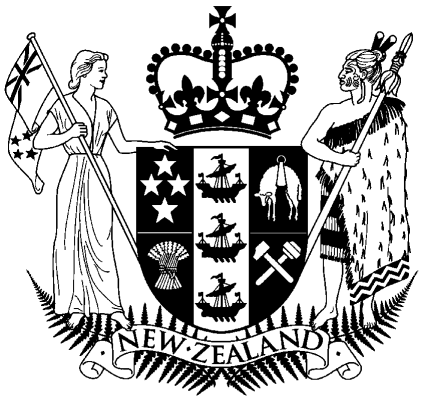

Court of Appeal Report for 1999

JUSTICE KEITH - NICOLA GRANT

TABLE OF CONTENTS

APPENDICES

1. INTRODUCTION

Overview

The Court of Appeal's appellate jurisdiction remained unchanged in 1999. The Court deals with civil and criminal appeals from matters heard in the High Court, and criminal matters on indictment in District Courts. As well, matters appealed to the High Court from a District Court can be taken to the Court of Appeal with leave if they are considered to be of sufficient significance to warrant a second appeal. The Court may, if it grants leave, hear appeals against pre-trial rulings in criminal cases. Finally, the Court hears appeals on questions of law from the Employment Court.

1999 was a heavy year for the Court in terms of caseload. In 1998, the Court dealt with 478 criminal and 164 civil cases. During the 1999 year, 544 criminal and 193 civil cases were heard. In addition, the Court dealt with 283 miscellaneous motions. This expanding area of the Court's jurisdiction is a varied mix of applications for directions, usually in the area of case management (84 in 1999), motions for conditional or final leave to appeal to the Privy Council and – the largest single category – 107 notifications of discontinuance, some involving costs issues. The Court was advised of two settlements and under its Rule 10 deemed 39 appeals to be abandoned, indicating that well over one-third of appeals filed in a year do not in fact proceed. The Court ended the year with only three reserved judgments outstanding.

The increase noted in 1998 in the number of civil appeals filed was not maintained, with 308 civil appeals being filed, compared with 318 in 1998. The number of filings, however, are of less significance than the number of appeals actually set down for hearing: on average, 15 applications for fixtures were made each month, giving a total of 185. This increased activity meant the Court started the new year in 2000 with over 40 civil cases that had already been allocated fixtures.

In 1999 there was a substantial increase in criminal appeals filed (565 as against 485 in 1998) with a record number of 74 filed in December. A comparison of the 1998 and 1999 figures shows that the increase is almost entirely due to the number of pre-trial appeals. The number of pretrial matters that went to full hearing was over double that of the preceding year.

In the criminal jurisdiction, the throughput of cases in the Criminal Appeal Division (CAD) was maintained at about eight cases per week. The following table compares appeals against conviction with those against sentence only, which are relatively quickly dealt with.

	1997*	**1998***	**1999***
Appeals against conviction, or conviction and sentence	233	205	221
Appeals against sentence only	203	164	193

*Figures include appeals disposed of ex parte and appeals against sentence by the Solicitor-General

Timeliness was a particular focus of concern in 1999. Criminal legal aid applications are processed with the aim, as far as possible, of having the matter brought to the point of allocating a hearing date or an ex parte disposal date within 30 days of filing the appeal. The efficiency with which the Court deals with cases that have been readied for fixture is now capable of being modelled, by way of measuring the timeliness with which cases are given a fixture date. The data set is still very shallow, but the Court will report on nine months' data in June 2000. The 30-day target becomes impossible to achieve if an application for legal aid goes to review. About one in seven legal aid refusals went to review by a Judge in 1999 – a similar rate to that of 1998.

Information on the throughput of criminal cases shows that about three quarters were disposed of within 90 days during 1999. Moreover, within a further 30 days 90 percent had been disposed of. Delays in processing these appeals were usually caused by difficulties over counsels' availability or other case management issues; or were the result of an appellant's decision consequent upon being denied legal aid. Where cases are then the subject of legal aid review, taken to private instruction or are handled by the appellant themselves, an inevitable slowing of the process, consistent with the requirements of justice, occurs.

The Court also records the number of legal aid applications granted on review. In 1999 this was very small: four applications were successful; 32 appeals went forward under private instruction, of these five were subsequently allowed (often with new points being raised), 19 were dismissed, and the remainder were pending at the end of 1999.

The year ended with more cases awaiting hearing than occurred in 1998. Sixty-five of the outstanding 72 criminal cases lodged before 1 December 1999 were set down for hearing early in 2000. All but six civil cases whose applications for fixtures were received before 15 December were also given fixture dates.

Members of the Court

Justice Henry sat in the Privy Council for six weeks during October and November.

As in previous years, members of the Court delivered papers and public lectures to legal, university and other audiences. Three members delivered public lectures as part of the Victoria University of Wellington Centennial celebrations. Other speeches to university audiences included a speech on public law delivered to Canterbury University law students, the delivery of a paper at the Australasian Law Teachers Association Conference and a graduation address at Victoria University. Members delivered papers at a number of conferences, including the Worldwide Common Law Judiciary Conference, Edinburgh; the Brookfields Medical Law Symposium; the Family Courts Conference; the Asia Pacific Conference commemorating the 1899 Hague Peace Conference, Melbourne; the Geneva Conventions 50th Anniversary Seminar, Trentham; the National Conference of the Australian Red Cross, Hobart; and a conference held in Wellington by the Australian and New Zealand Society of International Law and the New Zealand Branch of the International Law Association. One member delivered the

Neil Williamson Memorial lecture in Christchurch. Other audiences included the Employment Law Institute, the New Zealand Lawyers Association in London, the International Fiscal Association and the Society of Authors.

Court office and accommodation

The Court office continued to function well. No changes were made to the staffing structure: when two officers left, they were replaced, with one recruit coming from within the department and the other from outside. While those positions were vacant and the new officers were in their induction period the other office staff covered the extra duties with the help of casual Court Takers, recruited for the most part from the law school of Victoria University of Wellington. This support proved extremely effective both in terms of cost and quality and the staff resource has since been shared with other local courts. Casual staffers also competently supported the year's sittings of the Auckland Criminal Appeal Division.

1999 was the first in which each Court of Appeal Judge had his own Clerk. The arrangement has been very successful and has materially contributed to the smooth management of the increased workload. However, the Court building was built when the Court had under half the present volume of business and only half the numbers working there. The extreme shortage of space has an impact on the efficiency of the Court and on the appearance of justice. Many divisional court hearings have to be allocated to any available courtroom at the Wellington High Court, with High Court Judges seconded for divisional courts usually being housed in the High Court. One permanent Judge remains accommodated in substandard conditions. It was therefore very welcome news, late in the year, that the plans for the extensions to the Court building were once again being reviewed and that the case for an additional courtroom and Judge's Chambers, as well as library, research and conference space, was being updated.

Practice Notes

No changes to the Practice Notes for either jurisdiction were made this year. While a few memoranda were issued to the Court office to assist with inquiries received from counsel, the fundamental framework of the case management process remained intact. Timeliness and maintaining orderly progress on cases remain the most effective way of achieving outcomes in both jurisdictions. Miscellaneous motions are useful for this purpose in the civil jurisdiction, but the Court is concerned that its time limits, especially for the filing of submissions before a hearing, are not always observed, notably in criminal cases.

Electronic Libraries and Court of Appeal judgments database

Towards the end of 1999, Electronic Libraries was launched. Electronic Libraries is the second of three Judicial systems being developed to help Judges and their support staff

in their work. It is essentially an "intranet" which gives users in the Department for Courts access to a range of electronic legal materials, including publications such as Statutes, the New Zealand Law Reports and many others. The new system has greatly assisted the Judges and their staff in conducting legal research, and continuing developments increase its worth. During the year the Judges and support staff also obtained access to the internet, an invaluable legal research tool.

Developments were also made within the Court's existing judgments database, with the aim of improving the distribution of judgments. Judgments are compiled with a list for dispatch every Tuesday: the dispatch covers judgments released during the previous week. Courts users can choose between this service and the monthly service, where the previous month's judgments are collated and despatched, together with a list. Every High Court Judge is eligible for this service and in fact all the Judges serving on CAD have all judgments dispatched to them by email.

Programme for Court sittings

During 1999 the Court continued to sit in benches of three and five Judges. It was a year of particular strain on the judicial resources of the Permanent Court, so the assistance of visiting High Court Judges, equating over the year to two extra Judges, was particularly appreciated. High Court Judges bring a breadth of current trial experience and new points of view that are very beneficial to the overall work of the Court.

The complicated cycle of divisions and 5-Judge Courts that typified 1998 became much simpler in the latter part of 1999. The Court now sits in regular monthly cycles of five-Judge weeks at the beginning of the month, followed by (often) a week when two Courts sit, and then a fortnight when the Court sits in Divisions in Wellington, Auckland or both. In the course of a matrimonial property judgment, the Court, referring to the discussion in Meador, Rosenburg and Carrington, *Appellate Courts: Structures, Functions, Processes and Personnel* (1994) of intermediate and final appellant courts, noted that this Court fulfils a hybrid role, acting as both; *Snee v Snee* [2000] NZFLR 120, 126.

2. STATISTICS

Workflow

Five Judge cases	44	(39 civil, 5 criminal)
Three Judge cases	153	(97 civil, 56 criminal*)
Criminal Appeal Division	260	
Civil Appeal Division	51	

* A further 152 criminal appeals were decided ex parte.

	31/12/99	31/12/98	24/12/97
Criminal appeals awaiting hearing	143*	115	125
Civil appeals set down for hearing	54**	55	35

* Of the 72 filed before December 1999, seven were not ready to be allocated hearing dates.

** 41 of the 54 had confirmed fixtures.

Criminal Appeals

	Heard**	Allowed	Dismissed Ex parte	Dismissed After hearing
Conviction & Sentence	55	*11	26	41
Conviction	79	26	51	54
Sentence	96	40	52	57
S-G Sentence	17	13	0	4
Pre Trial	63	27	20	36
Other	10	1	3	8
Sub total	**320**			
Abandonments/No Jurisdiction	71	-	-	-
TOTAL	**391**	**118**	**152**	**200**

* Includes six cases where the appeal against sentence was allowed or was reduced.

** The number of cases heard does not equal the number allowed and dismissed following hearings. Six cases involved additional hearings. One case required two judgments and three 1998 cases were decided in 1999. Judgment was reserved in one 1999 case.

The distribution of the criminal appeals workload was as follows:

Permanent Court	CAD	Ex parte	Abandonments/No Jurisdiction	Total
61	260	152	71	544

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

	Heard	Allowed	Dismissed
1995	16	23	3
1996	21	16	5
1997	20	14	6
1998	16	8	8
1999	17	13	4

The number and outcomes of legal aid applications were:

	Granted	Refused	Total
1995	141	266	407
1996	95	275	370
1997	144	188	332
1998	168	191	*366
1999	214	256	*474

* The total number of legal aid applications does not always equal the number of applications granted and refused because each year a proportion of the applications are carried over to the following year for decision.

Civil Appeals

	Motions filed	Set down	Heard**	Allowed	Dismissed
1995	287	-	181	50	113
1996	305	122	164	56	117
1997	303	154	160	58	*93
1998	318	179	164	62	99
1999	308	185	193	58	*130

* Plus one adjourned sine die

** The number of cases heard does not equal the number allowed and dismissed as two judgments were reserved; the figure also excludes three costs hearings and 11 cross-appeals, five of which were allowed and six dismissed. Two cases were adjourned to the High Court. In addition there were 39 cases abandoned, two cases settled and 107 discontinued.

Privy Council Appeals

The following appeals were heard in 1999:

Date PC Judgment	Parties	Result	Whether NZ Judge sat
19.01.99	W v J	Dismissed	No
19.01.99	W v Bell	Dismissed	No
8.03.99	Attorney-General v Horton and Campbell	Dismissed	No
11.05.99	Guinness Peat Group International Insurance Ltd v Tower Corporation	(Petition) Dismissed	
22.06.99	Shardy v Circa Holdings Ltd	(Petition) Dismissed	
21.07.99	Manukau City Council v Ports of Auckland & Ors	Allowed	Yes
4.10.99	Wellington District Law Society v Tangiora	Dismissed	No
28.10.99	Lange v Atkinson* *remitted to NZ Court of Appeal for further consideration	Allowed	Yes
1.12.99	Arklow Investments and Christopher Mark Wingate v I D Maclean and Ors	Dismissed	Yes
24.11.99	AMP Finance (NZ) Ltd v Heaven	(Petition) Dismissed	

Total Heard	**10**
Total Dismissed	8
Total Allowed*	2

*One remitted to Court of Appeal for further consideration

Appeals from five Judge Courts	5	(1 Allowed, 4 Dismissed)
Appeals from three Judge Courts	5	(1 Allowed, 4 Dismissed)

3. MAJOR CASES

The selection of cases in this part and in the appendices has been made on the basis of the apparent importance of the issues in legal, social and economic terms; the assessment of the Court in assigning five judges; and reactions to the cases by the parties involved (eg by appeal), by the legislature or government, or more generally (eg through press or professional comment). The choice of cases involves an element of subjectivity. The summaries are intended only as a guide and cannot be substituted for the judgments.

Distribution of Public Trust common fund

Contradictors v Attorney-General [1999] 2 NZLR 523 concerned the distribution of the surplus of a common fund managed by the Public Trustee. The fund had been created out of the surplus of investments made by the Public Trustee, together with reserves derived from specified surpluses. The issue was whether the assets of the Public Trustee were subject to any legal or equitable private interest.

In 1891 statutory provision was made for the Public Trustee to establish one common fund for the purpose of investment on which interest would be paid at a rate determined by the Governor-General in Council. In 1913 the Public Trust Office acquired statutory authority to retain past profits and to retain them in reserves. The Public Trust Office Amendment Act 1951 provided that all profits were to be retained by the Public Trust Office and allocated amongst reserves. Under s30 of the Public Trust Act 1957 all capital money held by the Public Trustee in the common fund constitutes one common fund and is to be invested, but any investments made from the common fund are not on account of and do not belong to any particular estate. Interest is payable to the respective estates on the money which constitutes the common fund at rates to be determined from time to time by the Governor-General in Council. The Contradictors were appointed by the Court to represent all persons who might assert an interest in the surplus of the common fund.

The High Court held that the assets of the Public Trust, including reserves, were not subject to any legal or equitable private interest. The Contradictors appealed, submitting that the Public Trustee was not entitled to the surplus generated from the operation of the common fund and that the surplus ought to be distributed to all past and present beneficiaries of estates and trusts held and administered by the Public Trustee.

The appeal was dismissed by a five judge Court. The starting point for the inquiry was the Acts that have governed the operation of the Public Trust throughout its life. The Court outlined the various provisions of the Public Trust Office Act and the statutory scheme. The Act does not deal with sale or disposition of the Public Trust, which is indicative of and consistent with an intention that any surplus accumulated over the existence of the Office belongs to the Office, not to those who have from time to time contributed, and to whom there has been a proper accounting for both principal and statutory interest.

The Court held that the scheme of the Act in relation to the common fund was clear. The common fund was not a conventional fund. It was simply a means by which capital, which retained its notional character as money, was pooled for investment purposes. Returns on investment were provided for by the Public Trust Office Act at a rate of interest determined on by the Governor-General in Council, regardless of the success or failure of any particular investment from the common fund. The contributor did not gain a beneficial interest in any returns that may be generated on his or her capital contribution to the common fund. This conclusion was supported by the words of the statute, the legislative history and the Court's judgment in *Public Trustee v Hutt River Board* (1915) 34 NZLR 753.

Price of electricity supply and prime necessity

Vector Ltd v Transpower New Zealand Ltd [1999] 3 NZLR 646 concerned the price at which Transpower supplied electricity to Vector and in particular whether it was constrained by the common law doctrine of prime necessity. Transpower owned and operated the national grid, while Vector (formerly Mercury Energy Ltd) was a major line owner and one of Transpower's largest offtake customers. Vector alleged that Transpower was subject to the common law doctrine of prime necessity, which imposed an obligation on monopoly suppliers of essential services to supply its services to customers on terms, including prices, that were fair and reasonable. Transpower applied to strike out the cause of action on the ground that the common law doctrine of prime necessity was no longer part of the law of New Zealand. In the High Court it was held that prior to 1986 the doctrine of prime necessity was part of the law of New Zealand but that the Commerce Act 1986 and the State-Owned Enterprises Act 1986 had eclipsed the doctrine.

This Court unanimously dismissed Vector's appeal. Richardson P, delivering the judgment of himself, Gault, Blanchard and Tipping JJ, held that the doctrine of prime necessity was part of the common law of New Zealand. However, the doctrine was a somewhat blunt instrument, which spoke of a bygone age where legislation had a limited role. The doctrine gave no guidance about how to fix prices in a modern economy and extensive legislative landscape. It was best viewed as a backstop common law remedy applied in the absence of other remedies and where there were no contra-indications to its use.

Richardson P then considered the statutory environment in New Zealand and how this impacted on the operation of the common law doctrine in the present case. The doctrine of prime necessity did not operate in relation to the transmission of bulk electricity by Transpower to Vector because it was precluded by the Commerce Act, reinforced by the State-Owned Enterprises Act. If upheld in this case prime necessity would involve heavy-handed regulatory intervention on Transpower's pricing, through the Courts and potentially on a day to day basis at the suit of individual customers of Transpower, of a type which Parliament had decided it did not wish to impose; and to do so would be inconsistent with the purpose and scheme of the Commerce Act. Richardson P contrasted the effective price control of the doctrine of prime necessity with the legislated price control provisions. Price control through the Courts was a form of state control. The only state control of prices contemplated by the legislation was that

provided for in Part IV of the Commerce Act, available only when its criteria were satisfied. Prime necessity was an unsuitable instrument for price regulation in a multi-dimensional setting. It was inherent in the statutory scheme that Part IV was the exclusive means of achieving price control over the transmission of bulk electricity by Transpower.

Thomas J in a separate judgment expressed the view that there was scope for the further development of the doctrine of prime necessity in relation to state-owned enterprises as well as private enterprises, including privatised industries. However, a reformulation of the doctrine was necessary to make it consonant with the law's objective of curbing monopoly power in respect of the supply of essential services. The focus would be on whether the monopolist was abusing its power in refusing to supply or in otherwise placing supply in jeopardy. In relation to price, the question would be whether the price was so high as to negate or undermine supply or so extortionate as to be an abuse of monopoly power. Thomas J doubted that the decisions of state-owned enterprises could not be reviewed on grounds of illegality and improper purpose or motive.

Patentability of second or subsequent therapeutic uses of known substances

The Court considered the validity of patent claims drafted in the "Swiss" form in *Pharmaceutical Management Agency Ltd v Commissioner of Patents & Ors* CA56/99, 17 December 1999. Pharmac applied for judicial review of a "decision" by the Commissioner of Patents to release a practice note stating that the former practice of disallowing Swiss claims would no longer be followed. The Court, in agreement with the High Court, held that such claims were permissible.

A Swiss claim is a claim to the use of a known compound for the production of a pharmaceutical composition for the treatment of a specified condition. Swiss claims arise where the substance or composition is already known to have medical indications. The substance or composition cannot itself be claimed, because it lacks novelty, and claims to methods of using a known substance or composition for the therapeutic treatment of humans have traditionally been refused. The Swiss claim is drafted to avoid claiming the method of treatment, or the substance or composition itself. A Swiss claim is a use claim rather than a product claim, but it is already known that the active compound or composition may be used in the making of a medicament. The invention lies in the discovery of a new use.

It was emphasised that by acceding to the TRIPS Agreement New Zealand had undertaken to make available patents "for inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application" (Art 27:1). Once it was accepted that there could be new invention in the discovery of previously unrecognised advantageous properties in a chemical compound, the obligation to make patent protection available must apply. The provisions of the Patents Act 1953 should, if possible, be construed to that effect, and the judge-made rules in relation to novelty and methods of treatment ought to be modified if necessary. The Court held that in a Swiss claim "the integer representing

the inventive subject-matter and novelty is the new use for which the medicament is made." It is not possible to accept a method claim in this sphere, but it is possible to find the novelty in a Swiss claim in the designation of purpose or new use for a medicament. Accordingly, Swiss claims were to be allowed.

In some cases, including this Court's decision in *Wellcome Foundation Ltd v Commissioner of Patents* [1983] NZLR 385, there had been some suggestion that the exclusion of patents for methods of medical treatment was based on the proviso in s6 of the Statute of Monopolies 1623 that required that patents "be not contrary to the law nor mischievous to the state by raising prices of commodities at home, or hurt of trade, or generally inconvenient". Section 6 is referred to in the definition of "invention" in the Patents Act 1953, but the Court noted that there was some doubt whether that part of s6 was actually incorporated into the 1953 Act. Reference was made to s17 of the Patents Act which allows the Commissioner to refuse an application for an invention the use of which would be "contrary to morality" and it was noted that "[t]he exclusion from patentability of methods of medical treatment rests on policy (moral) grounds".

Harsh and oppressive terms in employment contracts

Tucker Wool Processors Ltd v Harrison [1999] 3 NZLR 576 concerned the power of the Employment Court under the Employment Contracts Act 1991 to set aside an employment contract in whole or in part if it finds that the contract, or any part of it, was procured by harsh and oppressive behaviour, undue influence, or duress, or that the contract or any part of it was harsh or oppressive when entered into. The first limb of the power relates to the process of concluding the contract and the second limb to the contract itself. This particular power to set aside a contract in whole or in part has rarely been exercised.

The nine respondents were originally employees of W Tucker Ltd, a wool scouring business. W Tucker Ltd sold part of its business to a new company, Tucker Wool Processors Ltd, the appellant. The employees moved to the new company and began work under a new collective employment contract, but were dissatisfied both with the process by which the contract was concluded and with certain of its provisions. The Employment Court found that the contract had been procured by harsh and oppressive conduct, undue influence and duress, and that a number of its terms were harsh and oppressive when entered into. The Chief Judge struck out nine of the 26 terms of the employment contract in full or in part, awarded compensation to each of the respondents, and made associated orders.

The Court set aside the Employment Court's finding that the employer had procured the contract by harsh and oppressive behaviour, undue influence and duress. The Court agreed that the bargaining provisions of the Employment Contracts Act applied to prospective (not merely existing) employers or employees, as appropriate. However, the Court found that the critical passages of the Employment Court's judgment were infused with an erroneous statement of law to the effect that each party to an employment contract had to regard the other as an equal contributor to the form and

content of the proposed contract. The Employment Contracts Act made it clear that either party to the negotiation may in general proceed on a take it or leave it basis.

On the issue whether the contract was harsh or oppressive when entered into, the Court found that the approach of the Employment Court was wrong in law. In coming to this conclusion the Court reconsidered its earlier decision in *Steelink Contracting Services Ltd v Manu* [1999] 1 NZLR 722. Three main reasons led the Court to reconsider *Steelink*: both parties were content for the Court to reconsider the judgment; the decision, given late in the preceding year by a Court of three Judges, had not led to expectations which would be seriously damaged by a review; and the issues were canvassed more comprehensively in this appeal, with material before the Court which appeared not to have been before the *Steelink* Court.

The Court held that the correct approach to determining whether a contract or term of a contract was "harsh and oppressive when the contract is entered into" was to undertake a two-step approach. First, the Court must determine the meaning of the contract or term: what its scope is and what rights or powers it confers. The Court will necessarily have regard to the contract as a whole, including terms implied by law, and the parties' mutual obligations of trust, confidence and fair dealing. Second, the Court must assess whether the contract or term, as construed, is "harsh and oppressive", that phrase having its natural collective meaning. The nature and extent of the provision in question, any statement of applicable criteria, discretionary elements, processes to be followed and the impact of the provision on the overall balance of rights and obligations and interests of employer and employee will be relevant to the inquiry. The Court emphasised the assistance which empirical evidence could give to the specialist court when undertaking this analysis.

On remedies, the Court held that the Employment Court was in error in two respects: the way it approached the discretion setting aside terms and its failure to consider alternative remedies. The orders of the Employment Court were set aside and the proceedings sent back to the Employment Court for reconsideration.

Damages in negligence for emotional distress

Van Soest v Residual Health Management Unit [2000] 1 NZLR 179 was an application to review a Master's decision striking out various proceedings by five plaintiffs. The first four plaintiffs were personal representatives of four patients who died during or after surgery at Christchurch Public Hospital. Three of those plaintiffs sought compensatory and exemplary damages as the personal representatives and next of kin of patients. All four plaintiffs alleged mental suffering including distress, shock, grief, and anxiety, but falling short of any psychiatric disorder or illness. None of the next of kin were present at the hospital during or immediately following the relevant operation. All heard of the death of their relative from an employee of the hospital and, some days or weeks later, learned of circumstances which they alleged amounted to gross shortcomings in the hospital's systems and in the manner in which the operations were performed. The fifth plaintiff survived her surgery but alleged that it was negligently

performed and sought compensatory and exemplary damages.

All members of the Court held that the personal representatives' claims were barred under the Accident Compensation Act 1982 and the Accident Rehabilitation and Compensation Insurance Act 1992, because they arose directly or indirectly out of personal injury. Failure in relation to diagnosis, monitoring and keeping a patient properly informed constituted medical misadventure, which is covered by the legislation. The personal representatives could not sue for loss of expectation of life because such losses were a direct consequence of the personal injury. Nor could the personal representatives sue for a failure to take some step required by law after a patient's death because there could be no breach of a duty of care owed to the deceased.

Four judges (Gault, Henry, Keith and Blanchard JJ), in a judgment delivered by Blanchard J, then considered whether the defendants owed a duty of care to the next of kin as "secondary victims", or persons who have experienced mental suffering but who were not physically injured or placed in physical danger by the defendant's negligence. With reference to the House of Lords decisions in *McLoughlin v O'Brien* [1983] 1 AC 410 and *Alcock v Chief Constable of South Yorkshire Police* [1992] 1 AC 310, they ruled that the next of kin could not claim compensatory damages for mental suffering caused by death or injury in the absence of a recognisable psychiatric disorder or illness caused to the plaintiffs. Since that was not alleged, the appeal was dismissed. They emphasised that the term "recognisable" was employed rather than "recognised" so as to allow for future development in the medical profession's recognition of mental conditions. The judges noted that relational proximity was not a live issue in this case, there being close ties of love and affection between the primary and secondary victims in each situation.

Thomas J, while agreeing that the appeals should be dismissed on the facts, found that the courts' policy-driven approach, reflecting a desire to avoid indeterminate liability, had caused the law to develop in an arbitrary and illogical fashion. He favoured abandoning the rules about geographical, temporal and relational proximity in favour of reasonable foreseeability as the sole test of liability for nervous shock. The rule should be modified so that while damages would not generally be available in the absence of a recognisable psychiatric illness, plaintiffs would not be prevented from recovering if they could nevertheless demonstrate that their mental suffering was approaching the order of a psychiatric illness and thus was plainly outside the realm of ordinary human experience.

Public interest immunity and ministerial certificates

In *Choudry v Attorney-General* [1999] 3 NZLR 399 the Court considered whether documents for which public interest immunity had been claimed in a revised ministerial certificate should be inspected by a Judge.

The case arose from an investigation by the New Zealand Security Intelligence Service into the activities of Mr Choudry, a political activist. Shortly before an APEC

ministerial meeting two SIS officers performed a covert search of premises of which Mr Choudry was tenant and occupier. Mr Choudry brought proceedings seeking damages for trespass and compensation for breach of his rights under the unreasonable search provisions of the New Zealand Bill of Rights Act 1990.

In an earlier judgment ([1999] 2 NZLR 582, 1998 Report 12-13), the Court considered an interlocutory claim to public interest immunity made by the Prime Minister, as Minister in Charge of the Security Intelligence Service, in respect of some 70 documents discovered by the Attorney-General. The Court concluded that the ministerial certificate was framed in such broad language that the Court could not effectively discharge its responsibilities. The Minister was therefore invited to file an amended certificate. The Minister subsequently did so and released some 20 documents previously withheld. The revised certificate was more detailed than the previous one but, Mr Choudry contended, in several respects was not particularised in the manner suggested in the earlier judgment. The certificate explained that the provision of further details would not be compatible with national security and would reveal information that it was the very purpose of the claim to keep secret. The issue was whether, in spite of that statement by the Prime Minister, the documents should nevertheless be judicially inspected.

The majority (Richardson P, Keith, Blanchard and Tipping JJ) set aside the High Court order for inspection. The new certificate complied with the terms of the earlier judgment; the Court had there recognised that in some cases the provision of further detail or explanation would not be compatible with national security. The revised certificate was considerably more detailed and internally cogent than the first and the process which had been followed provided a safeguard against an excessively wide claim. Judicial inspection of the documents could not responsibly advance matters, as the Court did not have the expertise or necessary information to go behind a ministerial certificate which stated that to disclose more information would itself jeopardise national security. Consideration of the competing interests had to be undertaken on the premise that the Minister had acted responsibly and with justification in providing the certificate in those terms.

Thomas J, dissenting, would have allowed the order for inspection to stand. He was not prepared to accept that the proper balance between a claim to public interest immunity and the public interest in the fair and effective administration of justice could be struck by requiring the Minister to furnish a proper certificate. While judicial inspection of the documents was an imperfect process it was the only effective means of holding the SIS accountable for its claim to immunity. The Judge was of the opinion that in some cases the information contained in the certificate would suffice, but in more, if not most, cases judicial scrutiny of the documents would be required. Inspection was, in his view, more than justified when the claim to public interest immunity had the history and characteristics of the claim in this case and the certificate was inadequate in a number of respects or otherwise fell short of the prescription which the Court had considered appropriate in its previous judgment.

Censorship classification and the New Zealand Bill of Rights Act

The interrelationship of the New Zealand Bill of Rights Act 1990 and the Films, Videos and Publications Classification Act 1993 was considered in *Moonen v Film and Literature Board of Review* CA42/99, 17 December 1999. The central issue was the place of freedom of expression in the classification process, and in particular in the interpretation of the term "promotes and supports" in s3(2) of the Classification Act. The publications in question were a book of short stories about sexual activity between men and boys under the age of 16 and a number of photographs depicting naked children, mainly boys. The Film and Literature Board of Review had classified the material as objectionable and had referred to the case of *News Media Ltd v Film and Literature Board of Review* (1997) 4 HRNZ 410, which stated that the Bill of Rights had no application in the classification context. On appeal, the High Court held that the Board had made no error of law in coming to its conclusion and Mr Moore successfully appealed to this Court.

Censorship of publications to any extent acts as a pro tanto abrogation of the right to freedom of expression, but the Court emphasised that any such abrogation must, in terms of s5 of the Bill of Rights, constitute only such reasonable limitation on freedom of expression as can be demonstrably justified in a free and democratic society. The relevant provisions of the Bill of Rights must be given full weight in the construction and application of the Classification Act.

The Court suggested a five step approach to the application of ss4, 5 and 6 of the Bill of Rights. After determining the scope of the relevant right or freedom, the first step is to identify the different interpretations of the words of the potentially infringing Act, in this case the Classification Act. If there is only one available interpretation, then it must be applied under s4 of the Bill of Rights. The second step, where more than one meaning is reasonably available, is to identify that interpretation which infringes least upon the right or freedom in question. It is that meaning that s6, aided by s5, requires the Court to adopt. Thirdly, the Court must identify the extent, if any, to which this selected meaning limits the relevant right or freedom. The fourth step is to consider whether the extent of such limitation can be demonstrably justified in a free and democratic society in terms of s5. If the limitation cannot be justified, then it constitutes an inconsistency with s5. Nevertheless, the inconsistent meaning must still be applied under s4. The fifth and final step is for the Court to indicate whether the limitation is or is not justified. The Court noted that, despite the insertion of s4 into the Bill of Rights, s5 remains and it should be regarded as serving some useful purpose. The Court has the power, and on occasions the duty, to indicate whether the statute complies with s5, even though the Court is nevertheless bound by s4 to apply the provision. A declaration on whether the limitation is justified could be useful if the matter were to be considered by the Human Rights Committee or by Parliament.

The Court then turned to the particulars of this case. It is necessary to adopt a tenable interpretation of the censorship provision that impinges as little as possible upon freedom of expression. Given the Board's reliance on the *News Media* case, it was likely to have erroneously regarded Bill of Rights considerations as irrelevant to its task. In respect of the material classified under s3(2), the Court noted that the Board's

decision did not address the meaning of the term "promotes and supports". Nor was there any discussion about why the Board saw the book as "promoting" the exploitation of children or young persons. The Court held that the Bill of Rights was a relevant consideration when interpreting the term "promotes and supports" and where the case was marginal, freedom of expression should be valued over objectionability. The concepts of promotion and support were concerned with the effect of the publication, not with the purpose or intent of the person who created or possessed it. Drawing on the Canadian case of *R v Sharpe* (British Columbia Court of Appeal, 2 July 1999, Rowles J) the Court stated that the concepts denoted an effect which advocated or encouraged the prohibited activity.

The appeal was allowed and the Court directed the Board to reconsider the classification of those publications deemed objectionable under s3(2).

Relationships between chief executives and statutory employees; public finance

Archives and Records Association of New Zealand v Blakely CA134/99 and CA186/99, 17 December 1999, arose from the actual and proposed reorganisation of parts of the Department of Internal Affairs so far as it affected the National Archives and the powers and responsibilities of the Chief Archivist. The two appeals raised questions, first, about the extent of the authority of public servants, or statutory officers, on whom Parliament has conferred power; and, second, about the methods by which Parliament appropriates money for government expenditure each year.

The first issue was whether the reorganisation was unlawful. The reorganisation involves bringing National Archives into a newly created Heritage Group under a Group General Manager who reports to the Secretary. The Chief Archivist remains but now reports to the Group General Manager rather than to the Secretary. The Archives and Records Association of New Zealand and the New Zealand Society of Genealogists, two bodies with major interests in the Archives, claimed that the reorganisation was unlawful because, among other things, it unlawfully diminished the functions of the Chief Archivist and unlawfully included the National Archives in the proposed reorganisation.

The Court upheld the High Court's finding that it was too early to be able to say that the proposals went further than envisaged by the legislation. The Court found that the plaintiffs had not satisfied any of the three grounds of appeal relied upon: the imposition of the General Manager between the Secretary and the Chief Archivist could not in itself render the reorganisation unlawful; there was no specific allegation before the court, nor any evidence, that the particular powers of the Chief Archivist had been unlawfully diminished; and the proposed role of so-called "service level agreements" to carry out some of the functions of Archives was not unlawful, provided that certain conditions were met.

The second issue was whether the reorganisation involved the unlawful transfer of moneys which Parliament had voted for national archival services to other purposes,

namely setting up the Heritage Group. The Secretary had required funds to set up the Heritage Group beyond what was available for that purpose from appropriations to his department. It was alleged that $300,000 of the Archives appropriation had unlawfully been made available for other uses.

The Court held, contrary to the finding of the High Court, that there had been no unlawful transfer of moneys. The Court began with the principle that there is to be no spending of public money without parliamentary approval. A principal means by which Parliament gives its approval is through annual Appropriation Acts. However, Parliament also gives financial approval by a number of other means, including Imprest Supply Acts. An Imprest Supply Act authorises the Crown to spend public money and to incur expenses and liabilities during a particular financial year in advance of appropriation by way of an Appropriation Act. The Imprest Supply Act provides authority separate from and ahead of the authority to be given in considerable detail in the later legislation. The authority is given in broad terms and is not limited by specific appropriations and votes. In this case the relevant Imprest Supply Act imposed an overall limit which the parties agreed had not been exceeded. It provided a separate and sufficient source of authority for the expenditure. The Government was not, as a matter of law, exercising any power to transfer funds from one vote to another. It merely left unspent some of the Archives Vote and exercised its power to incur additional expenditure within the limit authorised by the relevant Imprest Supply Act. Therefore, the government's actions were lawful.

Liability of barrister for costs on serious dereliction of duty

In *Harley v McDonald* [1999] 3 NZLR 545 the Court agreed with the High Court that it may award costs against a barrister in favour of the barrister's client in certain circumstances. The respondent had lost a significant amount of money through fraud by his former solicitors. He obtained judgment against the firm, but this became worthless when the firm became insolvent. At the advice of the appellant barrister, the respondent brought proceedings against the firm's professional indemnity insurer under s9 of the Law Reform Act 1936, based on the summary judgment. He also sued the Law Society as administrator of the Solicitors Fidelity Guarantee Fund. The claim against the insurer was dismissed with an award of costs against the respondent of $115,606.46. He succeeded against the Law Society but was awarded an amount well below that offered by the Society in a Calderbank letter prior to trial. He was thus ordered to pay an additional $30,000 in costs. Having changed his solicitors, and at the suggestion of the trial Judge, the respondent made a formal application for costs against the appellants, the barrister and her instructing solicitors. The High Court ordered the appellants to indemnify the respondent, jointly and severally, as to $65,000 of the costs that he had been ordered to pay to the insurer ([1999] 1 NZLR 583).

The Court identified a number of deficiencies in the case against the insurer. The statement of claim did not allege that the sum for which judgment had been obtained was a loss which was covered under the insurance policy. Although an amendment to this effect suggested by the Trial Judge was made, there was no cover under any policy for a liability under a guarantee. Further, the policies would have been voidable for

non-disclosure given the existence of fraud. These deficiencies were raised in the statement of defence but counsel had nonetheless proceeded with the matter. The instructing solicitors had taken a passive role and the case was run entirely on the advice of counsel.

In these circumstances, the Court held that the Court had jurisdiction to award costs against a barrister under r46 of the High Court Rules, the inherent jurisdiction, or a combination of both. Such an award was not contrary to any statutory provision or established principle of law. The Court examined the rationale behind the barristers' immunity from suit and stated that it did not render them immune from sanction for breach of their duty to the Court, as the underlying policy reasons for the immunity did not apply. The English position was not wholly relevant in New Zealand because of the historically different position of barristers. In England, barristers were not officers of the Court, but were instead subject to the jurisdiction of the Inns of Court.

It was then necessary to determine the level of conduct that would justify the making of such an award. In the case of solicitors, the requisite standard was serious dereliction of duty to the Court, and it was considered appropriate that the same standard be applied to barristers. The Court held that negligence or incompetence at an appropriately high level would be sufficient – bad faith or moral wrongdoing were not necessary. In this case, counsel had fallen well below the level of competence that the Court was entitled to expect from its officers. The Court did not consider it necessary or desirable to attempt to define the level of incompetence or negligence required. A comparison was drawn, however, with ss106 and 112 of the Law Practitioners Act 1982, which set out the grounds on which a legal practitioner may be struck off. The Court noted that the levels will often coincide although there was no necessary correspondence.

The Court held that the solicitors' breach of duty had been at the same level as that of counsel. The solicitors had relied too heavily on counsel and had not satisfied themselves that counsel's advice and proposed course of action were correct. While solicitors will usually be able to rely on the advice of counsel, that advice must be properly reasoned and the solicitors must be satisfied that the advice is tenable. Solicitors could not wash their hands of a case once it had been passed to counsel; they had an ongoing commitment to monitor the course of the litigation.

This Court upheld the High Court decision that liability was established against both the barrister and the instructing solicitors and the appeal was dismissed.

Evidence obtained by unlawful private actions

In *R v Accused* (1999) 16 CRNZ 415 the Court considered the relevance of international law to determining whether it was unfair to admit evidence obtained by unlawful private actions against an alleged shoplifter. The staff of a shop, suspecting the appellant of theft, followed him out of the shop, ushered him back and closed the shop doors briefly. As a result they obtained several items of evidence, including the recovery of the property in question and identification evidence.

The appellant based his argument primarily upon claimed breaches of the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights and the Body of Principles for the Protection of all Persons under any form of Detention or Imprisonment, adopted by the United Nations General Assembly in 1988. (An earlier challenge to the evidence based on the New Zealand Bill of Rights Act 1990 had already failed: see *R v N* [1999] 1 NZLR 713.) The Court acknowledged that the courts in interpreting, applying and developing the common law should act in conformity with international law. This applied when the courts were exercising the common law discretion to exclude evidence on the grounds of fairness.

However, the Court found that relevant international materials did not apply to the private acts in question in this case. The main provision in issue was Article 9 of the ICCPR, which guarantees the right to liberty and security of the person and prevents arbitrary arrest or detention. The Court observed that it is State parties that in general are obliged not to breach the rights and freedoms stated in the ICCPR; provisions such as Article 9 do not apply generally to the actions of private individuals. In this case there was no basis to attribute the actions of the shop staff to the State or to engage the responsibility of the State for the actions of the staff.

Even were there a breach of the rights said to be in issue in this case, the Court found that the relevant international material did not require that evidence be excluded. The inference to be drawn from international law was that there was a range of remedies and responses available to State parties. Factors relevant to the choice of remedy included the circumstances, the balance to be struck between competing principles and values, the constitutional character of the right infringed and the nature of the particular right (and breach): *Mohammed v The State* [1999] 2 AC 111 (PC). The most that international law could be said to require was that, if evidence was obtained in breach of relevant international rules protecting the individual, that breach should be taken into account in determining the admissibility of the evidence. This requirement was already inherent in the common law rule.

The Court concluded that it was not unfair at common law to admit the evidence. Although the actions of the shop staff were in the end unlawful, they began with reasonable steps in protection of the right of property and they were based on reasonable grounds to believe that the appellant had committed theft. The violation of the appellant's rights was limited in time and action and the evidence was non-confessional. There was no basis upon which to interfere with the way the trial Judge had exercised his discretion.

(Earlier in the year the Court considered the nature of an alleged positive obligation imposed on the state under the New Zealand Bill of Rights 1990 and related international human rights instruments: see *Mendelssohn v Attorney-General* [1999] 2 NZLR 268.)

Governor-General reference

R v Ellis (No 2) CA120/98, 14 October 1999, was the much-publicised second appeal of Mr Ellis against his conviction in 1993 for sexual offences against children in his care at a Christchurch crèche. The Court's jurisdiction to entertain the appeal came from a reference from the Governor-General under s406(a) of the Crimes Act 1961. The Court made it clear that such a reference is to be treated like an appeal and is limited to matters raised in the reference. The Court also emphasised that the scope of the rehearing is confined to new matters. The Court is not required to re-adjudicate issues that have been disposed of in earlier appeals. As the reference is treated like an appeal, court practice such as the rules regarding reception of fresh evidence are applicable.

The reference in this case raised a number of grounds, alleging a miscarriage of justice on the basis of: (a) the techniques used to obtain the children's evidence; (b) indications that retractions of allegations were not properly understood; (c) risks that the children's evidence might have been contaminated; (d) risks that in light of the above, a particular trial ruling was unfair; (e) the risk of jury bias; and (f) the fact that relevant material was not disclosed to the defence.

The five member Court was unanimous in dismissing the appeal. The Court expressed concern about the evidence relied upon by the appellant. Some of the evidence was not properly before the Court and no application was made to have it admitted. The Court was also concerned at the breadth of some of the new evidence which was properly before it, particularly relating to the reliability of childhood sexual abuse evidence. The Court stated that it was inappropriate for a Court of Appeal to undertake a comprehensive analysis of a controversial field in the context of a particular case. The Court expressed the opinion that such a function was more appropriate for a formal commission of inquiry.

The Court then considered the specific grounds set out in the references. In respect of grounds (a) and (c) together it was alleged that the child complainants' evidence was contaminated by, inter alia, interview technique failings, suggestive questioning by parents and the use of shared information between parents. These grounds had all been issues in the trial and the 1994 appeal. The Court considered in detail the affidavits from several child psychologists. The Court concluded that although interviewing techniques had developed since 1992, the new evidence did not raise sufficient doubts about the reliability and credibility of the complainants to conclude that there had been a miscarriage of justice. The real thrust of the appellant's case was that at trial contamination risks were underestimated and not properly investigated. The Court noted some concerns but ruled that the threshold for appellate intervention had not been reached.

In relation to (b) the appellant argued that the 1994 retraction of complainant A's allegations, which led to the convictions in respect of A being quashed in the 1994 appeal, affected the safety of the other convictions. The Court noted that this submission had been pursued and rejected in 1994, and in any event the jury's verdicts on the other counts were still sound as there was no evidence the jury had wrongly used A's evidence when considering other counts.

Ground (d) concerned a ruling made by the trial judge forbidding the defence from leading evidence contradicting complainant G's cross-examination answers on collateral issues. The statement at issue was a claim by G that another crèche worker was present during some of the abuse. The Court noted that a denial of this by the crèche worker would have added little to the accused's case and that G's credibility was still able to be properly assessed at trial.

In relation to ground (e), allegations of juror bias, the appellant alleged that Juror A knew the mother of one of the complainants through Juror A's partner. As soon as Juror A found out, she advised the juries' assistant. The Court held that the relationship between Juror A and the mother was tenuous and gave no cause for concern. Juror B was allegedly overheard to agree with an observation made at a housie evening held during the trial that the appellant was guilty. The Court noted that the overheard remark may have been misinterpreted and observed that, at any rate, the conversation was known to the appellant's counsel during the trial and was not raised either then or in the 1994 appeal.

Finally, the appellant alleged that the prosecution should have disclosed certain documents to the appellant at trial but did not. The Court concluded that none of the documents would have materially assisted the defence.

The Court thus held that no individual ground of appeal was made out, nor did their cumulative effect constitute a miscarriage of justice.

4. RECURRING CRIMINAL ISSUES

This section draws mainly on cases where there were successful appeals against conviction based on errors which occurred during the course of trial and other cases which raised issues relevant to the trial process. We also include four cases where the Court reviewed sentence tariffs. Other important criminal cases appear in Appendix A.

No proper plea taken

In *R v Jessop* CA404/98, 2 March 1999, an appeal against conviction was allowed because no proper plea had been taken in the Youth Court. The information recorded that the charge was "not denied" by the appellant. Section 153A of the Summary Proceedings Act 1957 requires that at a preliminary hearing for an indictable offence the charge will be read to the defendant, the defendant will plead either guilty or not guilty and the Court will record the plea. Counsel agreed that in this case no proper plea had been taken as the appellant had not been called upon to plead and no plea was recorded. The conviction was therefore a nullity. Section 204 of the Summary Proceedings Act was not available to remedy the defect. The matter was remitted to the Youth Court for the plea to be taken properly.

Severance wrongly refused

In *R v Moore (Kevin)* [1999] 3 NZLR 385 the Court allowed Mr Moore's appeal against conviction for conspiracy to pervert the course of justice on the basis that it was prejudicial to Mr Moore for the charge against him to be heard at the same time as the charge against another man (Mr Preston) of being a party to a murder said to have been committed by the Moore brothers. Mr Moore had previously been acquitted of the murder, allegedly due to his procurement of perjured evidence from another witness. The Court agreed with the trial Judge that Mr Moore's acquittal for murder did not present a bar to the bringing of the conspiracy charge. However the Court ruled that the jury would have experienced difficulty in achieving the conceptual division between the case against Mr Preston and the case against Mr Moore. To the extent that the homicide evidence was unrelated to the conspiracy, although arguably relevant to Mr Moore's motive, it was unfairly prejudicial to his defence. The Court quashed Mr Moore's conviction and ordered a separate retrial.

Failure to call evidence

In three cases the Court allowed appeals against conviction on the basis that a failure to call certain witnesses caused a miscarriage of justice.

- *Failure to call witness and expert*

R v K CA128/99, 10 June 1999, was an appeal against convictions for sexual offences by the appellant against his 14 year old niece. Counsel, who took over the case at a late

stage, advised the appellant and his wife not to give evidence and declined to call a paediatrician and a particular child witness to give evidence.

The Court found that the failure to call the appellant could not be seen as a serious tactical error, given the appellant's appearance and propensity to anger. It reached the same conclusion in relation to the failure to call the child witness, because it was unclear exactly what evidence the child might give. However the Court found that the failure to call the appellant's wife constituted a miscarriage of justice because at least two of the allegations made by the complainant concerned acts which happened in the wife's presence. It was also concerned about the failure to call the paediatrician because the paediatrician's evidence would allegedly have revealed certain learning and behavioural difficulties from which the complainant suffered. The Court accordingly quashed the convictions and ordered a new trial.

- *Failure to call character evidence*

A failure to call character evidence where credibility was in issue caused a miscarriage of justice in *R v Ahmed* CA331/98, 3 March 1999. Mr Ahmed was convicted of sexual violation. It was common ground that some sexual contact took place while the complainant was a passenger in Mr Ahmed's taxi but Mr Ahmed alleged consent.

The Court allowed the appeal against conviction and ordered a new trial on the grounds defence counsel had not led and developed the full range of good character evidence available, which related to Mr Ahmed and his devout Muslim beliefs and behaviour. The Court held that in this case of a one-off sexual allegation against a person without convictions, the exceptionally strong character evidence which was available should have been led, so strong was the need to establish Ahmed's credibility. Further, the Court held that had the evidence been introduced, the need for the Judge to give a full direction on character and its relevance in the circumstances would necessarily have followed. The absence of such a direction exacerbated the error by defence counsel.

- *Failure to call accused to give evidence at rape trial*

In *R v L* CA295/99 and 325/99, 28 October 1999, the Court allowed an appeal against conviction where the accused did not have an opportunity to make an informed decision whether or not to give evidence and his failure to do so resulted in a real risk of a miscarriage of justice. L was accused of raping his wife following an argument. The wife made a complaint of rape to the police but she chose not to give evidence at trial, claiming spousal privilege. The Crown therefore based its case solely on a videotaped statement between L and a detective, in which L had admitted that after an argument with this wife he "snapped" and forced himself on her. Defence counsel did not call L to give evidence and did not discuss the advantages and disadvantages of this step with L. Counsel was, it appears, relying on the opportunity to cross-examine L's wife, which did not ultimately arise.

The Court accepted L's submission that "[w]ithout cross-examination of L's wife on matters going to consent or evidence from L, conviction was almost inevitable". The

Court held that "in the circumstances L did not have the opportunity to make an informed decision as to whether to give evidence". The Court, citing *R v Beard* CA135/98, 17 December 1998, observed that in accordance with good practice L's counsel should have advised L of the factors for and against giving evidence and then obtained a written instruction from L. The Court quashed the conviction and ordered a new trial.

Evidence wrongly admitted or excluded

- *Evidence given before ruling made*

In *R v A* CA69/99, 28 June 1999 (judgment) and 15 July 1999 (reasons), a sexual violation case, the Court warned of the dangers of allowing evidence to be given before a ruling on that evidence has been made. At trial a friend of the complainant gave evidence before the Judge made a ruling, following a *voir dire*, to allow the friend's evidence in as recent complaint evidence. The Court of Appeal said for the Judge to make the ruling after the evidence had been given was most unusual and this procedure should not be followed in the future. This was because (i) the Judge would have had to stop the trial if the ruling had gone the other way and (ii) defence counsel were put in a difficult position in cross-examining the complainant at that stage. The convictions were unsafe and a new trial was ordered principally because of references to the appellant's earlier imprisonment made during cross-examination of the witness, the prejudicial effect of which exacerbated the problems arising out of the handling of the recent complaint issue.

- *Similar fact evidence*

In *R v Foord* CA95/99, 18 June 1999, the Court ruled as inadmissible certain evidence sought to be introduced as similar fact evidence. The evidence of the 16 year old complainant was of an indecent assault that included a role-playing incident in which she undressed for filming purposes, a bag was placed over her head, and the appellant touched her bare breast. The similar fact evidence sought to be introduced was of a young girl who worked for the appellant and involved him rubbing her chest area over her clothes. While there was similarity in the age of the complainants and the use of wine and cannabis oil to relax them, the similar fact evidence involved no film set scenario, no removal of clothes and no unusual conduct such as the use of a plastic hood or plastic skirt.

The Court cited *R v M* [1999] 1 NZLR 315 for the relevant legal principle that previous offending of the same general kind, without more, lacks sufficient probative value to be admissible in support of criminal proceedings. On the facts the Court held that the links between the evidence were tenuous and the probative value minimal. The Court also noted concerns about the directions given to the jury regarding the similar fact evidence. The Court emphasised that references to findings of fact made by the Court on a pre-trial application should not be put to the jury. The Court also warned that directions as to the relevance of similar fact evidence must be tailored to the situation and the defences argued. In this case the defence was a denial that the touching occurred yet the

trial Judge directed the jury that the similar fact evidence could be relevant to intent.

- *Evidence of motive or animus*

The Court found that certain evidence had wrongly been classified as collateral, and excluded, in *R v Singh* CA317/99, 7 December 1999. Mr Singh appealed convictions for threatening to kill and harassing the same complainant. The relevant evidence was of a conversation between a witness and the complainant during which the complainant made comments which indicated that she had a motive to make a false complaint against Mr Singh. The Court ruled that the evidence was not collateral. It was admissible as evidence relevant to the complainant's motive or animus towards Mr Singh, under the rule stated in *R v White* CA347/98, 17 December 1998. The Court also expressed concern at the timing of the Judge's ruling excluding the evidence, as evidence had already been adduced which contained references to the evidence later excluded. The timing of the ruling had at least the appearance of injustice.

- *Documentary hearsay and handwriting*

A trial Judge wrongly refused to allow cross-examination on certain documents seized in a search of the office premises in *R v Stephens* [1999] 3 NZLR 81, an appeal against conviction for using a document with intent to defraud. The Crown alleged that the appellant had submitted GST refund claims knowing them to be false. The refunds were claimed on behalf of a company and the defence was that some of the claim forms had been signed by a director of the company, not the appellant. The director denied this at the deposition hearing but died before trial. A pre-trial ruling allowed his deposition to be read at the trial, but the trial Judge refused to allow cross-examination on certain documents, including photocopies of cheques purporting to be signed by the director, which appeared to contradict the director's deposition evidence. The Court allowed the appeal against conviction and ordered a new trial on the basis that the Judge's ruling led to a miscarriage of justice. To allow the deposition to be read but to prevent the defence from pursuing virtually the only means of challenging that evidence was, the Court held, unfair.

The Court also discussed the application of s19 of the Evidence Act 1908, relating to the comparison of disputed handwriting. The jury should not be invited to make a comparison of disputed handwriting without the assistance of a suitably qualified expert, being either a handwriting expert or a person with sufficient knowledge of the handwriting of the person in question. The term "witness" in s19 necessarily means a witness qualified to make a comparison. The police officer in this case was not such a witness, so the section was not applicable.

- *Written statements of deceased person*

The trial Judge wrongly ruled that the written statements of a deceased person were inadmissible in *R v Preston* CA1/99 and 24/99, 27 May 1999. The Court held that it is for the party opposing admission to show that the prejudice to that party outweighs the

probative value of the statement. In this case the evidence had significant probative value which was not outweighed by the likely prejudice to the Crown from its admission. Mr Preston's conviction for being a party to the murder was quashed and a re-trial ordered.

- *Evidence of repayment of money relevant to mens rea*

In *R v Ellison* CA442/98, 2 February 1999, the Court quashed the appellant's conviction for using a document with intent to defraud on the basis that evidence of repayments made by the appellant had been wrongly excluded. The charges related to abuse of the general medical services benefit system. The Crown alleged that the appellant had fraudulently claimed a total of $90,000. The appellant's defence was that he honestly believed he was entitled to submit the claims. The appellant was found guilty on charges relating to only $285.

Prior to the trial, the appellant repaid $90,000 to the Crown. The appellant sought to have evidence of this repayment introduced at trial, to indicate that he had no intention of defrauding the Crown. This Court ruled that the intended evidence was relevant and admissible. The fact that it may not have helped the appellant's case and may ultimately have been to his disadvantage was irrelevant. The evidence was capable, depending on how the jury viewed the matter, of supporting the appellant's defence of honest mistake. To prevent the appellant from putting the repayment issue before the jury was to prevent him from advancing a full defence. In addition, the Crown's cross-examination of the appellant may well have misled the jury in view of the appellant's inability to engage the topic of repayment. A combination of these factors and the Judge's failure to properly direct the jury represented a miscarriage of justice. The Court declined to order a re-trial given that the jury had acquitted the appellant on the main thrust of the Crown's case.

- *Failure to cross-examine on complaints*

In *R v Cossey* CA14/99, 24 February 1999, the Court held that, in a trial relating to sexual offences allegedly committed by Mr Cossey, the jury was entitled to know that, within the period in which the alleged offending occurred, the complainant had discussed allegations of sexual misconduct by another man with his parents, school counsellors and the police, but had made no complaint about Mr Cossey. The Court also held that Mr Cossey was entitled to have in evidence the fact that he had encouraged at least one of the boys to go to the authorities about the incident involving the other man. The evidence was relevant not to whether the abuse took place, but to whether the complainant had complained about it.

- *Cross-examination on previous convictions*

Where leave is given under s5(4) of the Evidence Act 1908 to adduce evidence of previous convictions, that evidence is relevant only to the credibility of the accused, not to the likelihood of his or her having committed the offence. Even then, the Judge must

consider carefully whether the evidence is sufficiently cogent to overcome the recognised prejudicial tendency of such evidence. A direction to the jury on the use to which such evidence can properly be put should in general be given.

Cross-examination on previous convictions was wrongly allowed in *R v Anderson* CA393/99, 16 December 1999. The appellant was convicted of wounding with intent to cause grievous bodily harm. He appealed on the grounds that the Judge erred in allowing the Crown to cross-examine him on his two convictions for assault in 1990 and did not adequately direct the jury as to the use of such evidence. According to the Judge, the appellant had put character in issue by attacking the character of the police officers and giving evidence that, as a martial arts exponent, he normally exercised self-control. The Judge made no reference to the evidence of previous convictions when summing up.

The Court concluded that, even had a proper foundation for admission of the evidence been laid by the accused putting his character in issue, leave to cross-examine on the convictions should have been refused. The convictions were nearly ten years old, they did not allow any inference to be drawn as to the appellant's ability to control himself (because it was not known whether their context was one of loss of self-control), the fine imposed in respect of the 1990 offences did not suggest that the violence was comparable to that in issue in this case, and there was a serious risk that the jury would consider the 1990 convictions relevant to the likelihood of the appellant having committed these offences.

More fundamentally, the Court was not satisfied that the appellant had put his character in issue. The Court commented that, while the absence of a warning to counsel that he or she was putting the character of the accused in issue may not be fatal to the granting of leave, it was good practice.

Summing up and directions

- *Putting the defence case*

It is crucial, particularly where a trial has been lengthy and complex, for the defence case to be put to the jury. In *R v Maney* CA116/99, 21 October 1999, the Court allowed an appeal against a murder conviction because it was not satisfied that the trial Judge fairly put the defence case to the jury. The Judge did not summarise the appellant's defence to the charge. Nor was there any analysis of the Crown case against the appellant and her response to it. Further, the Judge had unwittingly emphasised the Crown case. The Court held that the failure to put the defence case may have resulted in a substantial miscarriage of justice and it could not be said that the only possible verdict on the evidence was that of guilty.

- *Judge expressing opinion in summing up*

In *R v McRoberts* CA86/99, 15 June 1999, the Court commented on the extent to which a trial Judge may express a view of the evidence. Provided a jury is clearly directed that they are the judges of fact and are free to disregard the Judge's views on the facts, and the comment is fairly presented overall, a trial Judge is fully entitled to give his or her opinion on a question of fact to the jury. Moreover, the Judge may express his or her opinion strongly. Where the evidence clearly favours the prosecution the Judge does not have to strive for an artificial balance between the prosecution and the defence. A Judge must not intervene to such an extent that a jury may be overawed or influenced to the point that their function as arbiters of fact is effectively denied them. However, a Judge may appropriately comment, provided the comment is no stronger than is warranted by the facts and is couched in suitable language.

- *Representative charges*

The Court gave guidance on the appropriate direction to be given to the jury in a case involving representative charges in *R v P* CA184/99, 2 September 1999. When dealing with a representative charge of rape, a trial Judge should instruct the jury that they must be unanimously satisfied beyond reasonable doubt that all the elements of rape coincided on one or more occasions in the period specified in the charge. In this case the Judge did not so direct the jury, raising a real risk of miscarriage of justice. This risk was exacerbated by the inconsistency between the guilty verdict on the representative count and the acquittal on other counts. A retrial was ordered on the representative charge.

- *Eyewitness evidence*

The standard direction, under s344D of the Crimes Act, about treating eyewitness evidence with caution, is not appropriate when the evidence is exculpatory in nature: *R v Tristram*, CA259/99, 28 October 1999. That case was an appeal against conviction for the aggravated robbery of a service station. The main issue at trial was identification. The Crown relied on the appellant's alleged confession to a police officer and evidence that the appellant's palm print was found on the counter. The appellant relied, inter alia, on the fact that both service station attendants gave descriptions of the offender that did not match the appellant. During his summing up, the Judge gave the standard direction, in accordance with s344D of the Crimes Act, that eyewitness evidence should be treated with some caution given the fallibility of people's powers of observation and recollection. On appeal the Court ruled that a s344D direction was only appropriate where the eyewitness evidence was inculpatory, not exculpatory.

- *Provocation*

In *R v Paniani* [2000] 1 NZLR 234 the Court upheld an appeal against conviction for murder because the Judge had, in summing up and in answering a jury question,

misdirected the jury on the issue of provocation.

The defence relied on the following acts as provocation: the appellant had discovered his wife lying on a bed with another man (the third party, B). P beat the deceased. Ten minutes later B attempted to free the deceased from P's headlock on the back porch. After that point the deceased was beaten again and killed. The Judge ruled that there was evidence which raised a proper basis for a defence of provocation. The Judge directed the jury that provocation must come from the person killed. The jury asked whether the actions of the deceased on the back porch could be classed as provocation as a compounding factor. The Judge told them (1) provocation must come from the person killed; (2) it is possible to revive provocation but the actions B on the porch were not provocative; and (3) the attempts by B to prevent harm did not constitute provocation. The appellant contended that the Judge by his emphasis on provocation coming only from the deceased, by his apparent compartmentalisation of the events occurring over a short period of time, and his by third point effectively took the issue of provocation, insofar as it depended on those later actions, away from the jury.

The Court ruled that provocation must come from the person killed (*R v McGregor* [1962] NZLR 1069 (CA)) but the acts of the third party could, in some circumstances, be sufficiently associated with the deceased so as to be her acts. The Judge correctly ruled that this was so of the acts of both B and the deceased in the bedroom. The jury, by the use of the word "compound" rather than the word "revive" may have been willing to see the short series of events as continuing, with the initial provocation continuing over that period. The actions involving the deceased on the porch were capable of being provocation as they could in the appellant's mind have been directly related to the events in the bedroom a few minutes before. Further, it was not for the Judge to go beyond the question of law and state flatly that the attempts to prevent harm did not constitute provocation. Such a finding could be made only by the jury, were the issue left before them (as it should have been). The conviction was quashed and a new trial ordered.

- *Use of written directions*

The Court has previously encouraged the use by the trial Judges of written guides in cases where the jury is facing complex concepts, a multiplicity of parties, or a multiplicity of counts, *R v Tuhoro* (1998) 15 CRNZ 568. In two cases in 1999 the Court emphasised the need for written directions to be accurate and to contain all relevant matters.

In *R v Wiley* CA438/98, 2 March 1999, the Court emphasised the need to ensure that written directions to a jury focus on the matters in issue. The appellant appealed his conviction for indecent assault. The trial Judge gave directions before the trial began on similar fact evidence. He also spoke to the jury at the end of the evidence and distributed a two page memorandum. Counsel expressed reservations about the memorandum because it contained disputed issues of fact, it omitted any directions on how to use similar fact evidence, and it suggested that there were several live issues which did not arise during the trial. The Court held that if the Judge considered it was

necessary to provide a written memorandum, then it must ensure that the jury's attention was focussed solely on matters which were truly in issue. In this case, a clear direction on the introduction of similar fact evidence and how it could be used was required. Although the Judge's summing up provided a full explanation of the law on similar fact evidence and the manner in which it could be used, the memorandum was misleading. This problem was compounded by the fact that, in summing up, the Judge drew attention to certain evidence without indicating that it was similar fact evidence. The conviction was quashed.

In *R v R* CA134/99, 15 July 1999, the Court held that the use by a trial Judge of a written guide to the jury for serious sexual offending was in part not an accurate statement of the law, was inconsistent in its own terms and was inconsistent with the oral summing up. The Court considered the exclusion of the essential elements of onus and standard of proof from the written statement must be seriously prejudicial to the accused. Even if the summing up had been accurate, it was doubted it could have corrected that prejudice as the jury would have had the erroneous written statement before them in the jury room. The Court held that there had been a miscarriage of justice. The convictions were set aside and a new trial ordered.

- *Error in assessment of facts*

In *R v Hills* (1999) 16 CRNZ 673, the Court allowed an appeal against conviction on the basis that the trial Judge had erred in his assessment of the facts. The appellant was convicted by a Judge sitting alone of assault with a weapon, the weapon being a rottweiler dog. The incident occurred when two uniformed police officers went to the appellant's house in the early hours of the morning to check whether another woman was present. The appellant told the officers to leave, the officers refused to do so, and, although there was conflicting evidence as to exactly what happened next, at some point the appellant released her rottweiler dog on the officers. There were a number of differences in the evidence given by the appellant and the two police officers, but the trial Judge accepted the evidence of the officers. The Judge held that the officers were initially on the property under a lawful purpose, and were accordingly quite within their rights to explore every possibility to ascertain whether the person they were trying to locate was in the house. He found that the officers had been given insufficient time to leave before the appellant acted as she did.

The Court was reluctant to disturb a trial Judge's findings of fact, but, having carefully considered the evidence, it concluded that the Judge had erred in his assessment of the facts, and accordingly erred in concluding that the officers were lawfully on the premises when the dog advanced upon them. They had been asked to leave before the appellant made phone calls to ascertain her rights, and they had ample time to do so. Because the police officers were technically trespassing at the time of the assault, regard must be had to s56 of the Crimes Act, which provides that reasonable force may be used to prevent any person from trespassing, or to remove a trespasser, provided he or she does not strike or do bodily harm to that person. In this context 'force' must include the threat of force. There was no striking or doing of bodily harm. The Court ruled that it had not been shown that the appellant had used unreasonable force in the circumstances.

- *Inadequate evidential basis for conviction*

In *R v M* CA148/99 and 218/99, 6 September 1999, an appeal against conviction for aggravated robbery was allowed on the basis that there was insufficient evidence to support the conviction. The appellant and three others were charged in relation to the aggravated robbery of a farm house. The appellant was apparently not at the scene of the robbery, but was involved in the planning. The actual robbery involved the use of an axe to threaten a victim. However, one of the co-accused gave evidence for the Crown that the men did not think anyone would be at home at the farmhouse.

The Court held that the tenuous evidence of complicity by the appellant in an aggravated robbery and the Crown evidence indicating complicity only in an intended burglary made it incumbent on the trial Judge to define the difference between aggravated robbery and burglary and to direct the jury that if they considered it reasonably possible that the appellant intended there only to be a burglary they should acquit. The crucial issue was whether there was an adequate evidential basis for the conviction. The Court was satisfied that there was abundant evidence of an offence relating to burglary, but insufficient evidence to support a conviction for aggravated robbery. The conviction and sentence for aggravated robbery were quashed. The Court ordered a retrial and that the indictment be amended by substituting a count of conspiracy to burgle.

Records of rulings and directions

Once again, the Court would like to emphasise that the argument and determination of appeals is made difficult if rulings, the reasons for them, and all interactions with the jury and counsel, are not recorded. In *R v Paniani* [2000] 1 NZLR 234 there was no written record of the Judge's answer to a jury question, apart from a note made by defence counsel. There were also differences between the original copy of a jury question and the record of that question in the trial transcript. In *R v C* CA211/99, 21 October 1999, there was no proper record of the summing up, so the Court had to rely in part on the recollection of counsel and the trial Judge.

New evidence

In two cases the Court quashed convictions on the basis of new evidence. In *R v Shearer* CA203/98, 204/98, and 212/98 25 February 1999, the Court, following a conference with counsel for the appellants and the Crown, admitted new evidence submitted by the Crown, quashed the convictions and directed that verdicts of acquittals be entered.

In *R v Pora* CA447/98, 18 October 1999, the Court quashed the appellant's convictions, entered in 1994, for the murder and rape of Susan Burdett and the aggravated burglary of her home. The Crown case was based on the appellant's confessions alone and there was no supporting forensic evidence. Subsequently, in May 1996, Malcolm Rewa was convicted at a retrial of the rape of Ms Burdett, although the jury was unable to agree on

a murder count. The Court had no doubt about that the jury at the appellant's trial might reasonably have been led to return a different verdict had further evidence concerning the involvement of Malcolm Rewa been available to it. Semen recovered from Ms Burdett's body was established by DNA profiling to have come from Mr Rewa. Rewa was a lone serial sexual predator who was, at the date of Ms Burdett's death, more than twice the age of the appellant. Although the confessional statements of the appellant were readily accepted by the jury at his trial in 1994, the Court found itself unable to assume the same would be the case with knowledge of the Rewa dimension. This was so particularly given the recognised possibility of false confessions to serious criminal offending (*R v Cooney* [1994] NZLR 38), the appellant's immaturity at the time of his confession and trial, his marked lack of literacy skills, and the new evidence. The Court made an order for a new trial.

Inconsistent verdicts

The Court found jury verdicts to be inconsistent in *R v Yu* CA117/99 and 230/99, 9 July 1999. The appellants were charged with conspiring to defraud Harrah's Sky City Limited and three alternative charges of breaching the rules of an authorised game with intent to obtain pecuniary advantage for the appellant Yu. All four charges alleged joint criminality, prior agreement and planning on the part of the appellants. The appellants were acquitted on the charge of conspiracy but found guilty on the three alternative charges of cheating.

The Court ruled that prosecuting for the alleged conspiracy or the acts of cheating were alternative options for the Crown to consider when framing the indictment, but were not appropriate alternative options for the jury's consideration. By proceeding on both the Crown risked either duplicitous verdicts or, as occurred, irrationally inconsistent verdicts. The facts made it clear that the appellants could only be convicted of cheating if the jury were satisfied they had jointly and knowingly breached the authorised rules of the game. This joint aspect of the cheating charges and the concealed nature of the signals passed between the appellants at the gaming table necessarily led to an inference of prior conspiracy. Conversely, the conspiracy charge, while separate, was dependent upon the jury being satisfied of actual cheating.

The Court concluded that it was a logical impossibility for the jury to find the appellants not guilty of conspiring to cheat but nevertheless guilty of cheating. The Court allowed the appeals and left it open to the Crown to decide whether a retrial on the cheating charges would take place.

Sentence tariffs

- *Class B drugs*

In *R v Wallace* [1999] 3 NZLR 159 the Court provided a tariff judgment for offences involving Class B drugs, in the same vein as *R v Stanaway* [1997] 3 NZLR 129 which dealt with offences involving class A drugs.

The appellants were involved in a large-scale drug manufacturing operation involving the Class B drug methamphetamine, popularly known as "speed". Both pleaded guilty to the same representative offences involving manufacturing, supplying and possession of methamphetamine, and money laundering. An appeal by Mr Wallace against his effective sentence of ten years imprisonment was dismissed. The appeal by Mr Christie was allowed and his sentence reduced from seven to six years imprisonment.

The Court canvassed cases relating to offending involving Class B drugs and distilled several principles. The Court ruled that there is no justification for differentiation between drugs in the same class, but any comparison of offending in relation to different drugs must take into account such matters as potency, purity, formulation, manner of sale and use. The Court repeated its statement in *Stanaway* that market value, if it could be reliably obtained, would give an indication of relative criminality, but experience has shown that estimates are usually strongly disputed and street values gave no reflection of what might have been received by the importer/manufacturer or wholesale distributor.

The Court warned that offenders are to be sentenced only for proved offending. However, this did not mean that evidence of past dealing must be ignored merely because precise quantities could not be proved. Nor did it mean that the conduct of the offender was not to be assessed in its overall context. There was little difference to be drawn between manufacturers and importers, since both introduce drugs to the market. However, instigators, masterminds, prime movers, or controllers, whichever role they fill, are at the top level, and when convicted must attract sentences at the upper end of the relevant range.

The Court repeated the statement that personal circumstances were generally subordinate to the need to deter dealing in drugs. The Court noted that in this context dealing by addicts warrants no different response from dealing out of greed or other motivations. Only in special circumstances will a non-custodial sentence be justifiable. That does not exclude the possibility of suspension of sentence in less serious cases which generally will be where the commercial element is absent and the quantities are small. Nor does it exclude the possibility, in special cases, of sentences devised to break addiction by courses of treatment by suitable agencies. The Court did recognise, however, that there will be the need from time to time to fashion sentences to take account of assistance to the police by drug offenders, such as by identifying suppliers, co-offenders and the like.

In relation to Class B drugs specifically, the Court noted the trend in recent years towards increasing sophistication and scale in the manufacture of such drugs and the introduction of large commercial quantities into New Zealand by importation. For commercial activity on a major scale the starting point for a principal offender will be in excess of eight years and in the very bad cases up to fourteen years, especially where repeat offending is involved. Commercial manufacture or importation on a substantial scale, reflecting sophistication and organisation, with operations extending over a period of time though not involving massive quantities of drugs or prolonged dealing, calls for a starting point in the range five to eight years. For smaller operations, but representing commercial dealing, starting points of up to five years are appropriate.

- *Cannabis cultivation*

In *R v Terewi* [1999] 3 NZLR 62 the Court reviewed the tariff case on sentencing in cannabis cultivation offences, *R v Dutch* [1981] 1 NZLR 304. A schedule of relevant authorities is annexed to the judgment.

The Court considered that it was still appropriate to divide cannabis cultivation offending into three broad categories. Category one offending consisted of the growing of a small number of cannabis plants for personal use by the offender, with no element of commercial dealing. Offending in this category was almost invariably dealt with by a fine or other non-custodial sentence. Category two offending comprised small-scale commercial cultivation of cannabis. The starting point for sentencing was generally between two and four years. Category three involved large-scale commercial growing, usually of quite a sophisticated nature. The starting point would generally be four years or more. The borderline between categories might in some cases be quite indistinct. The Court declined to specify numbers of plants for each category as it had done in *Dutch*. While such numbers were relevant, they were no longer themselves an adequate guide. Certain modern cultivation methods could speed up the growth and cultivation of the plants, and increase the yield and levels of tetrahydrocannabinol.

It was observed that sentencing Judges would be greatly assisted by evidence of likely amounts of annual gross revenues, or turnover, obtained by the offender, or which the offender anticipated deriving from the activity. This was a better indicator of the size of the operation than simple reference to the number of plants found. Annual revenues had to be considered in the dollars of the day. In 1999 values, annual revenues of more than $100,000 would place a cultivation operation clearly within category three. As with any drug offending with a profit-making motive, the personal circumstances of the offender whose activities came within categories two and three would not usually be given much significance in sentencing. The power to suspend sentences under s21A of the Criminal Justice Act 1985 would be invoked in cases involving a commercial element only in exceptional circumstances. It was fundamental that sentences imposed should act as a deterrent and s21A was directed only at deterring reoffending by the individual being sentenced. Applying these principles to the facts of the cases, the Court dismissed the appellants' appeals against their effective sentences of and two and seven years respectively.

- *Home invasion sentencing*

R v Palmer CA344/99, 16 December 1999, was the first appeal concerning the new home invasion legislation to come before the Court. Mr Palmer appealed against his sentence of ten years' imprisonment for rape. The Crimes (Home Invasion) Amendment Act 1999 applied, as the offence occurred in the victim's home. By virtue of that Act the maximum penalty for a rape involving home invasion is 25 years.

The Court examined the terms of the Act and its intended impact upon sentencing principles. The Act creates a two-tier penalty structure – it increases the maximum sentences for 41 offences in the Crimes Act 1961 in any case where the Court is satisfied that the offence involved home invasion. The Court found that Parliament's

intent as expressed in the legislation was clear. A sentencing Judge in a case involving home invasion should give discrete and concrete recognition to that fact. Having regard to the maximum term of imprisonment, a significantly greater penalty would be imposed. The aim was to provide greater protection from offending in the home, by sending a strong signal to offenders that the stakes are now higher.

The Court stated that the process by which the sentence is increased must be transparent. The Court recognised that potential difficulties in applying the Act stem from the fact that the courts have always recognised that the commission of an offence within the home is a serious aggravating factor, justifying an increased sentence. Thus, there is a possibility that the element of home invasion may be taken into account twice; first as an aggravating factor which would ordinarily led to a severe penalty, and second as a factor requiring a further addition to that penalty. The Court stated that there must be a flexible approach to the legislation depending on the circumstances of the particular case, including whether the offence is one for which there is a specified starting point or an established tariff.

In cases where the offence is one for which there is an established starting point, the Court held that the required discrete and concrete recognition of the home invasion element can best be achieved by adopting a higher starting point. An appropriate figure in cases of rape would be 11 years, as that is an increase of around half of the increase in the maximum sentence of five years. Having adopted this starting point, aggravating and mitigating factors should be taken into account in accordance with existing sentencing principles. While the home invasion element has already been allowed for, the Court said that the seriousness or particular nature of the home invasion may warrant a further increase in sentence.

Where there is no established starting point, the Court considered that it may be preferable to either arrive at the appropriate sentence by direct reference to the increased maximum penalty, or by first determining the sentence which would be appropriate under present sentencing practice and then increasing that sentence by such an identifiable measure as may be required in the circumstances to allow for the home invasion element. Either way, the important consideration is that the penalty be definitely increased and that the home invasion element be discretely addressed. The Court warned that care must be taken to ensure that existing sentencing principles and practice remain intact where home invasion is not an element of the case. The new legislation was not intended to result in lower sentences in such circumstances.

Applying these principles, Palmer's appeal was dismissed. The Court found the sentence of ten years to be within the available range, and emphasised that there had been a substantial discount for his guilty plea.

- *Rapes of partner or former partner; guilty plea*

The Court gave guidance on the appropriate starting point for sentencing in an uncontested rape case in *R v R* CA59/99, 15 June 1999. A schedule of relevant

authorities is annexed to the judgment.

The appellant appealed against his sentence of eight years imprisonment for the rape of his estranged partner, that sentence having been imposed concurrently with a sentence of three years imprisonment for kidnapping, relating to the same occasion. The appellant had admitted the offending when questioned by police and had entered an early guilty plea.

The Court reviewed a long line of authorities for uncontested rape sentences. For a contested rape the tariff was around eight to ten years imprisonment, while for an uncontested rape, the starting point was generally eight years minus a discount for a guilty plea. The Court noted that there is no separate sentencing regime for spousal rape. The Court relied particularly on *R v Ram* CA90/95, 1 June 1995, a case involving similar facts, in which a sentence was reduced on appeal from ten years to seven and a half.

The Court held that there was little to distinguish this case from *Ram*. The Court noted the victim's sympathy toward the appellant and the 'one-off' nature of the offending. The Court also noted the aggravating feature of the attempt to terrorise the victim. In the result, the Court quashed the eight year term and substituted a sentence of seven years imprisonment.

5. RECURRING CIVIL ISSUES

Second appeals

In several cases the Court emphasised its reluctance to grant leave for second appeals and reiterated its comments in *Waller v Hider* [1998] 1 NZLR 412. In that case it was said that the Court, on a second appeal, "is not engaged in the general correction of error." Rather, its primary function is to clarify the law and determine whether it has been properly construed and applied by the Court below. The appeal must raise some question of law or fact capable of bona fide and serious argument, in a case involving some private or public interest of sufficient importance to outweigh the cost and delay of further appeal: *Cuff v Broadlands Finance Ltd* [1987] 2 NZLR 343.

Leave to appeal was refused in *Gazzard v Papakura Realty Ltd* CA224/98, 3 May 1999. In that case it was common ground that the High Court Judge, who had allowed an appeal from the District Court, had proceeded on a mistaken view of the facts. Nonetheless, the Court dismissed the application for leave because it was satisfied that it would have been open to the High Court Judge in the exercise of his discretion and on a correct appreciation of the facts to have come to the conclusion that he did.

In *Cranson v NZ Trainers' Association Inc* [1999] 3 NZLR 641, the Court granted Mr Cranson, the plaintiff in a defamation action heard in the District Court, leave to appeal from a decision of the Full Court of the High Court. The primary reason for granting leave was that the High Court had placed considerable reliance on this Court's decision in *Lange v Atkinson* [1998] 3 NZLR 42. That decision was then under appeal and the Court observed that the Privy Council may reverse or modify it. In those circumstances it would not, the Court held, be just to deprive the appellant a second appeal pending the decision of the Judicial Committee.

In *Snee v Snee* [2000] NZFLR 120, the Court refused leave to appeal from a decision of the High Court which had allowed an appeal from the Family Court. The Court emphasised the reluctance of the Court to grant leave to appeal and reviewed the relevant cases. The Court was able to locate only one case in the past ten years where a party granted leave by this Court had gone on to succeed. That was *Engineering Dynamics Ltd v Norgren Martonair (NZ) Ltd & Victor Hydraulics Ltd* (1997) 7 TCLR 369, where the Court had commented that legal costs and expenses had long since exceeded the sum claimed.

Jurisdiction to hear appeals of interlocutory rulings

In two cases the Court made comments on the circumstances in which leave to appeal from a pre-trial ruling may be granted.

The first case was *Winstone Pulp International Ltd v Attorney-General* CA175/99, 30

August 1999. Winstone applied to the High Court to appeal an arbitral award assessing the value of land held under a Crown Forestry Licence. The High Court adjourned the application pending determination of a related appeal. In a further judgment the High Court refused an application by Winstone for leave to appeal to this Court and agreed that an adjournment was the appropriate course. Winstone applied to this Court for leave to appeal the decision of the High Court to refuse leave. The Court held that neither it nor the High Court had jurisdiction under the Arbitration Act 1996 to grant leave to appeal. The Court found that the High Court had not refused to grant leave; it had simply adjourned the application.

Winstone then submitted that the leave application to this Court should be viewed as an application under s24G of the Judicature Act 1908 for leave to appeal against the adjournment. The Court found that it had no jurisdiction to entertain the application, since the adjournment decision was not within the meaning of "decision" in s24G. The Court stated that "decision" is a popular non-technical word of variable meaning and the particular meaning necessarily depends on the context in which it is used. Broadly speaking interlocutory rulings fall into at least three categories: those that determine or affect the rights or liabilities which are in issue; those that decide the shape of the substantive proceedings; and those ancillary but important ruling on times and procedures. Section 24G could not sensibly apply to all the myriad of decisions that commercial list Judges make. Effective case management and timetabling necessarily involve directions, rulings and other decisions as to times and procedural aspects. In exceptional cases such a decision may affect rights and liabilities. In the ordinary run, however, an adjournment is simply procedural or administrative, not affecting rights or liabilities immediately as such, and the rights or liabilities in issue will remain for substantive determination. Generally, such an order or decision is not appealable, but an appeal will lie from such orders if they affect substantial rights. The present case did not fall into an exceptional category. Accordingly, the Court held that it had no jurisdiction to entertain the application.

In *Association of Dispensing Opticians of New Zealand Inc v Opticians Board* [2000] 1 NZLR 158 the Court considered whether s66 of the Judicature Act 1908 conferred jurisdiction upon the Courts to entertain an appeal from certain interlocutory rulings in the High Court. The question was whether High Court rulings refusing leave to cross-examine, refusing to order the production of certain documents at a hearing and refusing to file an affidavit fell within the phrase "judgment, decree or order" in s66.

The Dispensing Opticians appealed the Judge's rulings and the New Zealand Association of Optometrists applied to strike at the notice of appeal, alleging that the Court did not have jurisdiction to hear appeals from such rulings. The Court dismissed the application to strike out the application. The Court reiterated its statements in *Winstone Pulp* concerning the classification of interlocutory rulings. The issue of jurisdiction is not easily separated from the merits, so an application to strike out will rarely be appropriate. The preferable course is for any jurisdictional question to be dealt with as a threshold issue on the appeal and, if rejected, for the Court to go on and determine the substantive appeal.

In deciding whether the relevant rulings were within the designation "judgment, decree or order" the Court stated that the context of the decision was all important. Section 66 could not be intended to confer jurisdiction to appeal every decision made by the High Court in relation to the proceeding and before delivery of the substantive judgment. The Court considered that rulings made either in the course of the hearing of the proceeding or as part of the trial conduct or management process would not ordinarily be susceptible to interlocutory appeal. On the other hand rulings which have some substantive effect on rights and liabilities in issue would be. The boundaries were not fixed, and some cases may fall into an exceptional category. The Court endorsed the approach taken in *Winstone Pulp* as to the broad classification of "decision". On the present facts, the proceeding was not seen as ready to set down for hearing until the three interlocutory applications had been determined. It was still at the preparation for hearing stage.

Mareva injunction pending appeals

In *Prior v Parshelf 45 Ltd (in Receivership)* [2000] 1 NZLR 385, the Court held that it had no jurisdiction to grant a Mareva injunction to protect the interests of a party which had been unsuccessful in this Court pending the outcome of a further appeal to the Privy Council.

The Court of Appeal's jurisdiction derives from statute and subordinate legislation, including the Privy Council rules. Rule 6 of the Privy Council Rules empowers this Court to grant a stay of execution of its judgment pending an appeal. In *Attorney-General for Hong Kong v Reid (No.2)* [1992] 2 NZLR 394, the Court considered that, although R 6 was inapplicable to the circumstances, it was able to make an order whereby certain properties held by Mr Reid were preserved pending a Privy Council appeal. However, in that case the properties in question, unlike the property in the present case, were the subject matter of litigation and the tenor of the judgments was that the jurisdiction exercised by the Court was one to preserve the subject matter of the litigation pending determination of the appeal.

Section 16 of the Judicature Act 1908 gives the High Court a general jurisdiction which enables it to make Mareva orders, that power having been confirmed by High Court Rule 236B. By statute the English Court of Appeal has "all the authority and jurisdiction of the court or tribunal from which the appeal was brought". In contrast, s57(4) of the Judicature Act appears to be the only New Zealand statutory provision of general application that relates High Court powers to this Court and it is cast in a more limited way. It states that Judges of this Court continue to be Judges of the High Court and may sit or exercise any of the powers of Judges of the High Court. It operates only when the High Court could have exercised a power and therefore is available only pending determination of an appeal by this Court. It is not available once this Court has decided an appeal, for then the High Court would have no continuing power to grant interim relief.

The only basis upon which this Court may make orders with a view to preserving the

subject matter of litigation pending appeal is the inherent jurisdiction of the Court. However, unlike the English Court of Appeal, this Court does not possess an inherent jurisdiction that supplements the powers given to it by the statute and by rules. Since the decision in *Staples & Co Ltd v Corby and District Land Registrar (No.2)* (1900) 19 NZLR 539 it has been accepted that the Court has power to make orders preserving the subject matter of the litigation in "special and peculiar circumstances", such as existed in *Reid*. However an order in the nature of a Mareva injunction is a matter of a different character and the Court concluded that it would go beyond the very confined jurisdiction of the Court in relation to further appeals. Any such relief for a party appealing to the Privy Council is available, if at all, only from the Judicial Committee itself.

6. "SOME REFLECTIONS ON THE READING OF STATUTES" AND OTHER DOCUMENTS

The heading to this part of the Report is borrowed from a memorable lecture given by Justice Felix Frankfurter of the United States Supreme Court to the Association of the Bar of the City of New York in 1947. Frankfurter emphasised the central role, in the work of his court, played by statutes and by the search for their meaning. He drew on the craft and talents of three of his predecessors (Holmes, Brandeis and Cardozo): more, he said, was to be learned from contemplating the great artists' works than from thousands of pages of text books. (It follows that this part will be brief!)

The central role of legislation, as well as of other written texts, is also of course to be found in the work of our courts. That is one general reason for choosing this topic. Other more particular local reasons for the choice are three recent developments relating to statutes and a possibly controversial approach to the interpretation of contracts.

The legislative developments are:

- the introduction of new drafting styles over recent years by the Parliamentary Counsel Office,
- the enactment of the Interpretation Act 1999 (in force from 1 November 1999), and
- the adoption of a new format for Acts and Regulations from 1 January 2000.

George Tanner, Chief Parliamentary Counsel, has used the analogy of a three legged stool. All three changes, he suggests, are needed to bring about a real improvement.

The contract issue arises from the adoption and use in New Zealand of Lord Hoffmann's approach in *Investors Compensation Scheme Ltd v West Bromwich Building Society Ltd* [1998] 1 All ER 98, 114-115. Does that approach, as the critics say, wrongly diminish the importance of the agreed text, widen the scope of litigation and increase its cost?

The legislative drafting and format changes can be taken together. They are principally to be observed on the printed page (or not, since some of them succeed by being inconspicuous), but some are listed in the next paragraph. Some are also indicated in the *Drafting Manual*, issued in draft by PCO in 1997, along with a *Guide to Working with the Parliamentary Counsel Office*. As the Manual acknowledges, three of its chapters are based on the Law Commission report *Legislation Manual: Structure and Style* (NZLC R 35 1996). The changes in format draw on another Commission report, *The Format of Legislation* (NZLC R 27 1993) and extensive later consultation carried out by PCO.

Among the changes are

- a new type face, new settings, greater use of bold print, and more white space on the page
- a front page which gives the dates of assent and commencement (or a reference to the latter) and **Contents** rather than ANALYSIS
- a listing of headings to each schedule in the Contents
- an active enacting provision (**The Parliament of New Zealand enacts as follows)** rather than a subjunctive one (BE IT ENACTED by the Parliament of New Zealand as follows)
- arabic rather than roman numbers for parts
- running heads with parts and section numbers on each page
- headings to sections appearing as real headings (and not as shoulder or marginal notes)
- the orthodox use (or non use) of capitals: for instance, in interpretation provisions and in the middle of sentences which are paragraphed
- the dropping of "of this Act" etc unless needed for contrast
- the use of the present tense (and *must* instead of *shall*)
- a simpler amending formula
- a note of the legislative history (the dates of the various stages in the House and Bill references), facilitating, of course, the use of that history in the interpretation of the legislation.

Under the Acts and Regulations Publication Act 1989 (see NZLC R 11 1989), as amended from 1 January 2000, editorial changes along such lines can be made in reprints. (That has in fact been happening for a very long time: compare for instance the Sale of Goods Act 1908 as originally enacted with the version now included in RS 11.) Sections 17D and 17E provide:

> 17D. CHANGES TO FORMAT—
>
> (1) Format may be changed so that the format of the reprint is consistent with current drafting practice.
>
> (2) Changes authorised by this section include (without limitation) —
>
> (a) Changes to the setting out of provisions, tables, and schedules:
>
> (b) The repositioning of marginal notes or section headings:

(c) Changes to typeface and type size:

(d) The addition or removal of bolding, italics, and similar textual attributes:

(e) The addition or removal of quotation marks and rules:

(f) Changes to the case of letters or words (for example, the replacement of small capitals with ordinary capitals, and of capitals and small capitals with capitals and lower case):

(g) The addition, alteration, or removal of running heads:

(h) The repositioning of the date of Royal assent.

17E. OTHER CHANGES—

(1) Punctuation may be altered or omitted, or new punctuation inserted, so that the reprint uses punctuation that is consistent with current drafting practice.

(2) Unnecessary referential words may be omitted.

(3) Dates may be expressed in a manner consistent with current drafting practice.

(4) A Part numbered with roman numerals may be numbered with arabic numerals, and any cross-references to that Part in the reprint, or in another reprint, may be consequentially amended.

(5) The following changes may be made in relation to schedules:

(a) A schedule may be renumbered so as to be consistent with current drafting practice (for example, Schedule 1 may replace First Schedule), and any cross-references to that schedule in the reprint, or in another reprint, may be consequentially amended:

(b) A reference to a schedule to a particular enactment may be changed to a schedule of that enactment.

Other changes include the greater use of examples (as in the PPSA) and, apparently, of purpose provisions.

That last reference leads into the Interpretation Act (again based on a Law Commission report, *A New Interpretation Act* (NZLC R 17 1990)) and to the interpretation provisions of the Income Tax Act 1994 (which also introduced changes in drafting and style). Section AA3 of the Tax Act (as enacted in 1996 and 1999) is as follows:

AA 3. INTERPRETATION

(1) The meaning of a provision of this Act is found by reading the words in context and, particularly, in light of the purpose provisions, the core provisions and the way in which the Act is organised.

(2) Diagrams, flowcharts, reader's notes, and defined terms that follow sections in this Act are included only as interpretational aids, and

(a) if there is a conflict between an interpretational aid and a provision of this Act, the provision prevails, and

(b) if a defined term is used in a section and is not included in the list of defined terms for that section, the term is nevertheless used in the section as it is defined.

It is somewhat more elaborate than s5 of the Interpretation Act:

5. ASCERTAINING MEANING OF LEGISLATION—

(1) The meaning of an enactment must be ascertained from its text and in the light of its purpose.

(2) The matters that may be considered in ascertaining the meaning of an enactment include the indications provided in the enactment.

(3) Examples of those indications are preambles, the analysis, a table of contents, headings to Parts and sections, marginal notes, diagrams, graphics, examples and explanatory material, and the organisation and format of the enactment.

The 1999 Act, in accordance with its purposes stated in s2, does of course, like its predecessors, cover the range of matters usually the subject of interpretation legislation: in addition to the principles of interpretation (including non retrospectivity), commencement, exercise of power, repeal, amendment, the Crown, and standard meanings. It is to be hoped that the new Act makes the law more accessible (its real predecessor was enacted in 1888) and aligns interpretation approaches and rules with present day law, drafting practice and judicial method. John Burrows' second edition, although published before the new Act was enacted does refer to the Bill, commentary is beginning to appear and the Act has already been used in the Courts (even before it came into force: it is declaratory!).

The hope might be expressed that these developments and the one about to be mentioned will lead to an increased interest in the profession, including the academics, in the drafting and interpretation of statutes and other documents. John Burrows stands out and Garth Thornton now contributes from on shore; but consider the extent of

commentary in our journals on legislation compared with that on cases.

A link in that context to the interpretation of contracts is provided by a comment by Sir Christopher Staughton in a recent lecture, "How do the courts interpret commercial contracts?" [1999] Camb LJ 303. He regrets the shortage of academic work on that subject, although again there are, of course, exceptions. He is not impressed by the Hoffmann statement of principle which is as follows:

> My Lords, I will say at once that I prefer the approach of the learned judge. But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 3 All ER 237 at 240–242, [1971] 1 WLR 1381 at 1384–1386 and *Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570, [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows.
>
> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact', but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have

> been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax (see *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] 2 WLR 945).
>
> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:
>
> > '… if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.'

This approach or parts of it have been applied in at least three cases in the Court of Appeal, beginning with *Boat Park Ltd v Hutchinson* [1999] 2 NZLR 274. Of the second proposition Sir Christopher Staughton says:

> It is hard to imagine a ruling more calculated to perpetuate the vast cost of commercial litigation. In the first of the *Mirror Group Newspapers* cases I said that, as it then appeared to me, the proliferation of inadmissible material with the label "matrix" was a huge waste of money, and of time as well. Evidently Lord Hoffmann does not agree.

He refers as well to judicial criticism. Relevant to the fourth proposition is this passage from the Hoffmann judgment in *Mannai* mentioned there:

> The fact that the words are capable of a literal application is no obstacle to evidence which demonstrates what a reasonable person with knowledge of the background would have understood the parties to mean, even if this compels one to say that they used the wrong words. In this area, we no longer confuse the meaning of words with that meaning the use of the words was intended to convey. Why, therefore, should the rules for the construction of notices be different from those for the construction of contacts?

Sir Christopher retorts:

> So it would seem that the courts may override the words which the parties have used, in the process of interpreting a written contract, despite the powerful authorities which I have mentioned. (309)

Professor Malcolm Clarke has recently pursued this line of criticism in his contribution, "Freedom of Information in Commercial Disputes", to the conference in honour of Sir David Williams. He speaks of the cost of freedom proposed by Lord Hoffmann in terms of the cost of research, the problem of determining what is "reasonably available" to the parties, the limits on judges doing their own research and the possible roles of experts and assessors. One concrete possible cost in New Zealand is the impact of any perceived widening of the rules on the use of summary judgments.

The criticism brings us back to Frankfurter. Texts are to be given meaning by reading their words with reference to their purpose (if that is available and helpful) and in context. The practical question is just how far that process is to be allowed to run. Malcolm Clarke, perhaps qualifying the parts of his article just mentioned, suggests that later reported English decisions provide little hard evidence of fundamental change, yet a year earlier Sir Christopher Staughton had reported that "a distinguished firm of solicitors is telling its clients that the law of the interpretation of contracts is in confusion and needs to be clarified" (307). But how? National Interpretation Acts, the UN Convention on the International Sale of Goods, the Vienna Convention on the Law of Treaties and other international texts provide ideas. But how much of the process of reading and giving meaning can be captured in legislative or other formulas? To return to statutes, consider a decision of the House of Lords given earlier this month, *Inco Europe Ltd v First Choice Distribution (A Firm)* 9 March 2000. The particular provision of the Arbitration Act 1996 "read literally and in isolation from its context" provided an unanswerable argument, according to Lord Nicholls with whom the other four Law Lords agreed. But "several features make it plain beyond a peradventure that on this occasion Homer, in the person of the draftsman …, nodded." The literal meaning was discounted in the face of the purpose of the provisions, their history in the statute book, and the development of the relevant advisory processes. Lord Nicholls was left in no doubt that for once the draftsman slipped up. He freely acknowledged that his interpretation involved reading words into the Act. "In suitable cases, in discharging its interpretative function the Court will add words, or omit words or substitute words." Judges do that he said, quoting Sir Rupert Cross, to make as much sense as they can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role. At this stage what has become of the wise Frankfurter advice that while judges are not confined *to* the words of the statute they are confined *by* them?

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A. IMPORTANT CRIMINAL CASES

Substantive matters

- *Obligation to given notice of change of circumstances to Dept of Social Welfare*

Department of Social Welfare v Nicholson [1999] 3 NZLR 50 concerned s127 of the Social Security Act 1964 as it relates to omissions to supply information to the Department of Social Welfare relevant to continued entitlement to a benefit.

The appellant was a welfare beneficiary who obtained employment. She informed an officer of the Department of this by telephone, but her benefit continued to be paid. She then wrote to the Department repeating the information. Nonetheless, the benefit continued to be paid for another six months. During this time the appellant first kept the money in her bank account but eventually spent some of it. Section 80A of the Act required the appellant to advise an officer of the Department of her change in circumstances and it was accepted she had done this. She was charged with an offence under s127 of omitting to do or say anything for the purpose of misleading an officer of the Department. She was convicted in the District Court on the ground that she had continued to receive a benefit and had failed to continue to draw the error to the attention of the Department. The conviction was upheld by the High Court.

The majority (Richardson P and Keith J) allowed the appeal. Having traced the history of the legislation, the majority held that it is logical to read s80A and s127 together, so that s80A is more than empty exhortation unsupported by sanctions. The words in s127 making it an offence "to [omit] to do or say anything for the purpose of misleading" referred to something the person was under a legal duty or obligation to do. If that specific obligation was defined by s80A and is discharged, there remains no obligation to do or say anything to which s127 can attach. Therefore since the appellant had discharged her obligations under s80A by giving notice of her change of circumstances, she was not guilty of any offence under s127.

Blanchard J, dissenting, held that there was a duty contained within s127 which went beyond the specific duty found in s80A. When the appellant discharged the specific obligation under s80A to notify of her changed circumstances, she was still under a general obligation to say something to the Department when she continued to receive a benefit. She was obliged to take reasonable steps to try to ensure that further payments were not made into her bank account by the department. She did not take such steps and, accordingly, was guilty of an offence under s127.

- *Threatening to kill*

In *R v Adams* [1999] 3 NZLR 144 the Court allowed appeals against two convictions, one of threatening to kill and another of unlawfully possessing an explosive.

On the conviction for threatening to kill the Court had to consider the issue of mens rea for the offence. The Court held that there was no requirement of an intent to intimidate or cause fear. The only mens rea element required was that the threat be intended to be taken seriously. The Court noted that this approach was consistent with other New Zealand authority (*Police v Greaves* [1964] NZLR 295; *R v Cherri* (1989) 5 CRNZ 177), as well as the approach taken to other offences involving threats. The Court also considered the Canadian Supreme Court decision in *R v Clemente* (1994) 91 CCC (3d) and found that there were no substantial inconsistencies of approach between the jurisdictions. That decision held that the requisite intent could be formulated in either manner, as Cory J observed it was impossible to think that anyone threatening death or serious bodily harm in a manner that was to be taken seriously would not intend to intimidate or cause fear.

One of the convictions for threatening to kill was based on the statement 'what do I have to do to get some attention, do I have to shoot Lilly.' The Court held that such a statement was one of an upset man using emotional and extravagant language, couched in terms of a question, but not one to be construed as a statement of positive intent. It therefore did not constitute a 'threat'. Furthermore it was insufficient to establish beyond reasonable doubt an intent to have the hearer believe he was seriously contemplating killing Mr Lilly. The conviction on this count was quashed.

On the issue of unlawful possession of an explosive, the Crown agreed in the course of argument that there were good grounds for a discharge without conviction. The appellant acquired a detonator and detonator cord while he was clearing rivers for tourism purposes. However he subsequently forgot about the existence of the items and the original legitimate purpose no longer pertained. The issue was when the original justified possession ceased to be justified. The Court did not hear extensive argument on this question but stated that a genuine lack of knowledge in this situation ceases to have criminally reprehensible connotations.

- *Serious abuse*

In *R v Filimoehala* CA367/99, 387/99, 395/99, 401/9 and 415/99, 16 December 1999, the Court dismissed appeals against conviction and sentence relating to the abuse and death of Angelina Edwards, a mentally ill woman, while she lived with her relatives, the Filimoehala family. Five members of the Filimoehala family were convicted of various offences. Mrs Filimoehala, her daughter Kalina (then aged 19) and son Mavae (then aged 16) were convicted of manslaughter by unlawful acts, namely assaults, over an eight-month period (count 1). Mrs Filimoehala and her husband were also convicted of manslaughter by omitting without lawful excuse to provide medical care for Angelina's injuries (count 2). Another son, Siope, was acquitted of manslaughter but convicted of injuring with intent to cause grievous bodily harm.

Mrs Filimoehala was sentenced to 13 years and ten years concurrent imprisonment respectively on the two manslaughter counts. Kalina was sentenced to eight years and Mavae to six (after a two year allowance for time remanded in Social Welfare detention). Mr Filimoehala was sentenced to ten years for manslaughter and Siope to

four years on the injuring charge. All convictions and sentences were appealed, save Mrs Filimoehala's conviction for count two manslaughter.

Angelina Edwards was schizophrenic. She moved in with the Filomoehalas in December 1996. The Filimoehalas lived in a small cramped house and when Angelina joined them, 10 people were living in only three bedrooms. Angelina's behaviour was difficult. She could be manipulative and had unacceptable hygiene and toilet habits. The Filimoehala family reacted to this by treating Angelina almost like a slave. Countless injuries were inflicted. At one point Siope threw a weight bar at Angelina, hitting her and causing a large cut on her cheekbone (forming the basis of the injuring charge). Towards March 1998, there was evidence Angelina was assaulted on a daily basis.

When Angelina died, an examination revealed sore marks and bruises over her face and neck, deep oozing holes above her left elbow joint and historic oozing wounds on both feet. Her left hand had been fractured and there were multiple abrasions all over her body, including a recent large wound on her right hip. An abdominal examination showed an acute 3cm ulcer in the stomach. Angelina had acute peritonitis. Two pathologists gave evidence at trial. They agreed that Angelina's death resulted from peritonitis secondary to the perforated stomach ulcer.

The main issue on appeal was whether there was sufficient evidence for the jury to conclude that the ulcer was caused by the injuries inflicted on Angelina (as the jury must have done in convicting Mrs Filimoehala, Mavae and Kalina for count 1 manslaughter). It was argued that the jury could not rule out possibilities raised by one pathologist evidence that the ulcer was caused by an infection independent of the injuries. The appellants sought leave to introduce an affidavit from a gastroenterologist to the effect that ulcers caused by soft tissue injuries are possible but rare.

The Court, in accordance with the principles in *R v Zachan* CA304/94, 11 August 1995, declined to admit the evidence on the basis that it went no further than the evidence of the pathologist. The Court disagreed that the jury's verdict was unsupported by the evidence or unreasonable. The Court also rejected a submission that Siope's acquittal on the manslaughter charge was inconsistent with the jury finding that soft tissue injury caused death. The Court noted that the assault with the weight bar was the only injury inflicted by Siope during the relevant period and that the jury was entitled to dismiss it as a material cause of Angelina's death. Finally the Court rejected an appeal by Mr Filimoehala that the judge misdirected the jury as to the relevant period of time for considering the failure to get medical treatment under count 2 manslaughter.

The Court dismissed all of the sentence appeals. Mrs Filimoehala argued that the comparison made by the judge with *R v Witika* [1993] 2 NZLR 424 at sentencing was inappropriate. The Court did not agree, noting that this was a very serious case of culpable homicide which did not fall far short of the *Witika* case. The three year difference in penalty reflected any shortfall. Mr Filimoehala appealed on the basis that, since his wife had been primarily responsible for Angelina, he should have received a

lesser sentence on the second manslaughter count. The Court rejected this argument, stating that Angelina was under his care as well, that he knew what was happening but was indifferent and he still expressed no remorse. Kalina argued that encouragement from her mother, her troubled upbringing and her youth should have attracted a lesser sentence. The Court disagreed and noted the apparent enjoyment of Kalina in administering what could only be described as merciless violence. Her sentence of eight years was in line with the authorities. Mavae's appeal against his sentence of six years was similarly dismissed. The Court held that Mavae's actions could not be characterised as youthful indiscretion or immaturity, but were genuinely culpable. Finally, Siope appealed on the basis that four years was excessive for an impulsive act with a weapon. However the Court noted that Siope committed the offence while on bail, that this was not the only act of violence he had committed against Angelina, and that throwing a weight bar was a highly dangerous act.

- *Reasonable cause*

In *R v Constable* CA44/99, 13 May 1999, the Court ruled that, in some circumstances, a solicitor's silence could amount to advice, giving a bankrupt in the position of the accused "reasonable cause" for his failure to comply with the law. The accused was convicted of failing without reasonable cause to comply with s62 Insolvency Act 1967 by being a bankrupt taking part in the management of a company. The defence argued that the accused had reasonable cause by virtue of his reliance on legal advice as to setting up the company. The Court held the Judge misdirected the jury by effectively stating there could be no reasonable cause unless there had been articulated advice - that there could only be ignorance of the law which was no excuse. The Court ruled that, in the totality of the circumstances, silence may amount to advice and give a person in the position of the accused reasonable cause for his failure. The Court held there was a miscarriage of justice and a re-trial was ordered.

- *Theft by failing to account*

In *R v Prior* CA191/99, and 192/99, 24 August 1999, the Court upheld appeals by two company directors against convictions for theft by failing to account on the basis that the Judge had misdirected the jury on one element of the charge.

The appellants were each convicted of theft by failing to account and theft as a consequence of events surrounding the failure of their business. The charge of theft by failing to account related to the operation of the business bank account shortly before the company ceased trading. The appellants drew five cheques on the bank account in two weeks the effect of which was to reduce the company account to a zero balance. During this period, a number of deposits were made into the appellants' bank account, each corresponding in time with one of the cheques and money was subsequently deposited into a family trust account. At this time, staff were owed wages for six weeks, and GST and PAYE had not been paid. The appellants knew that the company was in financial difficulty and that receivership was a possibility.

In relation to the charge of theft by failing to account, the Judge identified four elements of the offence, though the appeal was concerned only with the second element. The Judge directed the jury that as a matter of law because they were directors of the company the appellants received the money on terms requiring them to account for it.

The Court found that the Judge was wrong to direct that at law this element was sufficiently established by proof of the director/company relationship. Simply to state that a director was in a fiduciary relationship with the company was to say nothing of his or her duties and obligations. It did not, as a matter of law, make the director an agent of the company for all purposes. To contend that moneys legitimately paid by a company to a director in his or her personal capacity remained the moneys of the company and were held only as agent before being appropriated to personal use is an unreal construct. Whether, there was a duty to account for moneys received would depend on the circumstances. Even if it could be raised as technically correct that for the brief moment between the cheque writing and its taking in a personal capacity there was a duty to account to the company the issue remained whether at the time the money was fraudulently converted it was still held as agent and not in the director's personal capacity.

The conviction of each appellant on this charge was quashed. The convictions for theft, which were appealed on other grounds, were allowed to stand.

Bill of Rights

- *Unreasonable search - evidentiary basis for claim*

R v Pointon CA227/98, 22 February 1999 was an appeal against convictions relating to burglary of a house in the Coromandel. Nearby residents were woken early one morning by a house alarm. On getting up, three residents saw a Holden utility, recorded its registration number and called the police. A local constable set out to intercept the vehicle. He eventually sighted a Holden with the same registration number as reported, stopped it and asked the occupants (the appellant and the driver, Robertson) to accompany him to the Coromandel police station to discuss the reported burglary. The constable arranged for the Holden to be driven to the same location. The appellant and Robertson were both questioned and arrested. Then, without reference to Robertson or the appellant, the Holden utility was searched and several implicating items found.

The District Court dismissed an application to exclude the evidence. On appeal, the appellant submitted that the seizure and the search of the vehicle were unlawful and unreasonable, and that the stopping of the vehicle was unlawful and amounted to arbitrary detention contrary to s22 of the Bill of Rights Act. The Court observed that the critical issue was simply whether the search at the police station was in breach of s21. Only a breach at this stage was directly causative of the obtaining of the disputed evidence. Thus, while the stopping and seizure of a motor vehicle may be relevant to the context of the search, the key issue was the nature of the search itself.

The Court found that neither the stopping nor the seizure of the vehicle were so closely connected to the search to be determinative of the reasonableness of the search. The stopping was too far removed in time and place from the search. The Court doubted whether the removal of the vehicle constituted a seizure but held that, if it did, the seizure was not the occasion of the discovery of the disputed evidence.

In relation to the search itself, the Court considered the argument that the accused did not have a reasonable expectation of privacy because neither he nor Mr Robertson had a possessory or proprietary interest in the vehicle. The Court found it unnecessary to express a concluded view on this point. It instead held that in the absence of any evidence of the accuseds' connection with the vehicle, including evidence of lawful permission to be in it, exclusion of evidence was an inappropriate remedy. This was because exclusion is "usually a remedy for breaches of rights personal to the person applying for such exclusion". The Court therefore dismissed the appeal on the basis that the accused did not raise an evidentiary basis for his claim.

- *Invalid search warrant*

R v McColl CA135/99, 29 July 1999, involved a pre-trial ruling on the validity of a search warrant. The appellant faced two charges of cultivating cannabis and one charge of possession of cannabis for supply. He appealed against a pre-trial decision that ruled as admissible evidence obtained during a search of his property under a warrant. A police Detective had received information from an informant about a cannabis purchase from a person of the appellant's name. The information about the address of the supplier and the colour of the supplier's car proved to be incorrect, but the informant had himself expressed doubt about the address. The transaction had occurred three weeks earlier. Two months later, the Detective applied for a search warrant for the appellant's property, without disclosing that the information in the application was almost three months old and that some details had been incorrect. The warrant was executed the same day and 3.5kilograms of cannabis was found.

The appellant maintained that the warrant was invalid. He argued that the Detective had been "less than frank" in the provision of information to the judicial officer in his affidavit supporting the warrant application. The central question was whether the failure to provide full details about the information, including its age and the errors noted above, rendered the search warrant invalid and the subsequent search unreasonable.

The Court was satisfied that if the Detective's affidavit had not contained these deficiencies, the judicial officer should have either declined to issue the warrant or adjourned the application so that more up-to-date information could be obtained. The information here was almost three months old and, in the Court's opinion, this rendered it stale. The Court noted, as a comparison, s198(3) of the Summary Proceedings Act 1957 which requires a warrant to be executed within one month of its issue. The Court held that invalidity of the warrant made the search unlawful and led to the conclusion that the search was also unreasonable. The evidence obtained during the search was inadmissible.

The Court added that the same conclusion could be reached from the point of view of abuse of process. The Court did not accept the Crown's submission that, in the absence of a finding of bad faith in respect of the Detective's conduct, there could be no abuse of process. In the circumstances of the present case, the affidavit was misleading and did not disclose certain material facts. In the Court's view, the Detective's lack of candour amounted to abuse of process and this gave rise to a miscarriage of justice

- *Confessions*

In *R v Ali* CA253/99, 8 December 1999, the Court allowed an appeal against convictions for sexual offences on the grounds that a written statement, in which the appellant made confessions, ought to have been excluded.

The police had gone to the appellant's house late at night and asked him to accompany them to the police station to discuss the complainant's allegations. The appellant was cautioned and advised of his Bill of Rights rights. He was then taken to the police station, put in an interview room and questioned for twenty to forty minutes before making a written statement. The process of completing the statement and reading it back took a further hour and fifty minutes. The interview was conducted by two officers. During the interview the officers persistently cross-examined the appellant, raised their voices and accused the appellant of lying. No record was made of the interview.

The Court concluded that it could not dispel the concern that the police engaged in improperly persistent questioning in an intimidating atmosphere. The Court was not satisfied that the prosecution established beyond reasonable doubt that the statement was voluntary. Nor was this a proper case for the application of the proviso.

In *R v Taliau* CA99/99, 30 June 1999, the Court considered the extent to which the Police could question a suspect who had expressed an unwillingness to continue with an interview. The Court held in the circumstances the questioning inappropriately denied the appellant's s23(1)(b) Bill of Rights Act right to silence and involved unfair elements of cross-examination.

The Police were interviewing an inmate who they suspected was involved in a murder at Rangipo prison. The appellant was 18 years old and as an inmate was not free to leave the interview. No guard was present to terminate the interview on his behalf. The Court found that these objections were not sufficient in themselves to make the interview unfair. However, they were the background against which the Court considered the manner of questioning. During the videotaped interview the appellant stated on more than one occasion that he did not wish to say any more. Despite this, the Police continued to question the appellant and went on to conduct what the Court could only call a cross-examination of his answers.

The Court affirmed the observation from *R v Wilson* [1981] 1 NZLR 316, 324, that the

police are not be unreasonably handicapped in their enquires and recognised the difficulties confronting the Police in investigating crimes of this nature. The Court observed that it will be a matter of fact and degree whether an interview has transgressed the bounds of fairness. The Court held that it was important that the safeguards which the law had built to control questioning procedures were paid more than lip service and that the Court had the responsibility to ensure that the expediencies of a difficult investigation do not override principles which have been established to ensure that standards acceptable to the community as part of the due administration of justice are met.

Leave to appeal

- *Failure to provide reasons in District Court*

The applicant applied for special leave to appeal to this Court under s144 of the Summary Proceedings Act 1957, the High Court having refused leave.

The applicant was prosecuted before Justices of the Peace for speeding in a motor vehicle. The Justices stated their decision in a single sentence, providing no reasons for the conviction other than "on the evidence as presented and your cross-examination of the same". The only evidence was that of a police officer. On a general appeal against conviction, a District Court Judge considered it totally unsatisfactory that no reasons for the decision had been provided by the Justices. However, he refused to grant a retrial, as he was of the opinion that this would not be appropriate given the relatively minor nature of the proceedings and the expense and inconvenience for all parties. The Judge considered and rejected the applicant's appeal after considering the notes of evidence and the applicant's submissions. In this Court, the applicant submitted that it was wrong, or arguably wrong, in principle for the Judge to have given a judgment on the facts where reasons had not been given by the Justices.

The Court dismissed the application for special leave. The Court stated that the question raised on the application fell squarely within the jurisdiction and powers of the High Court in hearing and determining general appeals under the Summary Proceedings Act. Section 115 of the Summary Proceedings Act confers a general right of appeal against conviction of a defendant in the District Court. There is no requirement for reasons for any decision of the District Court, nor any requirement that reasons be transmitted to the High Court. Section 119 provides for the procedure on appeal, and provides that all general appeals shall be by way of rehearing. Further appeals to this Court are confined to appeals against any determination of the High Court on a question of law arising in any general appeal under s144(1), and must be of general or public importance.

The leading authority in New Zealand on the giving of reasons for a judgment is *R v Awatere* [1982] 1 NZLR 644. The Court stated it is good judicial practice to provide a reasoned decision. However, it would be undesirable and impractical to lay down an inflexible rule of universal application, given the infrequency of the problem when

weighed against the volume of cases, together with the powers of the High Court to ensure that justice will be achieved. Nonetheless, Judges and Justices should always do their conscientious best to provide with their decisions reasons which can sensibly be regarded as adequate to the occasion. What is appropriate depends on the nature of the case and the issues involved. However, the failure to provide reasons for a decision does not automatically vitiate the decision.

The Court concluded that faced with an insufficiency of reasons for the decision of the District Court, the High Court may, on hearing and determining the appeal, adopt whichever of the statutory courses it considers feasible and best calculated to meet the interests of justice in the particular circumstances, those interests including Bill of Rights considerations. The statutory options are: (1) hearing and determining the appeal on the material before the court, including rehearing any part of the evidence and receiving further evidence; (2) directing the District Court to provide adequate and proper reasons; (3) remitting the matter to the District Court for rehearing; and (4) simply quashing the conviction. That final option will be exercisable where the High Court concludes that the interests of justice so require, notwithstanding the other courses available. In the present case, the Court was satisfied that the High Court Judge was entitled to follow the course he did in hearing and determining the appeal. He exercised his jurisdiction under s121 in accordance with the statutory options available to him and according to what in his judgment met the interests of justice in the particular circumstances. The application for special leave to appeal was accordingly dismissed.

- *Jurisdiction on application for leave to appeal after trial started*

R v Watson [1999] 3 NZLR 257 concerned the jurisdiction of the Court after a trial has started to hear an application for leave to appeal against a ruling about the admissibility of evidence. On 8 June 1999 the balance of an application relating to the admissibility of evidence was heard and the decision reserved. On 10 June the trial began. On 24 June, during the course of the retrial, the Judge gave the decision on the remaining pre-trial applications, against which the Crown sought leave to appeal.

The Court held that it had no jurisdiction to hear the application. As an appellate Court created by statute, the Court's jurisdiction was confined to matters for which a right of appeal is provided by statute. Some pretrial rulings are appealable under s379A, but others are not. The legislation contemplates that where a ruling which is not within the defined and limited appeal provisions of s379A is given the trial will proceed, but in appropriate cases the matter may be reviewed by way of appeal against conviction or as a question of law reserved at the request of the prosecutor or the accused.

Section 379A(1) provides that at any time before the trial either the prosecutor or the accused person may, with the leave of the Court of Appeal, appeal to this Court against various orders. Counsel for the Crown submitted that if time remained to hear and determine the matter in a manner helpful to the trial process it would be appropriate to do so. This Court rejected this argument, holding that the section clearly provides a right of appeal on a pre-trial ruling only before the commencement of the trial. Where the trial has started, the applicant, either prosecutor or accused, is left to his or her post-

trial remedies. While the Court was sympathetic to the pressures on the Judge and other participants in trials, it was satisfied that the language and scheme of s379A were too clear to allow the expansive meaning urged by the Crown. The Court noted that its decision did not preclude the trial Judge from revisiting the ruling in question if circumstances made it desirable in the interests of justice to do so.

Bail applications

- *General observations on bail applications*

The Court made some general observations on bail applications in *R v B* [2000] 1 NZLR 31. The appellant was charged with conspiracy to import a Class A controlled drug, cocaine. The Crown case was that he was involved in an attempt to purchase cocaine in Canada for importation into New Zealand. The appellant was arrested and applied for bail. The application was declined in the District Court and, on a fresh application, in the High Court. He appealed.

The Court began by stating that someone who appeals a refusal of bail and is unable to point to a material change in circumstances since the lower Court's decision faces the difficulty that it is a challenge to the exercise by a Judge of a discretion. The appellant, said the Court, must therefore establish that the refusal of bail was contrary to principle, or that the Judge failed to consider all relevant matters or took into account irrelevant matters, or that the decision was plainly wrong.

Someone who has pleaded not guilty must be presumed to be innocent of the charged offending until proven guilty according to law: s25(c) New Zealand Bill of Rights Act 1990. Such a person is also entitled to the benefit of s24 of that Act which requires that there be "just cause" for continued detention. The Court held that the seriousness of the charge faced will not of itself provide justification for a refusal of bail. Rather, the prosecution must demonstrate that there is something in addition which favours detention of the accused in the public interest. The Court listed as possibilities the likelihood that the accused will offend while on bail, will abscond or otherwise fail to answer bail, or will seek to interfere with witnesses in the case. It commented that the seriousness of the charge faced is particularly relevant to the possibility of failure to answer bail, as the heavier the potential penalty hanging over the accused, the greater is the incentive for an attempt to abscond, especially if facing a strong case. Experience indicates that there is a particular risk in cases of drug importing, where the accused is more likely to have associations with an overseas country.

The Court held that the prosecution must further show that any considerations weighing against bail are not outweighed by those in favour. The societal interest must be unable to be met by the granting of bail upon terms as to residence, reporting to police, curfew, non-association, travel restrictions and the like. In addition to the seriousness of the charge, the Court must be satisfied that the prosecution has a strong case. Further factors to which regard must be had are the likely length of detention, and the need for the accused to have access to defence counsel.

The major ground put forward in the present appeal was that the Crown case was not as strong as first contended. The defence suggested, as an alternative inference from the undisputed facts, that the appellant intended to steal money rather than import drugs. There was however no evidential foundation for this suggestion, and the appeal was dismissed.

Costs

- *Costs in criminal cases*

In *Solicitor-General v Moore* CA310/99, 18 November 1999, the Court upheld an appeal by the Solicitor-General against an order requiring the police to pay Mr Moore $54,000 towards the costs of his defence to drug charges.

This case was the first exercise by the Crown of a right to appeal conferred in 1998 on parties dissatisfied with decisions made under the Costs in Criminal Cases Act 1967. Under that Act a Court may order the payment of a just and reasonable sum towards the costs of the defence of any defendant who is acquitted of an offence or discharged, or where the information charging that person is dismissed or withdrawn. The discretion is conferred in very broad terms and the court must have regard to all relevant circumstances, including those listed in the legislation.

Mr Moore had been discharged on charges of cultivating cannabis and possessing cannabis for sale. That discharge, after weeks of evidence, followed a decision made in favour of Mr Moore's wife, before trial, to the same effect. As well as discharging Mr Moore, the District Court Judge ordered a stay of proceedings for abuse of process. The Judge awarded costs to Mr Moore in excess of the scale fixed by the regulations. He acknowledged that there was adequate evidence at the commencement of the proceedings to support a conviction and that the prosecution had acted in good faith. However, significant factors in the decision to make an award were the careless police investigation and grossly inadequate preparation for the case.

The Court found that there had not been a proper exercise of the discretion. The Judge had given insufficient weight to a number of factors, including the fact that investigative errors made by the police did not in any real respect prejudice the defence; the only violation of Mr Moore's rights appeared not to have any prejudicial effect; the initial case against Mr Moore was strong; and the reasons for the discharge were essentially technical. The Court went on to exercise the discretion and found that it was not just and reasonable that a sum be paid towards Mr Moore's defence. The Court commented that the discharge and an earlier evidential ruling were subject to substantial question.

B. IMPORTANT CIVIL CASES

Tort and contract

- *Negligence action against Department of Social Welfare*

In *B v Attorney-General* [1999] 2 NZLR 296 the Court upheld a decision to strike out an action in negligence brought by a father and his two daughters in respect of an inquiry by the Department of Social Welfare into allegations that the father had sexually abused his daughters.

The allegations of sexual abuse came from the youngest daughter who allegedly told a friend at school that her father abused her. The Department of Social Welfare was informed and, as a result, began an inquiry in which a clinical psychologist interviewed the two girls at school. The younger daughter alleged abuse of both girls, while the older daughter denied any abuse. A social worker attended the interviews and obtained a warrant to remove the girls from their father under s28 of the Children and Young Persons Act 1974. Lengthy court proceedings resulted in the children being returned to the full custody of the father.

The father and his daughters brought proceedings in negligence against the Department, the clinical psychologist and the social worker. The alleged negligence by the Department was the failure to adequately oversee and control the investigation by the clinical psychologist and the social worker, in particular, a failure to follow up information from a family friend and a doctor which suggested that the allegations of abuse may be false.

The Court unanimously held that on the facts pleaded no duty of care could exist. There were two judgments of the Court; a joint judgment of Keith and Blanchard JJ (delivered by Keith J) and a concurring judgment of Tipping J.

The joint judgment found that the principal matter for inquiry concerning the existence of a duty of care was the policy behind the Children and Young Persons Act 1974, then still in force. The Judges acknowledged that the interests of the child were the first and paramount consideration in actions taken under the legislation. Also critical was the positive legislative duty placed on the Director-General by s5 to take preventive action and to investigate complaints of neglect. In *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 the Court recognised that there was an arguable duty on the Department, enforceable through negligence proceedings, to develop processes to determine whether the threshold test, "triggering" the duty in s5, was met. The joint judgment distinguished this case from *Prince* because the negligence in this case fell outside the initial period of statutory obligations where a common law duty of care may also arise. The duty in *Prince* was limited in time to the "triggering" and closely related stages. By contrast, the process here had moved from the initial stage of responding to the complaint and initiating an inquiry to the operational stage of information gathering

and considering the exercise of statutory powers and then to the exercise of those powers. The critical actions were various actions and failures occurring in the course of he investigation and which continued beyond the initiation of the court process. To impose a duty of care at this later stage would cut across the statutory scheme and would involve other public agencies.

Tipping J agreed that the follow up steps after the initial triggering of the duty did not attract a duty of care. He would also have found against the plaintiff on the grounds that the alleged acts of negligence were not, in terms of the pleadings, causative of the loss or damage claimed. There was no pleading that the warrant was improperly or negligently obtained or would not have been obtained had the investigation been carefully conducted, and it was the obtaining and execution of the warrant which was said to have caused the loss.

- *Negligence of auditors*

In *Boyd Knight v Purdue* [1999] 2 NZLR 278 auditors appealed against a High Court decision holding them liable for losses of investors who invested in a company in response to an offer made in a prospectus issued by the company. The investors cross-appealed against a finding of contributory negligence.

The auditors admitted being negligent by providing a report for inclusion in the prospectus stating that the accounts gave a true and fair view of the financial affairs of the company. In fact, one of the company directors had committed frauds, and the accounts were misleading. The auditors admitted that reasonable care on its part would have led to the discovery of the frauds before the date of the audit report, in which case the audit report would not have been given and the prospectus would not have been issued. The investors put their case on the basis that general reliance by investors was all that was required to be established. However one investor, Mr Purdue, gave evidence that the audit report influenced him to place his investment with the company.

The Court allowed the appeal, unanimously holding that (a) despite Mr Purdue's evidence there was no actual reliance, and (b) that general reliance is insufficient to found a duty of care. While Blanchard J repeated the general principle that auditors do not usually assume a responsibility to anyone other than the company and its shareholders when performing their auditing functions, they do assume a duty of care to investors. The real issue is the scope of that duty. When auditors furnish a report for inclusion in a prospectus they express an opinion on the accuracy of the financial statements of the company which they have audited. They do not give investment advice. Thus the statement that the company accounts give a true and fair view of the financial affairs of the company is only meaningful to those who have read and relied upon those accounts. Reliance, and a consequential duty of care, cannot be asserted in a vacuum. There must first have been a specific influence of the financial statements on the mind of the investor. However, a broader approach is permissible where it is proved or admitted that if the accounts had been accurate no prospectus would have issued and no investment could then have been made. Even in such circumstances the scope of the duty is limited; there must at least be reliance on the basic features of the financial statements.

On the facts of this case Blanchard J ruled, contrary to the finding of the High Court, that there was no evidence upon which it could be concluded that the investors, including Mr Purdue, relied upon the financial statements or any particular features of them. The appeal was therefore allowed. Since the plaintiffs had throughout taken the position that proof of general reliance would be sufficient to establish their claim, a further hearing was not granted to allow further evidence of specific reliance.

Gault J agreed, adding that it is not a sufficient test of remoteness of damage that "but for" a defendant's negligence the loss would not have occurred. There could be no warrant for holding auditors liable for inaccurate information where the loss did not flow from reliance on the accuracy of the information. Salmon J agreed with both judgments.

- *Obligation of solicitor in joint venture*

The main issue in *Armitage v Paynter Construction Ltd* [1999] 2 NZLR 534 (omitted from the 1998 Report) was whether a firm of solicitors which acted for one party to a joint venture agreement and who then accepted instructions to carry out certain work for the joint venture was under a fiduciary duty to the other party for whom it did not otherwise act. If this was the case, the exact scope and nature of the duty and whether the firm acted in breach of it fell to be determined.

The respondent, Paynters, ran a development and construction business. It was unable to sell several residential units within a complex and decided to market them on a timeshare basis. To this end, it entered a joint venture with a company called Leisuretime. Leisuretime's solicitor conducted the conveyancing work for the joint venture. In addition, Paynters executed a power of attorney in the solicitor's favour, authorising him to conclude contracts and accept payments on its behalf. In fact the law firm made only one payment to Paynters and paid all other proceeds to Leisuretime. Leisuretime decided to buy out Paynters, but ran into difficulties before it honoured all its payment obligations. Paynters claimed that it had suffered considerable losses attributable to the solicitor's fault.

The Court dismissed the law firm's appeal, holding that the law firm was in a fiduciary relationship with Paynters. The Court held that the relevant retainer was not the retainer in respect of the conveyancing work, but the retainer in respect of the joint venture. The joint venture retainer required the law firm to receive the proceeds of sale "for and on behalf of the joint venture parties". This was more than an obligation to simply distribute the monies received; the law firm had an obligation to receive and disburse the proceeds of sale for and on behalf of both joint venture parties in accordance with the joint venture agreement.

The Court stated that there is no such thing as a fiduciary duty in the abstract. The broad designation of a relationship as "fiduciary" does not in itself assist to identify the duties which arise or the nature and content of those duties. In this case, the Court considered that the obligation which arose out of the law firm's instructions to act for

the joint venture involved obligations of loyalty and good faith to both parties to act in the interests of the joint venture. The law firm could not knowingly advance the interests of one party at the expense of the other. Once the solicitor knew that the proceeds of sale obtained from the joint venture were being used to prop up Leisuretime he could not serve both parties faithfully and loyally.

- *Duty of care owed by professional advisers; discharge of concurrent tortfeasors*

In *Allison v KPMG* CA146/98, 17 December 1999, the Court considered whether a settlement agreement with one tortfeasor discharged a concurrent tortfeasor.

The appellants purchased Holmac Holdings Ltd, a subsidiary of Holman Construction Ltd, from Holman's parent company. KPMG acted as an intermediary and was responsible for auditing the accounts of Holmac prior to sale. A copy of that audit report was provided to the appellants and, to KPMG's knowledge, they relied on it. The share purchase agreement included a clause entitled "Undertakings, warranties and agreements". That clause materially provided that the accounts fairly and accurately reflected the position of the company; that the vendor accepted responsibility for any liabilities not disclosed in the last balance sheet; and that all information given by or on behalf of the vendor or company (including by any professional adviser) was provided in good faith in the belief that such information was accurate.

Within three months the appellants became concerned that they had been misled about the financial wellbeing of the company. They claimed compensation of over $1.5m from Holman and two months later accepted $500,000 "in full and final settlement of all claims" in relation to the share purchase. However, the appellants subsequently claimed that they had been induced to enter the settlement by misrepresentations made by or on behalf of Holman. They wanted the settlement agreement set aside so that they could pursue their original grievances. The appellants also claimed in negligence against KPMG for the preparation of the audit report.

The trial Judge rejected the claim against Holman on the facts, but awarded $100,000 (plus costs, general damages and interest) against KPMG, being the difference between what the appellants paid for the shares (taking into account the true value of the company) and the compensation paid by Holman in settlement. The appellants appealed against the rulings in relation to Holman. KPMG cross-appealed, pleading that there was no sufficient basis on which to impose a duty of care owed by it to the appellants and that in any event KPMG was released by the settlement agreement.

The Judges wrote separately but all three rejected the appeal, upholding the trial Judge's ruling that the settlement agreement discharged Holman from all claims in relation to the sale. With respect to the cross-appeal, Thomas J in the leading judgment confirmed that KPMG owed the appellants a duty of care. The firm knew that a copy of the audited accounts was being relied upon by the appellants, and it had dealt directly with the appellants in promoting the sale. KPMG argued that the appellants had suffered no loss because they had received the shares plus a contractual warranty entitling them to

recover any loss which they might suffer as a result of the accounts being inaccurate. Thomas J rejected that argument. He held that such a warranty has no particular value until it is enforced; before that time it is merely a potential remedy in respect of a future unliquidated amount. The appellants could pursue either the contractual or tortious remedy, without first having to exhaust the former.

Thomas J also rejected the argument that KPMG was released by the settlement agreement between the appellants and Holman. Joint tortfeasors would be discharged by a release of one tortfeasor because the obligation arising from the joint cause of action would be deemed to be extinguished. However, the same reasoning did not apply to concurrent tortfeasors because their obligations arose under different and separate causes of action. The release of one tortfeasor would not release another concurrent tortfeasor unless the settlement has rightly construed as being in full satisfaction of the plaintiff's loss or injury rather than merely as discharging the defendant's obligation: *Brooks v New Zealand Guardian Trust Co Ltd* [1994] 2 NZLR 134. Thomas J could see no such intention evinced in the words of the settlement agreement in this case.

Thomas J discussed *Jameson v Central Electricity Generating Board* [1999] 1 All ER 193, where the majority of the House of Lords appeared to place concurrent tortfeasors on a par with joint tortfeasors in terms of release. Thomas J rejected that approach, preferring Lord Lloyd's dissent. In any event, he found that the case could be distinguished on its facts. Keith and Tipping JJ in separate judgments concurred.

Employment

- *The special character of the Employment Tribunal*

The Court commented on the special character of the Employment Tribunal in *New Zealand Van Lines Ltd v Gray* [1999] 2 NZLR 397. The appellant, an employer, appealed against a decision of the Employment Court, upholding a decision of the Employment Tribunal, making an award to the respondent, a former employee of the appellant.

The respondent worked as a casual lifter for the appellant, a household removal business. In November and December 1994 there were complaints about the respondent's conduct and he was reprimanded. The respondent, who was trained in lifting and not packing, was subsequently asked to pack and performed an unsatisfactory job. On 9 January a discussion took place between the respondent and the manager of the appellant regarding the respondent's future employment. The respondent alleged he was unjustifiably dismissed. The Employment Tribunal heard the dispute and extensively questioned one of the appellant's witnesses. It found that the respondent had not been unjustifiably dismissed, but that he had suffered an unfair disadvantage.

The appellant alleged that the Tribunal acted outside its power by finding a different

personal grievance than that alleged; that the Tribunal intervened excessively in examining the appellant's witness; and that the Tribunal erred in fixing the amount of damages.

This Court dismissed the appeal. In a broad historical overview, the Court emphasised the special role of employment institutions and their predecessors. It held that the six propositions from *Auckland Shop Employees Union v Imperial Supplies Ltd* [1983] ACJ 729, 740-741, emphasising the special character of the Arbitration Court, apply equally to the Tribunal. The Employment Tribunal is a specialist Court with unusual powers. In its exclusive jurisdiction it is concerned primarily with fairness, applying equity and good conscience, although equity and good conscience cannot be invoked to override mandatory legislation or a collective employment contract. The Tribunal is allowed to develop its own methods and processes. Legal technicalities or analogy of rules will not always be helpful in achieving its objectives and onus of proof is not important, as the Tribunal may admit and call for any evidence. On this basis, the Court went on to reject each of the appellant's arguments. The Tribunal has wide powers to collect evidence; it may make findings that a personal grievance is of a different type to that alleged; and on the facts there was no question of contributory fault as the respondent was required to carry out a task for which he was not trained.

Constitutional law

- *Invalidity of Part XA of the Income Tax Act 1976 under Magna Carta*

In *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154 the taxpayer objected to his assessment for a superannuation surcharge. He sought a declaration that Part XA of the Income Tax Act 1976 was invalid and contrary to the Magna Carta. Part XA imposed an additional rate of tax on New Zealand superannuitants where their income from other sources exceeded a specified exemption. In the relevant income years the appellant derived income from sources other than New Zealand superannuation that exceeded the specified exemption and he therefore became liable for tax.

The appellant argued that the legislation was invalid. He submitted that the surcharge unlawfully discriminated against New Zealand superannuitants because its basis was the source of people's income (New Zealand superannuation) rather than the amount of their income. The appellant maintained submitted that Part XA of the legislation was invalid since it was contrary to chapter 29 of the 1297 Magna Carta, which prevents victimisation of citizens in the sense of penalising or discriminating against them without due process in a court of law.

The appeal was dismissed, the Court holding that the Declaratory Judgments Act 1908 did not give the courts power to consider the validity of the content of legislation. The power under s3 to consider the validity of legislation was limited to ensuring that a statute was properly enacted. The Court further stated that the power of Parliament to make laws was not limited by the Magna Carta. Chapter 29 was part of the law of New Zealand but did not constitute supreme law in the sense of limiting the sovereignty of Parliament. Despite the fact that the Magna Carta and other English statutes which form part of the law of this country appear in a list headed "Constitutional Enactments",

they do not constitute supreme law in New Zealand in the sense that they limit New Zealand Parliament's sovereignty. Section 15 of the Constitution Act 1986 provides that "the Parliament of New Zealand continues to have full power to make laws" and this power is not limited by the Magna Carta. The Court refused to enter into a constitutional debate over the conventions that govern our country and delimit the respective roles of the legislature, the executive and the courts.

- *Electoral expenses, statutory interpretation and function of the courts*

In *Electoral Commission v Tate* [1999] 3 NZLR 174 the Electoral Commission sought a declaration that a party secretary was required to forward a breakdown of the party's election expenses on the form provided by the Commission under s214C of the Electoral Act 1993. Following the 1996 election the ACT secretary had provided only the total of the party's expenses, having taken legal advice and been advised that that was sufficient to comply with the Act. The Judge at first instance declined to make any declaration, on the basis that the meaning of s214C was "unclear", and that the question was a political one which should be left to Parliament to resolve unless the courts were forced to give an answer.

Section 214C provides that every party secretary shall forward to the Electoral Commission a return of that party's election expenses, on a form provided by the Commission. "Election expenses" are defined in s214B to include expenses that are incurred by or on behalf of the party in respect of any election activity, which is defined as an activity carried out by the party or with the party's authority, which comprises: advertising of any kind; radio or television broadcasting; or publishing, issuing, distributing, or displaying addresses, notices, posters, pamphlets, handbills, billboards and cards. The form provided by the Commission under s214C requires the party secretary to summarise the party's election expenses under those three classes of activity, giving further particulars in schedules which correspond to those three classes.

The Court held that where Parliament has not conveyed its intention clearly, it is the courts' role to provide that clarity so that people's rights, duties and powers are determined. That a piece of legislation has "political" content or is "politically" controversial is an insufficient ground upon which to decline to determine an issue.

The Court made a declaration in favour of the Commission, summarising its reasons for preferring that construction under three heads: the textual indicators; the scheme of the Act; and the legislative history. The Court found that the terms of the section as a whole only made full sense if the legislature contemplated more than the return of an overall figure, indicated by the use of the terms "return" and "particulars" in the section, the provision of a "form", and the statutory definitions of "election expenses" and "election activity".

This conclusion was also supported by the scheme of the Act, particularly the comprehensive provisions limiting a party's election expenditure and requiring disclosure of election donations. Parliament clearly contemplated that disclosure was

necessary to ensure the integrity of the MMP electoral system. In order that the Commission be enabled to fulfil its functions, something more than a bare total for election expenses must be returned.

Finally, the Court considered the legislative history of the Act, including the Royal Commission Report of 1986, which greatly influenced the Act. The Court essentially found that the Royal Commission's recommendations in respect of the control and disclosure of political income would have counted for nought if the Electoral Commission did not have the power to require secretaries to provide the information it needed to properly perform its functions.

Tax

- *Taxation of insurance company investments*

Commissioner of Inland Revenue v National Insurance Company of New Zealand Limited (1999) 19 NZTC 15,135 concerned the taxability of gains made by National Insurance on the sale of its shareholding in South Pacific Merchant Finance Limited (Southpac). The High Court held that the gains were not assessable income of National Insurance under any of s65(2)(a), (e) or (l) of the Income Tax Act 1976. The Commissioner's appeal to this Court was dismissed.

In December 1982 National Insurance acquired a 30 percent shareholding in Southpac. In October 1987 National Insurance agreed to sell its Southpac shares to the National Bank of New Zealand, the major shareholder. The terms of the agreement were that Southpac would pay to National Insurance two dividends, each of $20m, and National Insurance would grant National Bank an option to acquire its shareholding in Southpac for $40m. National Bank exercised its option in December 1987. The gain to National Insurance on realisation of the shareholding in Southpac was assessed at approximately $67m and was included in the assessable income of National Insurance for that year.

This Court relied on the classic statement of the Lord Justice Clerk in *Californian Copper Syndicate (Limited and Reduced) v Harris (Surveyor of Taxes)* (1904) 5 TC 159, that whether the gains produced in a business are revenue or capital depends on the nature of the business and the relationship of the transactions producing the gain to the conduct of the business. The very nature of insurance business requires the investment of substantial funds in realisable securities in order to meet the claims of policyholders. However, the Court held that this particular investment in Southpac was not part of the insurance reserves of the business, but a diversification of business and therefore on capital account.

Profits derived from the sales of shares are taxable under the second limb of s65(2)(e) if the shares were acquired for the purpose of sale or other disposition. The test of purpose is subjective, requiring consideration of the state of mind of the purchaser as at the time of acquisition of the property. The High Court Judge accepted the evidence of

the witnesses who could properly speak to the subjective intention of National Insurance. This Court concluded that the Judge had not been shown to be wrong in his final conclusion under this head that the asset was a capital asset and therefore the gains on sale not assessable. The acquisition and the management of the shareholding was not included in the extensive portfolio of investments which were clearly part of the insurance business. The documentation indicated that at the time of purchase resale was not a predominant consideration.

The Court then considered the applicability of s65(2)(a). The High Court held that the company had diversified with the acquisition of Southpac, and therefore the shares in Southpac were part of the capital of the company. This Court considered that there was no clear cut answer, but found that the Judge was not demonstrably in error in his conclusion. There were features of the Southpac transaction distinguishing it from the general run of investments inherent in the nature of the company's insurance business which allowed a conclusion that it was a move into another area of business which then, for supervening reasons, it became commercially desirable to terminate. By the time of disposition the shareholding could be seen as part of the capital structure of the company's business. The Court was not persuaded that it should interfere with what ultimately were essentially findings of fact, and the appeal was dismissed.

- *Tax on sales and transfers of forests*

In *Tasman Forestry Ltd v Commissioner of Inland Revenue* (1999) 19 NZTC 15,147 Tasman Forestry Limited, the taxpayer, appealed against a High Court decision on the deductibility of the cost of timber from profits or gains derived from the sale of timber.

Tasman had been merged to form part of a substantial group of companies. Tasman acquired land and standing timber held by other companies in the group through transactions involving the purchase of all the shares in each company, then the liquidation of the relevant company and distribution of the assets to Tasman. Tasman treated the value of the forest assets (excluding the land) acquired on the distribution as the "cost" of timber. The company acquired further forestry assets through an agreement for the exchange of property holdings with New Zealand Forest Products. The agreement effected a direct exchange of certain lands and forest equalised by an issue of redeemable preference shares and the transfer of shares. Tasman treated the market value of the forests on the transfer date as the "cost" of the forests acquired by way of the exchange.

The Commissioner took the view that there were no "costs" deductible under s74 of the Income Tax Act 1976 and that the whole of the profit arising on the sale of the timber was assessable income.

The taxpayer's appeal to this Court was successful. The Court held that s74 did not expressly limit the cost of timber to the purchase price on sale. There was nothing in the scheme or the specific provisions (save in s74(6) which is directed to the Matrimonial Property Act) suggesting that where there was no sale and purchase, no

cost of timber passed on acquisition by a subsequent owner, even where related companies were involved. There was nothing in s74(2)(b) that required a sale transaction to enable a cost to be isolated.

Section 74(5) is confined to sales of land with standing timber. It provides for determination of the amount of the consideration to be allocated to the timber and says that is to be "taken into account" in calculating the cost of the timber to the person acquiring that land. The section plainly contemplates that the cost of timber need not be identical to the amount of consideration allocated to the timber on purchase. It therefore could not be said that the only cost of timber that could be taken into account was that arising on the purchase of the land with standing timber. Further, the Court stated that it could not be implied from the express inclusion of apportionment in the case of purchases of land with standing timber by s74(5), that s74 expressly limited the cost of timber to purchase price.

The Court concluded that the "cost" of the timber acquired by distribution in specie was the initial cost of acquiring shares in the target company. The correct course was not to dissect the transactions by which the forests were acquired, but to view them in their commercial reality. The shares were purchased as the means for, and with the intention of, acquiring the forests. For practical purposes, the cost to the taxpayer in acquiring the forests was the amount paid for the company shares that gave access to the forest assets. The appropriate portion of that cost was to be treated as the cost of the timber. The exchange was a "sale" for the purposes of s74(5) and the costs incurred by the taxpayer were therefore deductible.

Limitation of action

- *Limitation of action in cases of child sexual abuse*

In 1999 the Court heard two cases involving limitation of actions in sexual abuse cases. The first was *W v Attorney-General* [1999] 2 NZLR 709. W was sexually abused by a foster parent as a child in the early 1970s. W alleged that her complaints to a Social Welfare Officer were ignored and the abuse continued. W subsequently suffered from serious and lasting psychological and emotional impairment, psychiatric disorders, anxiety, depression, depersonalisation, and a marked inability to cope with everyday life. W alleged that these were the results of the abuse and she wished to sue the Department of Social Welfare for exemplary damages, pleading breach of fiduciary duty and breach of statutory duty. Her counsel applied for leave to bring an action in respect of bodily injury after the expiration of two years from the date on which the causes of action accrued under s4(7) of the Limitation Act 1950. Leave was refused, and that decision was appealed. The Court allowed the appeal, and each of the three Judges wrote separately.

On the issue of when the causes of action accrued, Thomas J discussed the "reasonable discoverability test" and this Court's decision in *S v G* [1995] 3 NZLR 68. The Court in *S v G* held that where damage is an element of the cause of action, as in negligence, the

reasonable discoverability of the link between the psychological and emotional harm and past sexual abuse may be employed to determine when the cause of action accrued. Thomas J interpreted *S v G* as requiring the objectification of the intended plaintiff's subjective condition. He criticised this approach, stating that such objectification presumes that a sexually abused person will behave "normally", creating a tension between the way in which the courts assume such a person will behave and the way in which a real victim, psychologically damaged and disadvantaged, will actually behave.

The Judges differed in their approach to the issue of when the cause of action accrues. Thomas J adopted a subjective test. He stated that the issue of when the intended plaintiff between the abuse and her later psychological and emotional difficulties will be a question of fact, and testimony from medical experts will be significant in this determination. Tipping and Salmon JJ preferred a mixed objective-subjective approach; the test is whether the victim taken as he or she is, ought reasonably to have made the link between the abuse and the harm earlier.

Thomas and Tipping JJ ruled that because a defendant was entitled to raise a Limitation Act defence as a positive defence at trial, it was inappropriate to determine a leave application by way of a pre-trial hearing. Once affidavit evidence indicated a prima facie case then leave should be granted without prejudice to the defendant's right to pursue a positive time-bar defence at trial. Salmon J agreed that time-bar issues should almost always be considered at the substantive hearing.

The issue of limitation of actions in sexual abuse cases was again raised in *M v H* (1999) 18 FRNZ 359. M applied to the High Court for leave under s4(7) of the Limitation Act to bring a proceeding claiming compensatory damages from her mother and stepfather for psychological and emotional damage she suffered as a consequence of sexual, emotional and physical abuse by her stepfather when she was a child in the 1960s. Her proposed causes of action were breach of fiduciary duty and trespass to the person. Leave was refused and M appealed that decision in relation to her stepfather. The key grounds of appeal were that the decision was made in the context of a preliminary procedure that operated unfairly against the appellant; that the Judge wrongly equated knowledge of the physical acts of abuse with appreciation of the elements of the causes of action; that he was wrong to apply the Limitation Act by analogy to the cause of action in breach of fiduciary duty; and that he erred in his conclusion on fraudulent concealment.

The majority of the Court dismissed the appeal, Thomas J dissenting. Gault J, delivering the judgment of himself and Henry J, said that although the desirability of an appropriate sui generis cause of action with an approach to limitation sensitive to the nature of such claims was patent, until changes were made by the legislature he felt obliged to proceed in a principled way as the Court had endeavoured to do in *S v G*. Distortion of existing causes of action and disregard for the existing law of limitation could not be justified. On the procedural issue, Gault J held that, as the parties had agreed to have the leave application determined in advance of trial, it was too late to seek to have it dealt with in some other way. However, he confirmed that the most appropriate manner to determine limitation issues was at trial, when all the evidence

was available and could be tested.

As damage was not an element of the cause of action for breach of fiduciary duty or trespass to the person, "discoverability" was applied to the realisation that the victim did not give considered and free consent to the abuse. The appellant pleaded that such discovery did not occur until May 1993. Gault J held that the appellant had known of the elements of the cause of action by 1991, confirming the decision of the Judge below. While she may not have recognised her own lack of blame, she had indicated that she knew the stepfather's conduct was wrong, which was the necessary element in the cause of action. Gault J shortly dealt with the analogy issue, stating that as the separate causes of action alleged the same conduct, the principle that equity follows the law was entirely applicable.

Gault J expressed a preference in this area for a finding that a cause of action does not accrue while the proposed plaintiff is, through lack of recognition of the true nature of the alleged abuse and its consequences, or because of psychological repression, unable adequately to disclose the facts and secure proper advice. This equates to a finding that the proposed plaintiff was under a disability within s24 of the Limitation Act.

Gault J also confirmed the Judge's decision on fraudulent concealment. That the appellant laboured under a misapprehension that she was in some way to blame for the abuse did not, Gault J held, necessarily establish that her stepfather fraudulently concealed the nature of his actions.

Thomas J, dissenting, emphasised the absurdities created by the present situation, especially the fact that the reasonable discoverability test permits recovery where a claim is based in negligence but not when the cause of action involves intentional wrongdoing. He advanced three principal ways to develop the law to avoid those absurdities: to adopt the reasoning of the High Court of Australia in *Hawkins v Clayton* (1988) 164 CLR 539, such that the abuser cannot rely upon the statutory bar for so long as the victim's debilitating condition operates to prevent her from initiating a claim; adopt the reasoning in *M(K) v M(H)* (1992) 96 DLR (4^{th}) 289, such that it is not until the victim becomes fully cognisant of who bears responsibility for her childhood abuse that she realises the wrongful nature of the act done to her, and thus has an action; or, third, to accept that while causes of action in assault and for breach of fiduciary duty may not require proof of damage, where a woman claims compensatory damages for psychological injury occasioned by sexual abuse the cause of action accrues when she recognises the causal relationship between the abuse and the injury.

Thomas J addressed a number of secondary issues. He held that s4(9) should not be applied in this case to bar by analogy the equitable action in breach of fiduciary duty, on the general principle that it would be unjust in the particular circumstances of the case. On the issue of fraudulent concealment, he concluded that what must be proved is unconscionable conduct in breach of fiduciary duty which operates to conceal a cause of action from the plaintiff. Thomas J also found that M was under a disability within the terms of s24 of the Limitation Act

Property law

- *Impact of s118 notice on waiver by election*

The impact of a notice issued under s118 of the Property Law Act 1952 on the rules of waiver by election fell to be considered in *McDrury v Luporini* CA25/99, 14 December 1999. The appellants leased a farm from the respondents. Under the lease agreement, the appellants were required to apply a specified amount of fertiliser to the land by a particular date. Shortly before that date the respondents wrote to the appellants, noting that this requirement had not been met. Two days later, the appellants arranged for the application of some of the fertiliser. The respondents complained that this had been done without consultation, contrary to the requirements of the lease. In July 1996, the respondents served a notice under s118 of the Property Law Act 1952 on the appellants citing the failure to apply the fertiliser as cause for forfeiture. Section 118 states that a lessor may not re-enter or forfeit where the breach is other than non-payment of rent unless the lessor has served a notice requiring the lessee to remedy the breach and the lessee has failed within a reasonable time to comply. The notice was not fulfilled and the respondents re-entered in October 1996. During the period of the notice, the respondents had continued to invoice the appellants for rent. The appellants contended that by accepting rent, the respondents had waived the breach.

The Court began by noting that the essence of waiver in the present context lay in election. Thus, it required an unequivocal act demonstrating a choice between two inconsistent rights. The Court further noted that election depends upon the person said to have made an election having been entitled at the time of such election to alternative and inconsistent rights.

The Court ruled that until the lessor had an unconditional right to forfeit, no choice is possible between the right of forfeiture and the alternative right of affirming the lease. Whether one took the approach that a s118 notice "suspended" the right or that no enforceable right existed until the notice had expired, the effect was that there could be no election while the notice was running. That there was no unconditional right to forfeit until then was also clear from the statutory opportunity afforded the lessee to avoid forfeiture by compliance with the notice. Thus, in this case, there could be no election during the currency of the notice by acceptance of rent. Thus, the respondents could not be said to have made their election by acceptance of rent prior to issue of the notice. The appeal was dismissed.

- *Impact of heritage listing on valuation of ground rent*

The main issue in *S & M Property Holdings Ltd v Waterloo Investments Ltd* [1999] 3 NZLR 189 was whether, in valuing the ground rent on renewal of a Glasgow lease, the heritage listing of a building or parts of the building situated on the land should be taken into account. In this case, the north and east facades of the building featured in the heritage list of the Wellington City Council Proposed District Plan. The lessee contended that the presence of the building, with its heritage listing, was relevant to the valuation and could be taken into account. The lessor contended that the valuation

should proceed on the basis that the land was vacant and that, for the purposes of the valuation of the land, the building with its heritage listing did not exist. The lease specified that no account should be taken of the value of any buildings or improvements for the purposes of valuation for ground rent.

The majority of the Court (Henry, Thomas, Blanchard and Tipping JJ) dismissed the appeal, concluding that the heritage listing should not be taken into account in the valuations. There were concurring judgments delivered by Henry J; Thomas and Blanchard JJ (jointly); and Tipping J; with Gault J dissenting. The majority held that a "ground rent" was a rent paid for the use of land to be built on or for the land void of buildings. The ground rent should be assessed by reference to the highest and best use of the land without reference to the presence of buildings. To hold otherwise would mean that the land would have a different ground rental depending on the use made of the land by the lessee. The majority preferred the view that the benefits and burdens attaching to improvements, including the effect on the lessee's ability to use the land, rested with the lessee. Since the heritage listing related to the building and not the land, it must be ignored.

The majority further held that the heritage listing of a building was to be distinguished from zoning provisions. The heritage designation was directed to the protection of the building whereas zoning provisions applied to the land and any building on that land and defined the highest and best use of the land.

Gault J, dissenting, held that the heritage listing was not to be distinguished from a zoning requirement, and as such, regard should be had to it in the valuation. The lease specified that the ground rent valuation was to be made having regard to any constraints upon the use of the land contained in the lease or imposed by law. The heritage listing was a constraint upon the use of the land since it prohibited, without consent, development of the land, unless the two facades were preserved.

Maori fisheries

- *Allocation of fisheries assets to Maori – preliminary question*

The central issue in *Te Waka Hi Ika o Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285 was whether the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 required any scheme providing for the distribution of pre-settlement assets held by the Treaty of Waitangi Fisheries Commission to provide for the allocation of such assets exclusively to "iwi" or bodies representing "iwi" or both.

Since 1992 the Commission has been formulating a scheme for the distribution of the pre-settlement assets. The Commission has indicated in a draft allocation proposal that it will recommend allocation through traditional tribes. As a consequence there have been five separate applications for review. A conjoint trial of all proceedings in the High Court was scheduled for early this year. Two preliminary questions were ordered

to be tried in advance of trial: *Treaty Tribes Coalition, Te Runanga o Ngati Porou and Tainui Maori Trust Board v Urban Maori Authorities* [1997] 1 NZLR 513 (PC). Those questions were, essentially, whether the empowering legislation required that any scheme for the distribution of the assets should provide for allocation solely to "iwi" and, if so, whether in the context of such a scheme "iwi" meant only traditional Maori tribes. The High Court answered "yes" to both questions. This appeal was from that ruling.

The majority dismissed the appeal, holding that the legislation required allocation exclusively to iwi and that iwi in that context meant traditional Maori tribes. Two Judges dissented, preferring the view that the legislation did not require allocation solely to iwi. All members of the Court commented on the apparent futility of the appeal. Regardless of the answers to the questions the Commission was not bound to distribute to entities other than "iwi". The question was premature because it remained to be seen whether the chosen scheme would conform with the overriding requirement of the legislation, upon which all parties agreed, which was that the distribution must be for the benefit of all Maori.

Keith, Blanchard and Tipping JJ (in a judgment delivered by Blanchard J) held that the legislation required any scheme for allocation proposed by the Commission to allocate exclusively to iwi and that "iwi" in this context meant traditional tribes or, more particularly, the people of the tribes. That conclusion was reached as a matter of statutory interpretation. There could be no doubt that the resolutions passed at the hui-a-tau of 1992 described a tribal settlement. The legislation which effected the settlement required the Commission to consider "how best to give effect to the resolutions". The Commission could not do so other than by allocating to iwi. If Parliament had intended allocation other than to iwi it would have used clear language to that effect. Parliament must have intended that the requirement of allocation to iwi be harmonised with the requirement that the settlement is ultimately to be for the benefit of all Maori. The safeguards were the role of the Minister and the Commission's accountability, as a trustee, to all Maori.

Gault J, dissenting, would not have construed the legislation as requiring allocation exclusively to iwi. He expressed the view that if there is a conflict between the purpose of a trust and the specified mechanism for achieving that purpose, the mechanism must give way. Parliament could not have intended that allocation must be exclusively to iwi because then the Commission would be precluded from performing its principal functions of assisting Maori in fishing.

Thomas J, also dissenting, would have favoured a decision declining to answer the questions posed. However, if pressed, he would have held that the Commission retained a statutory discretion to promote a scheme to distribute the assets to non-traditional iwi or other Maori organisations as it saw fit. Justice Thomas emphasised the "new dimension" which intervened between the hui-a-tau and the enactment of the Settlement Act; that was the agreement - embodied in the Settlement Act itself - that "the settlement was ultimately for the benefit of all Maori". To allow the means by which the assets must be distributed to control or override the objective of the Act would be,

he said, to allow the tail to wag the dog.

Jurisdiction of Maori Land Court

- *Jurisdiction of Maori Land Court to issue injunction against local authority*

The central question for decision in *McGuire v Hastings District Council* CA224/99, 16 December 1999, was whether the Maori Land Court had jurisdiction under s19(1)(a) of the Te Ture Whenua Maori Act 1993, also known as the Maori Land Act, to issue an injunction restraining a local authority from embarking on the designation processes under the Resource Management Act 1991 (the RMA). Under s19(1)(a), the Maori Land Court may issue an injunction against any person in respect of any actual or threatened trespass or other injury to any Maori freehold land.

The Hastings District Council had engaged in a process to commence designation under s168A of the RMA of a route for the northern arterial intended to link the Hastings urban area and Havelock North to the motorway that leads to Napier. The interim injunction issued on the application of the appellants as owners of Maori freehold land prevented the council from proceeding to designate the northern arterial route through their lands, until further order of the Maori Land Court. The Council successfully obtained judicial review of this decision on the grounds that the Maori Land Court acted unlawfully and/or ultra vires. The Maori landowners appealed.

The Court dismissed the appeal, holding that the Maori Land Court had no jurisdiction under s19(1)(a) to entertain a collateral challenge to the validity of the decision by the Council to make and notify a requirement under ss168 and 169 of the RMA.

The Court traversed important features of the Maori Land Act and the RMA. It found that the Maori Land Court had jurisdiction to grant an injunction where injury to Maori freehold land was threatened. However, the Court considered that, leaving aside the question of whether a designation may ever constitute "trespass" or "other injury" to land, "injury" within s19(1)(a) must be one which was caused by an unlawful act. The alleged failure of the Council to carry out its intended exercise of s168A powers in accordance with its statutory responsibilities was not an unlawful act. The exercise by the Council of a statutory power had to be accepted as lawful unless and until set aside by a court of competent jurisdiction. Section 19(1)(a) did not purport to give the Maori Land Court jurisdiction to question decisions of the council which on their face were squarely within the RMA. There could be no justification for reading in a controlling jurisdiction of that kind by implication.

The Court was satisfied that the RMA was intended to be self-contained as to all matters capable of falling within its compass. The Environment Court had a general appeal jurisdiction with extended declaratory jurisdiction and enforcement powers. As well, the High Court had jurisdiction under the Judicature Amendment Act 1972 and the prerogative writ procedures. There was no warrant for attributing jurisdiction to the

Maori Land Court, whose area of operation and expertise was far removed from resource management and judicial review matters. The appeal was accordingly dismissed.

Maritime law

- *Russian ships*

In 1999 three disputes involving Russian ships all reached the Court of Appeal. In *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37 Vostok brought an *in personam* claim against a Russian company, Okra, for the price of goods and services supplied by Vostok to Okra in respect of a ship. Vostok also brought an *in rem* claim against the ship.

The respondent, Confederation, applied to have the *in rem* claim set aside on the basis that it was the beneficial owner of the ship when Vostok issued proceedings. The basis for Confederation's claim to be the beneficial owner was that Okra sold the ship to Confederation (a subsidiary of a bank to which Okra was indebted) in March 1998 and physical possession passed in May. However the ship was not permanently registered until August when a deletion certificate removing the ship from the Russian register was produced. This was a day after the High Court hearing had begun.

The two issues were where the onus and standard of proof lay and which law was to be applied to determine the beneficial owner. Richardson P and Blanchard J delivered the main judgment, with Gault J concurring in a separate judgment. The Court disagreed with the High Court finding that the onus lay on the applicant (Confederation) to prove that the plaintiff had no arguable case. The Court held that, in accordance with international approaches, the plaintiff was required to prove to the balance of probabilities that the claim lay within the jurisdiction. This must be determined before the substantive hearing. The Court held that the relevant law was New Zealand law, as the issue was a condition precedent to New Zealand jurisdiction. Confederation was clearly the beneficial owner under New Zealand law. The Court added that this would have been the result under Russian law.

A similar issue arose in *Kareltrust v Wallace and Cooper Engineering (Lyttelton) Ltd* [2000] 1 NZLR 401. The respondents, Wallace, brought *in rem* proceedings against four ships Wallace had worked on for a Russian company (as well as an *in personam* action against the company). Before Wallace commenced its action, the Russian company sold the ships to a related company, Kareltrust. In the Court of Appeal Kareltrust was granted leave to seek an order striking out the *in rem* proceedings on the basis that it, not the company, was the beneficial owner when Wallace commenced the action. Complicating this issue was the fact that before the sale, the ships were forfeited to the Crown under s107B(2) of the Fisheries Act 1983, then released to the company for a fee under s107C.

The High Court held that the release revived the company's beneficial interest in the ships. However, the High Court Judge found that the company's subsequent sale to Kareltrust was voidable under s60 of the Property Law Act 1952 as being an alienation of property with intent to defraud creditors. The Judge observed that the Russian company and Kareltrust had a "reasonably close association" and he was of the view that the sale had been effected to avoid Wallace's likely in *rem* claims.

The five member Court of Appeal agreed in a unanimous judgment that while the s107B(2) forfeiture extinguished all prior interests, these were revived by the later release. The Court disagreed that the sale of the ships to Kareltrust was in breach of s60 as there had been no unequivocal act of avoidance by Wallace (or any other creditor) for the simple reason that Wallace knew nothing of the sale. Transactions under s60 are only voidable, not void *ab initio*. Thus Kareltrust, not the company, was the beneficial owner of the ships at the relevant time. The appeal was allowed and Wallace's *in rem* proceedings were set aside.

The third case, *AO Karelrybflot v Udovenko* CA129/99, 17 December 1999, related to claims by crew on three of the vessels in the *Wallace* case for unpaid wages from the Russian company. In the High Court the six respondents successfully obtained *in personam* claims for wages, damages for failure to pay, and repatriation costs against the company. They also obtained maritime liens in relation to those claims. The trial Judge held that the company breached the employment contract by unilaterally terminating it and requiring the crew to return home without payment.

In the Court of Appeal the appellant did not dispute the grant of the maritime lien, but argued that the contract had been frustrated by the forfeiture of the ships and, alternatively, that the trial Judge had incorrectly calculated the wages due. Richardson P, Keith, Blanchard and Tipping JJ delivered a joint judgment. Gault J delivered a separate judgment. The majority rejected a submission that the contract had been frustrated, observing that the Court will be slow to apply this doctrine to employment contracts. At any rate the trial Judge had found that the company knew of possible forfeiture proceedings at the time the contracts were signed. Gault J found that the contract had been frustrated and that wages were due only until the date of forfeiture. The Court agreed that the Minimum Wage Act 1983 applied but held that the Judge should have applied the hourly rather than the daily rate. The Court reduced the wage awards accordingly. The Court overturned the award of damages for non-payment on the basis that the respondents had failed to mitigate their loss by rejecting an offer to fly home before being paid.

Insolvency and bankruptcy

- *Right of Official Assignee to abandon cause of action in favour of bankrupt*

In *Edmonds Judd v Official Assignee* CA30/99, 1 December 1999, the appellant law firm sought to appeal against a High Court judgment dismissing an "appeal" by the law firm under s86 of the Insolvency Act 1967 against the decision of the Official Assignee

to abandon a cause of action against the law firm to a former bankrupt, Mr Hobbs. The issue was whether the Official Assignee had the power to abandon a bankrupt's cause of action, and the effect of that purported abandonment.

Mr Hobbs was adjudicated bankrupt in October 1994 and was discharged from bankruptcy in October 1997. Administration of the estate was completed in June 1997, but the Official Assignee did not apply for release from administration of the estate. In June 1998, a lawyer for Mr Hobbs informed the Official Assignee by telephone and faxed letter that Mr Hobbs wanted to bring an action for damages against the appellant firm, alleging breach of their contract of retainer, negligence and breach of fiduciary duty in relation to Mr Hobbs' affairs, resulting in his bankruptcy. The faxed letter stated that if the Official Assignee did not bring the claim, then such claim would be deemed to be abandoned. The Official Assignee responded that he had no plans to pursue any legal action against the law firm, and that therefore any potential action may be deemed as abandoned, and vested in Mr Hobbs. Mr Hobbs subsequently filed a statement of claim against the law firm and the partner who had acted for him.

The Court found that the law firm had standing to invoke s86 of the Insolvency Act in the High Court and to appeal against the High Court decision. It went on to allow the law firm's appeal, quashing the orders made by the High Court and the decision of the Official Assignee to abandon the cause of action. On the issue of abandonment, the Court questioned whether under the scheme of the statute there is any room for a non-statutory broad abandonment process sitting alongside the statute's constrained disclaimer provisions. The Court refrained from expressing any concluded views on the issue, in the absence of argument. The Court did, however, consider it arguable that it is legally impossible for the Official Assignee to abandon a right of action in favour of the former bankrupt or anyone else.

The Court considered the effect of s86 in this case. The Official Assignee's decision to abandon the cause of action was made on the basis of the absence of funds in the bankrupt's estate, and not on any evaluation of the merits of the cause of action. The Court concluded that this decision, which was designed to encourage Mr Hobbs' advisers to institute proceedings the next day, was fatally flawed and could not stand. An analysis of the contemplated claim would have indicated the difficulties in establishing that any breach by the law firm was causative of loss to Mr Hobbs. Second, it was no part of the Assignee's function to traffic in frivolous and vexatious proceedings. Third, in the exercise of his or her functions, the Official Assignee must recognise a basic principle of bankruptcy law that, following the orderly administration of the bankrupt's estate and distribution of available funds to the creditors, neither bankrupt nor creditor has any claim on the other. While the Official Assignee may assign a right of action, abandonment is not provided for in the statute. In adopting a stance which encouraged or allowed Mr Hobbs to sue the appellant law firm, the Official Assignee was not serving the due administration of the estate.

- *Joinder of beneficiaries in bankruptcy petition*

In *Khan v Fleming* [1999] 3 NZLR 268 the issue was whether a bankruptcy petition,

based on a debt owed to a trust, must be brought not just by the trustee but also by the beneficiaries. The Court held that it was sufficient if the beneficiaries were before the Court and had joined in the requisite oath.

The appeal was against a ruling that a bankruptcy petition brought in the name of a trustee only was a nullity. A Master directed that an amended petition in the names of the beneficiaries as well as the trustee was to be filed within a stated time.

The argument that beneficiaries need be joined in a bankruptcy petition brought by a trustee was based on a number of early English cases and more recent commentary. The justification given for the rule was a concern to protect the position of the debtor. The Court, dismissing the appeal, expressed doubt whether the rule formed part of New Zealand law. The Insolvency Act 1967 simply provided that "a creditor" may bring a bankruptcy petition. Similarly, in regular civil proceedings a trustee, as creditor, could obtain judgment on a debt owed to the trust, as had the trustee in this case. Joinder of the beneficiaries as co-petitioners could be impractical if there was a large number of beneficiaries or if beneficiaries were difficult to contact or refused to participate. In any case, a rule requiring that beneficiaries be joined as co-petitioners would seem unnecessary to protect the debtor, given the ordinary protections afforded both to defendants in civil proceedings and to debtors in bankruptcy proceedings. The Court observed that the rule may have reflected particular aspects of the law of England in the 1870s and 80s which are in no sense replicated over a century later in New Zealand.

The Court held that in this case the stated purpose of the rule – the protection of the debtor – was fully satisfied by the beneficiaries being in court and joining in the requisite oath. Prior to the hearing of the petition the two named beneficiaries had sworn affidavits in which they confirmed that the trustee had their full support and consent in the bankruptcy proceedings and one of them had added that the full amount of the judgment debt remained unpaid. On that basis the appeal was dismissed.

On a separate point the Court expressed the view, but found it unnecessary to decide, that it is open to a court to direct that an amended petition should be filed notwithstanding that the usual three month period from the act of bankruptcy had elapsed.

Public works

- *Land acquired by Crown for other than public purposes*

Port Gisborne Ltd v Smiler [1999] 2 NZLR 695 concerned the operation of s40 of the Public Works Act 1981 and whether it required the appellant, Port Gisborne Ltd, to offer the respondents a first right of purchase of a block of land which Port Gisborne proposed to sell.

The original Maori owners of the land and the Crown began negotiating over the land, known as the Tauwhareparae Block, in 1874. The Immigration and Public Works Act 1870 empowered the government to acquire land in the North Island with funds allocated to it under the Act, but did not specify the purpose for which the land was being purchased. The land was eventually purchased in 1879 when agreement was reached and in 1881 an order was granted vesting the land in the Crown. Later that year a proclamation in the Gazette declared the land to be waste lands of the Crown, which meant the land was held for no particular purpose. The Gisborne Harbour Act of 1884 endowed the land on the Gisborne Harbour Board for the purposes of providing an income stream to support the funding of the port. The land was transferred to Port Gisborne in 1993 under the Port Companies Act 1988.

The High Court found that it was contemplated prior to 1884 that the land would be suitable as an endowment for the Harbour Board. This was sufficient to conclude that the land was held for a public work, so Port Gisborne was obliged to offer the land back to its original owners or their successors. Port Gisborne appealed, and the appeal was allowed by this Court.

The Court stated that the land had been bought by the Crown as part of a commercial negotiation and had not been acquired for public works. This Court differed from the High Court Judge in its assessment of the historical position. It found that there was nothing in the affidavit evidence recording the historical background leading up to the endowment which could support a finding that at the time of acquisition the Crown had in contemplation use of the land for what is now, or was then, defined as a public work. The Public Works Act 1981 dealt with land acquired for public works either through compulsion or with the possibility of compulsion. It was not concerned with land that had been acquired for other purposes. Land designated waste land, as the Tauwhareparae land had been, was publicly owned but was not held for any public work, or dedicated to any particular public purpose. The land formed a part of the land holdings of the Crown available for sale under the waste lands regime prevailing in the land district of Auckland. The acquisition of the land by the Crown was therefore not an acquisition to which s40(2) applied. The first occasion on which the land was acquired for public works was on its endowment in favour of the Gisborne Harbour Board. It followed that the respondents had no entitlement under s40(2) and the person so entitled was the Crown.

The Court held that the fact that the present owner of the land was not the particular body which originally acquired the land was irrelevant for the purposes of s40 where a public work use had continued. In a case where land had been held by successive public bodies for public works throughout, the land should be offered to the original owner. However, where, as here, the land was acquired and held by the first public owner for something other than a public work, there were no rights to preserve and it was not possible for those rights to accrue when ownership changed.

- *Impact of health reforms on obligation to offer land back under the Public Works Act*

In *Counties Manukau Health Ltd v Dilworth Trust Board* [1999] 3 NZLR 537 the appellant appealed against the High Court's refusal to strike out Dilworth's statement of claim. Dilworth sought an order under s40 of the Public Works Act 1981 that Counties was required to offer to sell it a block of land which had been acquired from it "for hospital purposes" in 1973. The land was vested in the Auckland Hospital Board in 1983 and was transferred to the Auckland Area Health Board in 1992, as part of restructuring. In 1994, as part of further restructuring, the land was transferred to Counties (then Manukau Health Ltd). In anticipation of that transfer, Dilworth had lodged a caveat against the title, to protect its interests under s40 of the Public Works Act.

It was accepted that at some point in time before Counties Manukau Health became the registered proprietor of the land, the land was no longer required for hospital purposes and should have been offered for sale to Dilworth. No such offer was made. Counties Manukau Health contended that cl 3(2) of the First Schedule to the Health Reform (Transitional Provisions) Act 1993 provided a complete defence to Dilworth's claim, and so the statement of claim should be struck out. Clause 3(2) provides that ss40 to 42 of the Public Works Act shall not apply to the transfer of land to a transferee so long as the land continues to be used for the purposes of the transferee. Under the Health and Disability Services Act and the Health Reforms (Transitional Provisions) Act the statutory purposes for which the CHE was established were clearly wider than "hospital purposes". The CHE had constructed a "super clinic" on part of the land and it was common ground that the clinic was not a hospital. The balance of the land remained undeveloped.

The first issue was whether the word "purposes" in cl 3(2) referred to the purposes of Counties Manukau Health, or was restricted to the purposes for which the land was originally taken. The Court acknowledged that cl 3(2) was not happily worded but considered it evident that Parliament had intended that land would be transferred to CHEs, and that ss 40 to 42 would not apply if the land continued to be used for the CHEs wider purposes.

The second issue was whether the "option" created by s40(2) survived the transfer of the land to Counties Manukau Health, notwithstanding the terms of cl 3(2). The Court considered this to be a difficult question as it was unlikely to have been addressed by Parliament when enacting the legislation. The situation where the right or "option" under s40(2) had come into effect prior to the transfer was not explicitly addressed. Hence, the Court said it would be preferable to have all the relevant facts before it when interpreting and applying s40 and cl 3(2) to such a situation. The Court made some further comments, subject to the reservation that any opinion at the interlocutory stage was necessarily tentative. The Court, dismissing the appeal, tentatively expressed the view that the most likely construction of the opening part of cl 3(2) was that it was intended to mean no more than that ss40 to 42 do not apply to the transfer of land to a transferee if the land is to be used for the purposes of the transferee. Under the remaining part of the clause it was clear that, should the land no longer be required for

the CHE's purposes, ss 40 and 41 would apply. This was prospective in that ss40 and 41 only apply if and when this situation eventuates. Construed in this way, the Court said that cl 3(2) does not necessarily preclude the possibility that s40(2) still applies to the land as a result of it being no longer required by the Auckland Area Health Board for its purposes *prior* to the transfer to the CHE.

The Court referred to the Privy Council holding in *Attorney-General v Horton* [1999] 2 NZLR 257 that the right to repurchase under s40 bears closer resemblance to an option than to a right of pre-emption, as it is not dependent upon the vendor choosing to sell but arises as soon as the land is no longer required. The Court held that it is arguable that Counties Manukau Health took the land subject to Dilworth's statutory right, in the nature of an option, to repurchase the land. Whether or not the CHE took the land subject to that right would depend upon whether it had actual, constructive or imputed notice of that interest. The Court said that such a matter was a question of fact, or at least of mixed law and fact, and was best left to a substantive hearing.

Military law

- *Condonation*

Attorney-General v Lawrence CA138/99 and 163/99, 11 November 1999, addressed the military law concept of condonation. A sexual violation complaint had been laid against the respondent. The Attorney-General, representing the Royal New Zealand Navy, appealed against a High Court ruling that the alleged offences had been condoned in terms of s22 of the Armed Forces Discipline Act 1971, the effect of which was that the Navy could not try Lawrence on the charge of rape as intended.

In early 1998, the respondent's commanding officer became aware of a rape allegation made by a female rating against the respondent. The commanding officer was of the opinion that the allegation was not well founded. He informed his superior, the Maritime Commander, of this view in writing. He also orally informed the respondent. The Maritime Commander disagreed with the commanding officer's assessment and instructed him not to convey any such view to the respondent in written form. The Maritime Commander had the respondent transferred to another Command, in order that the matter could be reviewed by the new commanding officer. The new commanding officer considered the allegation to be well founded and charged the respondent accordingly. The question before the Court was whether the charge had already been condoned by the earlier commanding officer such that it was unlawful for a charge of rape to be subsequently tried.

The two relevant provisions were ss22 and 103 of the Armed Forces Discipline Act. Section 22(2)(c) provides that persons are not to be tried where offences have already been disposed of, including by condonation under s22(1)(d). Subsection (2)(c) provides that an alleged offence has been condoned where the commanding officer has, firstly, informed the person against whom the allegation is made that no charge will be laid and, secondly, made a written record of his having so informed the alleged offender.

The written record in this case was said to be the commanding officer's letter to his superior. Section 103 provides that the commanding officer of a person against whom an allegation has been made shall cause the allegation to be recorded in the form of a charge and investigated unless the commanding officer considers that the allegation is not well founded. Counsel for the respondent argued that s22(2)(c) provided an exhaustive definition of condonation, whereas counsel for the appellant contended that it was purely procedural. The appeal was allowed in this Court and the declaration made by the High Court set aside.

The Court noted that, as ordinarily understood in military law, condonation occurs where the commanding officer considers that the alleged offender may have committed the alleged offence. Such an approach was supported by the authorities and also conformed to the ordinary dictionary meaning of the term condone. The issue was whether the commanding officer had condoned the alleged offence of rape in circumstances where he believed that the allegation was not well founded. To suggest that the offence had been condoned in these circumstances was to turn on its head the concept of condonation, as understood in military law. The Court was not satisfied that s103 could be used to support a definitional approach to s22(2)(c). It noted that there was less conflict between ss22 and 103 than might initially appear.

The Court considered that s103 had to be read subject to s22. The seemingly absolute duty to charge under s103 was, of necessity, subject to there being no impediment under s22 to the charge being tried. The Court further held that Parliament must have contemplated that a commanding officer might condone a well founded charge notwithstanding s103, and it was unlikely that s103 was subject to all paragraphs of s22(1) other than paragraph (d). Such an interpretation was more likely to accord with Parliament's intention than a construction that assigned to the term condonation a meaning contrary to its established usage.

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