Court of Appeal Report

2000

RT HON JUSTICE SIR KENNETH KEITH - NICOLA GRANT - MEGAN INWOOD

APPENDICES

* * * *

1. Introduction

Overview

The Court of Appeal's statutory functions in the criminal and civil jurisdictions remained unchanged through the year. At the end of the year, however, legislation was before the House that would have the effect of amending Part XIII of the Crimes Act 1961, which sets out the Court's powers to deal with criminal appeals. The Court dealt with 509 criminal and 162 civil cases. This was a somewhat reduced workload compared to 1999, when the equivalent figures were 544 and 193 respectively. One criminal and six civil cases awaited judgment when the Court closed in December 2000.

The Court dealt with 221 miscellaneous motions compared with 283 in 1999. As usual, notices of discontinuance comprised the largest single group: 62 such notices were received this year compared to 107 in 1999. 42 appeals were deemed to be abandoned under R10 in 2000, an increase of three over last year's figure. No settlements were advised to the Court in 2000; two had been reported in 1999. Taken together these figures indicate a drop-off rate of about one-third of appeals filed throughout the last two years.

In addition, the number of civil appeals filed has declined since 1998. In 1999 and 2000 respectively, 308 and 293 civil appeals were filed. The number of appeals actually set down for hearing also dropped. On average, 12 applications for fixture were made each month, giving a total of 152 for 2000 (185 in 1999). The Court ended the year with 34 cases that had fixture dates assigned, including four to be heard in May 2001. A further 13 awaited a confirmed fixture date.

The substantial increase in criminal appeals filed in 1999 (565) was not maintained. In 2000, 478 appeals were filed, including 76 pre-trial matters.

The Court has again closely monitored the timeliness of its processes. It has maintained its standards of throughput of criminal cases: in 2000 about three quarters were actually disposed of within 90 days, and, within a further 30 days, 90 percent had been disposed of.

The Criminal Appeal Division, which handles a very large part of the criminal caseload, and particularly the sentence appeals, has maintained its throughput at about eight cases in each week of sitting. Sentence appeals are relatively quickly dealt with and are a growing proportion of appeals:

	2000	**1999**	**1998**	**1997**
Appeals against conviction, or conviction and sentence	196	221	205	233
Appeals against sentence only	188	193	164	203

(Figures include appeals disposed of on the papers and appeals against sentence by the Solicitor-General)

The Court also monitors the timeliness within which the Registry readies criminal cases for hearing by measuring the time elapsed between the date of filing the appeal and the day the date of hearing is given. It will continue to do so even after the new system for assigning legal aid comes into force on 1 February 2001, when the Legal Services Agency will have full responsibility for this function. The Court expects to maintain its current target for setting fixtures for 90 percent of cases within 30 days (unless they are subject to a legal aid review process) and will be closely monitoring the effect of having the legal aid decision made by another, totally independent, agency. Timeliness of processing applications and the number of cases that subsequently go to review will be a significant aspect of the successful implementation of the new system.

In addition, the Court has continued to record the number of legal aid applications granted on review. The following table updates the figures published as at the end of 1999 and, given that decisions remain to be made on cases filed late in 2000, sets out comparative statistics to the extent possible:

	2000 (as at 31 January 2001)	**1999**
Review applications made	45	71
Review applications that succeeded	13	6
Cases taken to private instruction	18	53
and allowed	3	6
or dismissed	11	46

In considering possible interpretations of these figures, it is important to note that the term "allowed" includes appeals that succeed in part; and that cases that succeed after being denied legal aid most often do so on the basis of fresh argument or new information that is brought before the Court.

As 2000 came to an end 64 of the 109 cases on the current criminal case load had a fixture date. Of those without a date, all but one had been filed at the end of November. Four civil cases whose applications for fixture came in before 1 December were without fixtures. All were for various reasons not ready to proceed to a hearing.

Court office and accommodation

The Court office continued to function well. One officer left on parental leave late in the year and, as another officer plans to resign to further her academic career mid-way through 2001, a permanent replacement was recruited, starting in late November 2000. Casual staffers continue to support the sittings of the Criminal Appeal Division at the High Court in Auckland. Six Judge's Clerks had to be recruited as well; three to replace those whose contracts had expired and three to replace clerks whose personal circumstances meant an early resignation from their two-year contract.

With this full complement of staff under its roof, the Court continues to feel the effects of its extreme shortage of space. It continues to use a courtroom at the Wellington High Court for divisional court hearings when necessary and when it uses its own second courtroom for that purpose there is no space to accommodate the High Court Judges who serve the divisions. The newly appointed permanent Judge had to be accommodated in substandard conditions. Throughout 2000 the size and the state of the Court building were said to be under review although no material change in either occurred. The Court continues to struggle with inadequate space for its functions.

Practice Notes and procedural developments

No changes to the Practice Notes for either jurisdiction were made.

During the year litigation was commenced challenging certain aspects of the way the Court has dealt with criminal appeals for which no grant of legal aid has been made and the appellants were unrepresented. The matter is currently before the Privy Council. As noted earlier, legislation designed to clarify the Court's powers when dealing with criminal appeals was brought into the House in November. In addition legislation was enacted during the year removing from the Court any involvement in the procedure by which applications for legal aid are determined. This new measure comes into effect on 1 February 2001.

Programme for Court sittings

Once again the Court sat in benches of three and five Judges (and once with seven) and continued to benefit from the contribution of some 100 High Court Judge weeks to assist the divisional Courts.

The Court maintained its 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 either Wellington or Auckland. A very successful divisional week was held in Christchurch in 2000, hearing a mixture of civil and criminal cases. Comments from the local profession attested to the usefulness of taking the Court south, and provided there are sufficient "anchor" cases from both jurisdictions established early enough in the fixtures schedule, it is quite possible that this approach will be followed in 2001.

Caseload was divided between the Permanent Court and the Divisions in the following way:

	2000	1999
Permanent Court - five Judges	50 (25 civil and 25 criminal)	44 (39 civil and 5 criminal)
Permanent Court - three Judges	104 (79 civil and 25 criminal)	153 (97 civil and 56 criminal)
Civil Appeal Division	58 cases	51 cases
Criminal Appeal Division	263 cases	260 cases

Year-end workflow statistics are as follows:

	2000	1999	1998	1997
Criminal appeals awaiting hearing as at 31 December	109	143	115	125
Civil appeals set down for hearing as at 31 December	47	54	55	35

Members of the Court

Justice Henry retired from the Court in July after sixteen years as a Judge. In August, Justice McGrath, the former Solicitor-General, was appointed to the Court.

Justice Blanchard sat in the Privy Council in May and the President in October.

Members of the Court delivered papers and public lectures both nationally and internationally to legal, university and other audiences, including the Institute of Chartered Accountants 2000 Tax Conference; the Royal Australasian College of Dental Surgeons Convention, Auckland; the Continuing Legal Education Committee's Criminal Law Symposium, Wellington; the Australasian Banking Law Conference, Queensland; the Just Peace Conference, Auckland; the Judicial Conference, Calgary; the New Zealand Institute of International Affairs; the Maritime Law Association of Australia and New Zealand, Queenstown; a conference in honour of Sir David Williams, Cambridge; and the Refugee Judges Conference, Bern. One member delivered the Harkness Henry Lecture in Hamilton. Papers were published in law reviews and other publications.

A member of the Court chaired the organising committee for the Judicial Standards Interbench Seminar and also chaired much of the seminar itself.

* * * *

2. Statistics

Criminal appeals

	Hearings	Allowed	Dismissed	Dismissed on the papers
Conviction and Sentence	76	*37	34	24
Conviction	77	18	54	34
Sentence	102	50	47	54
S-G Appeals	16	10	3	-
Pre Trial	48	8	46	10
Other	11	3	6	1
Sub total	**330**			
Abandonments/No Jurisdiction	73	-	-	-
TOTAL	**403**	**126**	**190**	**123**

* Includes 19 cases where the appeal against sentence was allowed or was reduced.

NOTE: The number of cases heard does not equal the number allowed and dismissed : three cases involved two decisions, 17 additional hearings were held. One 1999 case was decided this year, one 2000 judgment was reserved.

Criminal caseload

	Permanent Court	CAD	On the papers	Abandonments/No Jurisdiction	Total
Total	50	263	123	73	509

Civil appeals

	2000	1999	1998
Motions filed	301	308	318
Appeals set down	149	185	179
Appeals heard	160	193	164
Appeals allowed	64	58	62
Appeals dismissed	*94	*130	99

* plus one adjourned sine die

NOTE: The number of cases heard does not equal the number allowed and dismissed as six judgments were reserved; two were decided on the papers and three were judgments for cases heard in 1999.

The figures exclude two costs decisions and 18 cross appeals, five of which were allowed or partially allowed and thirteen dismissed. One case remitted to the High Court and 11 decisions concerned procedural or interlocutory matters not dealt with as miscellaneous motions.

Civil caseload

	PERMANENT COURT	CID	DISCONTINUED	ABANDONMENTS	TOTAL
Total	104	58	62	42	266

Privy Council appeals

DATE P.C. JUDGMENT	PARTIES	RESULT	WHETHER NZ JUDGE SAT
23 March	Gilrose Finance Ltd v Ellis Gould	Dismissed	No
13 April	Phipps v Royal Australasian College of Surgeons	Dismissed	No
12 June	CIR v New Zealand Forest Research Institute Ltd	Allowed	Yes
14 June	Auckland Gas Co Ltd v CIR	Dismissed	Yes
29 June	Fifield v W & R Jack Ltd	Dismissed	Yes
15 November	Pauline Janice Harrison and Angela Janice Harrison v Attorney-General	(Petition) Dismissed	
20 November	Far Eastern Shipping Company Public Ltd v Scales Trading Ltd and Geo H Scales Ltd	Allowed	No
	Total Heard	7	
	Total Dismissed	5	
	Total Allowed	2	
	Appeals from Courts of more than three Judges	1	(1 Dismissed)
	Appeals from Courts of three Judges	6	(2 Allowed 4 Dismissed)

* * * *

3. Major Cases

The summaries in this chapter and the appendices are just that – summaries. It is the judgments that are authoritative.

Defamation – qualified privilege and political discussion

Lange v Atkinson [2000] 3 NZLR 385 was a rehearing of an appeal by Mr Lange, the plaintiff in a libel action against the refusal by Elias J from a judgment of Elias J ([1997] 2 NZLR 22) to strike out the respondents' defence of qualified privilege ([1997] 2 NZLR 22). That refusal had been upheld by the Court of Appeal ([1998] 3 NZLR 424) but the Privy Council set this decision aside and remitted the appeal to this Court for decision in light of the House of Lords decision given on the same day by the same Law Lords in *Reynolds v Times Newspapers Ltd* [1999] 3 WLR 1010 ([2000] 1 NZLR 257). In the second *Lange* case a Court of five upheld the earlier judgment that the defence of qualified privilege not be struck out and dismissed the appeal.

The Court held that the defence of qualified privilege could be available in respect of a statement published generally and in respect of the actions and qualities of those currently or formerly in Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affected their capacity to meet their public responsibilities. What matters bore on that capacity, which included both personal ability and willingness, would depend on a consideration of what was properly a matter of public, rather than private, concern. The width of the identified public concern justified the extent of the publication while a statement involving such qualifying subject matter will ordinarily be made on an occasion of privilege, there may be times when a communication within the subject matter will not be made on such an occasion because in the particular circumstances there was no shared interest between the maker and the recipients. A gratuitous slur upon a politician in a publication concerned with a quite different topic could not sensibly be regarded as having been made on an occasion of privilege. It was accepted that this requirement for the occasion to qualify might lead to difficulties at the margins, but the Court considered that there was in reality likely to be comparatively little uncertainty in the area.

The Court was not persuaded by the approach taken in *Reynolds* that matters such as the steps taken verify the information, the seeking of comment from the person defamed, and the status or source of the information, should fall within the ambit of the enquiry into whether the occasion is privileged. This was seen as altering the structure of the law of qualified privilege in a way that added to the uncertainty and chilling effect almost inevitably present. For the reasons expressed in its earlier judgment, the Court reiterated that it was not necessary to import a specific requirement of reasonableness.

The Court stated that it was able to take a more expansive approach to defining an occasion of privilege to the extent that it had the ability in s19 of the Defamation Act 1992 to take a correspondingly more expansive approach to what constitutes misuse of an occasion. The idea of taking improper advantage was to be appropriately applied to those who are reckless and thereby do not exhibit the necessary responsibility when purporting to act under the cloak of qualified privilege.

In responding to issues identified by the Privy Council, the Court saw the significant differences between the constitutional and political context in New Zealand and the United Kingdom, reflecting societal differences, as supporting a different approach in this country. The position of the press in the two countries was also seen as significantly distinct. Finally the Court noted that this was an area of law in which Parliament had essentially left it to the courts to develop the governing principles and apply them to the evolving political, social and economic conditions. The Court thus adhered to its earlier conclusions.

Censorship, sexual orientation and the right to freedom of expression

In *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570, a Court of five examined the Films, Videos and Publications Classification Act 1993. The appeal was on a question of law from a High Court decision upholding a decision of the Film and Literature Board of Review classifying two anti-homosexual videos as "objectionable" under s3 of the Act ((1997) 4 HRNZ 422). The Board concluded that the videos tended to represent that a class of persons were inherently inferior by reason of a ground which was a prohibited ground of discrimination under s21(1) of the Human Rights Act 1993. One of those grounds was sexual orientation. The High Court endorsed that approach. It also supported the preference given by the Board to the anti discrimination provision of s19 of the New Zealand Bill of Rights Act 1990 (which referred to s21(1) of the Human Rights Act) over s14 of the Bill of Rights, protecting freedom of expression. The Court, holding that the High Court had erred in law, allowed the appeal and quashed the Board's and Court's decision and remitted the matter back to the Board.

Richardson P, Gault, Keith and Tipping JJ held that a publication could not be objectionable unless it dealt with one of the matters set out in s3(1) – sex, horror, crime, cruelty or violence – in such a manner as was likely to be injurious to the public interest or to "matters such as" those listed. While the words "matters such as" were both expanding and limiting they could not extend to all matters. "Such as" was a deliberate departure from "includes" used in the earlier legislation. The qualifying publication must fairly be described as dealing with matters of the kinds listed. The collocation of words "sex, horror …" also tended to point to activity rather than to the expression of opinion or attitude. Accordingly, the Judges concluded that the High Court had erred in determining that the reference in s3(3) of the Act (which set out matters which the Board was to give particular weight "in

determining whether for the purposes of this Act, whether or not any publication … is objectionable …") justified including sexual orientation, race and gender within the s3(1) net.

The four Judges held that no clash arose between ss14 and 19 of the Bill of Rights since that Act is concerned with governmental, and not private, conduct. The ultimate inquiry involves balancing the rights of a speaker and of members of the public to receive information under s14, as against the state interest under the 1993 Act in protecting individuals from harm caused by the speech.

Thomas J, would have gone further. In his view the Board lacked jurisdiction to classify the publication under s3 and accordingly there was no reason to remit the decision to the Board. The Board had failed to link the subject mater of the videos to the statutory "gate way", that is sex or a matter akin to sex in s3(1).

Name suppression

In *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 a Court of five upheld a High Court order made on an application for judicial review, quashing a District Court order prohibiting publication of the appellant's identity when he appeared on, pleaded guilty to, and was discharged without conviction on drug importation charges. The suppression order had been made under s140 of the Criminal Justice Act 1985.

No grounds were available to the Judge which could justify departing from the important principle of open justice and the freedom to receive and impart information protected by s14 of the New Zealand Bill of Rights Act 1990. The order was accordingly made in error of law. In addition, the conduct of the proceedings in the District Court was marked by procedural irregularity in breach of the principle of open justice and a failure by the Judge to give reasons for his decision. In the circumstances that failure was also an error of law.

Televising of exhibit

In *Television New Zealand Ltd v Mahanga* CA213/00, 28 November 2000, the Court dismissed an appeal against a High Court ruling refusing permission to TVNZ to copy or broadcast a police suspect video interview. The appellant had been convicted of murder. During the trial the Crown played a videotape of an interview with the appellant by the police in the course of their inquiries. TVNZ had been given permission by the trial Judge to televise the trial and, in the course of this filmed the television monitor as it played the interview. The permission did not extend to copying the video tape which was an exhibit. In addition to its television coverage, TVNZ produced a documentary on child abuse and wanted to use

excerpts from the interview in the programme. Although it had filmed the Court monitor playing the interview, it had no audio link up and consequently the sound and recording were distorted. TVNZ therefore sought access to the Court's copy to dub the sound or copy the tape. The trial Judge refused permission and forbade TVNZ broadcasting any part of the interview. A further application was made to the Court after the trial but was refused. TVNZ appealed from that decision to this Court.

The issue for determination on appeal was whether there had been a proper exercise by the Judge of his discretion under R2(5) Criminal Proceedings (Search of Records) Rules 1974. TVNZ argued that the starting point in the exercise of the discretion should be the rights to freedom of speech and open justice, as affirmed by the New Zealand Bill of Rights Act 1990. The Court concluded that the principles of open justice and freedom of expression do not directly govern the exercise by Judges of their power to regulate the proceedings of their courts in circumstances such as those presented. The principles were essentially fulfilled by the Court being open to the public and the media being able to report the proceedings. The Court held that the right to freedom of information related to the imparting and receiving but not the acquiring of information. The Court went on to say that R2(5) did not require a restrictive approach to be taken to the exercise of the discretion and there was no presumption in favour of protecting privacy rights. The Rule required a balancing of the competing interests, legitimate privacy concerns, open justice, the purpose for which disclosure is sought and any risk to the administration of justice. The Court also held that the existence of the discretion excludes arguments based on the existence of a common law right to access judicial records. In this instance the Court ruled that the trial Judge had appropriately weighed the competing interests and properly exercised his discretion.

Asylum seekers and temporary immigration permits

Attorney-General v E [2000] 3 NZLR 257 concerned thirteen asylum seekers (the respondents). On their arrival in New Zealand, in addition to applying for refugee status, they had also unsuccessfully sought temporary immigration permits. The legal issues were whether the respondents should have been issued temporary permits and whether the immigration officials' decisions to refuse the permits could be set aside on an application for judicial review. Under s128 of the Immigration Act 1987, the refusal of a permit rendered the respondents' immigration status unlawful and triggered their detention. They were released from prison by a District Court Judge two days after the High Court judgment.

The High Court set aside the decisions to refuse temporary permits and directed the Immigration Service to reconsider the applications "on the basis that refugee claimants are to be granted temporary permits in the absence of special factors making detention necessary" ([2000] NZAR 354). The Crown's appeal was allowed and the application for judicial review dismissed.

Richardson P, Gault, Henry and Keith JJ held that there was nothing in the Act, the Immigration Services Manual and practice, the 1951 Convention relating to the Status of Refugees (given effect by the Act) and various decisions and documents relating to the Convention which required a presumptive approach to applications for temporary permits made by applicants for refugee status. They noted that the broad powers under the Immigration Act to allow or refuse entry to non citizens were constrained by the 1999 amendments to the Act, enacted to ensure that New Zealand met its obligations under the Convention. In particular refugee claimants were not to be removed from New Zealand except in the narrowly defined circumstances allowed by the Convention. Those Convention provisions were also relevant to the powers to grant temporary permits and the closely related power of detention. The 1999 statutory amendments provided significant safeguards against undue or unjustified continued detention by expressly bringing consideration of that matter under the auspices of the District Court. The respondents had in fact been released in exercise of those powers and the matter of their detention was not before the Court.

Thomas J dissented. He would have dismissed the appeal except in respect of two of the respondents who arrived in New Zealand during the Asia Pacific Economic Cooperation Conference. The immigration officer had failed to act with fidelity to the governing statute. He purported to exercise an "extremely wide" discretion when his discretion was constrained by the part of the Act concerned with refugees, the Convention as explained by the UN High Commissioner for Refugees material, and government policy.

Appeal from arbitral award

Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd [2000] 3 NZLR 318 was the first opportunity for the Court to consider the provisions in the Arbitration Act 1996 relating to the grant of leave to appeal on questions of law to the High Court from the decision of an arbitral tribunal.

The appellant and the respondent were in dispute over payments relating to a mining agreement that both had been parties to. In accordance with the provisions of the agreement, they referred their dispute to a three-person panel of arbitrators, who ruled largely in favour of the respondent. The appellant unsuccessfully sought leave to appeal to the High Court under cl 5 of the Second Schedule to the Act, claiming that there were errors of law in the arbitrators' decision. Its further appeal failed.

The Court of five noted that while cl 5 required that the determination of the question of law concerned could substantially affect the rights of one or more parties, this was only a precondition to the granting of leave under the clause. There remained a discretion to be exercised by the High Court in determining whether, once this precondition was met, leave to appeal should then be granted. Parliament had chosen to favour finality, certainty and party autonomy. It intended to encourage arbitration as a dispute *resolution* mechanism. It has chosen to favour

finality of arbitral awards when the parties have chosen to submit their dispute to resolution in such manner. It plainly intended a strict limitation on the involvement of the Courts where this choice has been made.

The Court considered the following factors were to be considered in the exercise of the discretion whether to grant leave to appeal from an arbitral decision. Other than the first which was most important they were listed in no particular order. There may be other relevant considerations in particular circumstances. The factors are guidelines to, rather than governing, the exercise of the discretion:

- The strength of the challenge and the nature of the point of law. If the point is a one-off point, then unless there are very strong indications of error, leave should rarely be given. In other cases, a strongly arguable case would normally be required for leave to be granted.
- How the question arose before the arbitrators: whether it was the very point of the arbitration or whether it emerged as crucial only during the process.
- The legal or other qualifications of the arbitrators.
- The importance of the dispute to the parties.
- The amount of money involved.
- The amount of delay involved in going through the courts.
- Whether the contract provides for the arbitral award to be final and binding.
- Whether the dispute before the arbitrators is international or domestic (in international arbitrations, the parties can expressly choose to opt into cl 5, thereby displaying an intention that the courts be involved).

The Court also gave guidance on the procedure to be followed on the hearing of applications for leave to appeal under cl 5. The application should state the alleged error of law and concisely give reasons why the tribunal is said to be in error. It should indicate whether the error is said to be of general importance giving evidence where necessary. The hearing of the application should be kept brief. If the Judge decides to grant leave to appeal, reasons should ordinarily not be given (in order to avoid influencing the Judge who is to hear the substantive argument). But if leave is not granted, the Judge should deliver a short judgment for the parties' benefit. A detailed analysis of the alleged error of law is not required.

Applying these criteria to the present case, the Court declined leave to appeal.

Test to be applied to family protection claims

In *Williams v Aucutt* [2000] 2 NZLR 479 the respondent succeeded in the High Court in a claim under s4 of the Family Protection Act 1955 for further provision out of the estate of her mother. The primary beneficiary under the will was the respondent's sister, the appellant. No suggestion was made by the respondent that she was in need or might be in need of maintenance. Her case was that she deserved greater provision than was made in the will in recognition of the fact that she belonged to the family and of the contribution she made to her mother's life. The value of the mother's estate was around $920,000. The respondent received various items worth $50,000 in total (five percent of the estate), and the appellant received almost all of the rest. The assets owned by the respondent and her husband were worth close to $1m, while the appellant's net worth was $78,000. In her will the deceased expressly stated that she had made greater provision for the appellant than for the respondent because the financial position of the former was much worse than the latter's who was well provided for and because her late husband's wish and intention was that the former's greater need be recognised. The Judge awarded the respondent 25 percent of the residue of the estate.

In allowing the appeal, Richardson P, Gault, Keith and Tipping JJ, reviewed the history of s4 in the courts from its original enactment in 1900. They also noted the proposals of law reform bodies and relevant research material. The test applicable under s4 was whether adequate provision has been made for the proper maintenance and support of the claimant. "Support" is an additional and wider term than "maintenance". Moral and ethical considerations are to be taken into account in determining the scope of the duty, as is the need for recognition of belonging to the family. The test is not limited to consideration of the claimant's financial circumstances. What amounts to proper maintenance and support in individual cases is ultimately a matter of judgment, but where there is no economic need s4 may be satisfied by a moderate legacy. However, provision so small as to leave a justifiable sense of exclusion might not amount to proper support for a family member.

The Judges noted that the testator had taken considerable care in determining how her estate should be distributed upon her death and that she had not failed to recognise the respondent's contribution to her life. However, they concluded that the testator was probably unaware of the full value of her estate, and, in particular, that she did not appreciate the full value of her shareholdings. This led the Court to order that the respondent receive $50,000 in addition to her entitlements under her mother's will.

Blanchard J, concurring, noted the Law Commission and other criticisms of the expansive approach to the power conferred by s4 which has recently been taken by the High Court. While distancing himself from some aspects of the Commission's findings, he recognised the force of some of its criticisms. He distinguished between claims for proper maintenance, based on a claimant's economic position, and claims for proper support based on recognition of a claimant's family membership and contribution to the testator's life. He stated that it should not be assumed that merely because a claimant, no matter what his or her personal substance, has been a dutiful child it will necessarily be appropriate to order further provision merely because the

claimant has not received a large share of an estate. In some cases a mere acknowledgement of the relationship may suffice to satisfy s4. In others the competing claims on the testator of a surviving spouse or less fortunately placed siblings may negate any moral duty towards a wealthy claimant. He stressed that the courts' power does not extend to re-writing a will because of a perception that it is unfair.

Issues of bias

Riverside Casino Ltd v Moxon CA113/00, 19 December 2000, was an appeal against a High Court order to set aside interim and final decisions of the Casino Control Authority granting to Riverside Casino a casino premises licence. That order rested on the determination that one member of the Authority was disqualified for bias. This Court allowed the appeal and set aside the High Court order.

The Court of five confirmed the test for apparent bias to be that set out in the speech of Lord Goff in the House of Lords in *R v Gough* [1993] AC 646, 670. The court, having ascertained the relevant circumstances, should ask itself whether having regard to these circumstances there was a real danger of bias on the part of the relevant member of the tribunal in the sense that he might unfairly regard (or have unfairly regarded), with favour or disfavour, the case of a party to the issue under consideration by the tribunal. The test requires a real danger, in the sense of a real possibility of bias. Where the possibility of bias can actually be excluded appearances will be irrelevant. However, where actual bias cannot be excluded, the danger or possibility of bias can still be held to rise from appearances. The Court recalled the need to distinguish between error and bias.

From the Court's review of the transcript of the public sittings of the Authority, it did not find any consistent pattern of intervention pointing to a closed mind (the alleged bias). That impression should not however be substituted for that of the Judge unless he proceeded on some wrong basis. The Court thought he had for three reasons. He had imparted to the member predisposition when there was every reason for him, given the course of the proceedings, to have formed preliminary views. Secondly, he had wrongly attributed to the member a failure to focus on the possibility of refusing a licence. And third, the Judge was persuaded to condense isolated comments spread over ten weeks and motivated by context into a picture of a persistent and coherent pattern of intervention. The expression of views in the course of a hearing should not, the Court said, be confused with bias, and allegations of bias do not open the way for some wider review of the merits of the decision. Finding that there was insufficient evidence of a closed mind the Court allowed the appeal and quashed the order of the High Court.

Man O'War Station Ltd v Auckland City Council CA245/98, 27 November 2000, concerned an application for the setting aside or recall of a Court of Appeal judgment on the basis of apparent bias due to a Judge's undisclosed acquaintance with a witness.

The Court applied the law as to apparent bias as set out by Lord Goff in *R v Gough* [1993] AC 646, 670 and adopted by the Court in *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142. Accordingly, the Court asked itself whether, having regard to all the circumstances, there was a real danger of bias on the part of the relevant Judge, in the sense that he might unfairly have regarded the appellant's case with disfavour. Drawing guidance from *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 1 All ER 65, the Court noted that it could, as it did in this case, receive a written statement from a Judge against whom an allegation of apparent bias is made. The decision of the Constitutional Court of South Africa in *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 was also cited.

Apparent bias was not established. The direct relationship between the Judge and the witness could not seriously be advanced as so close as to raise any issue of apparent bias. While the Judge and the witness were acquainted, there was no close personal friendship between them and they had not been in contact during the past eight years. This, even when added to the fact that the Judge had acted for a company associated with the witness, could not lead to the inference that the Judge could not perform his judicial functions impartially. To take any other view in the New Zealand context where senior legal practitioners must inevitably come into contact with a considerable proportion of professional practitioners in other fields was unreal.

Retrospective application of home invasion sentencing provisions

In *R v Poumako* [2000] 2 NZLR 695 a Court of five and *R v Pora* CA225/00, 20 December 2000, a Court of seven considered the effect of amendments made in July 1999 to the Criminal Justice Act 1985 and also to the Crimes Act 1961. The amendments increased sentences for crimes involving home invasion and in particular provided for a mandatory minimum non parole term of 13 years for those convicted of murder involving home invasion. That increase from the general minimum of ten years provided in s80 of the Criminal Justice Act (first enacted in 1993) was accompanied by a provision about its temporal application:

> Section 80 … (as amended by this section) applies in respect of the making of any order under that section on or after the date of commencement of this section, even if the offence concerned was committed before that date. (Criminal Justice Amendment Act (No. 2) 1999 s2(4)).

That final phrase directly contradicts the principle against the retrospective increase of criminal penalties, a principle long established in the law and recently restated in s4(1) of the 1985 Act, s25(g) of the New Zealand Bill of Rights Act 1990, and article 15(1) of the International Covenant on Civil and Political Rights 1966. The Crown accepted that the power to impose a minimum non parole term fell within the principle.

The judgments written in the two cases identify four possible periods of application of the amended legislation relating to non parole terms:

(1) it has no retrospective effect at all (with s4(1) of the 1985 Act and the other provisions prevailing over s2(4) of the 1999 Amendment);

(2) so far as murder involving home invasion is concerned, it applies retrospectively from 15 July 1999 (the date the amendments to s80 of the Criminal Justice Act came into force) only until 2 July 1999 (when the concept of "home invasion" first entered the statute book with the amendments to the Crimes Act);

(3) it applies from 1 September 1993 (when the power to fix minimum non parole terms was first introduced by the enactment of the present s80 of the Criminal Justice Act);

(4) it applies without limit of time.

Pora was convicted of a murder committed in 1992 (after a successful appeal and a retrial) and sentenced to life imprisonment with a minimum non parole of 13 years, the sentencing judge considering that the provision applied even before 1993. The Court of seven were unanimous that his appeal was to be allowed : at the least the minimum non parole period did not extend without limit of time. That is, the fourth position was rejected. Three of the Court (Elias CJ, Thomas and Tipping JJ) concluded that the provision had no retrospective effect at all, adopting the first position. Three others (Gault, Keith and McGrath JJ) rejected that position and adopted the third (while noting that in the circumstances they need not consider the second). Richardson P agreed with the reasons given by the latter three Judges for holding that the legislation did not apply to offences committed before 1 September 1993 but expressed no view on the first position.

Poumako's appeal was heard earlier than Pora's. He had pleaded guilty after the legislative amendments were made to a murder involving home invasion committed in November 1997. A minimum non parole term of 13 years was imposed, the sentencing Judge considering that he was bound to impose it. This Court concluded that even if the Judge were dealing with the matter under the old law as a matter of discretion, the 13 year period would have been fully justified. "This was a violent, brutal and totally unprovoked murder of an innocent woman in her own home." The appeal therefore had to be dismissed. Three of the Judges (Richardson P, Gault and Keith JJ) indicated support for the second position – with the consequence that the amended power did not apply to the murder. Although they tentatively favoured that position they were conscious of the strength of the reasoning rejecting that position, set out in Henry J's judgment, and of the fact that that position only ameliorated the problem of retrospectivity and would not fully address the continuing inconsistency with fundamental rights. Legislative attention was needed. Thomas J also rejected the second position and would have made a formal declaration that s2(4) of the 1999 amendment was inconsistent with s25(g) of the Bill of Rights and New Zealand's commitment to article 15(1) of the International Covenant.

Guidelines for aggravated robbery sentencing

In *R v Mako* [2000] 2 NZLR 170 the Solicitor-General sought leave to appeal against the sentence of five and a half years imprisonment imposed on the respondent for an aggravated robbery. The Court of five took the opportunity to provide guidelines for sentencing in aggravated robbery situations, reviewing the position set out in *R v Moananui* [1983] NZLR 537.

The *Moananui* categories, as they had been used in practice, had tended to place the focus more on the applicable type of target premises at the expense of an assessment of the true culpability of the offender. In referring to types of premises the Court was providing a broad indication of the danger likely to be caused and the particular value of the target. But it could never have been intended to replace the proper assessment in each particular case of the significance of those factors. To the extent that it had done so the guidelines had been unsatisfactory. A different approach should be adopted.

The range of conduct that can constitute aggravated robbery is very wide. In addition to the essential elements of the offence in each case there will be features, themselves widely variable, that will contribute to or detract from the seriousness of the conduct and criminality involved. It is the particular consideration of these variable features which requires assessment. Once the seriousness of the particular combination of features is assessed and a starting point reached, aggravating and mitigating features of the offender's personal circumstances will have to be assessed.

The Court then considered different combinations of the features of offending. Relevant features include:

(a) the degree of planning and preparation;

(b) the number of participants and their deployment;

(c) disguises;

(d) the number and types of weapons and how they are brandished, and whether any firearms are unloaded;

(e) the target premises or persons, relevant to the potential gain, and the number of members of the public who are affected; the home invasion legislation is to be considered where relevant;

(f) the vulnerability of the victims;

(g) the need for deterrence of certain types of activity in view of their frequency or prevalence in a particular area;

(h) the use of violence;

(i) the presence of threats and intimidation;

(j) the property stolen and the extent of any recovery;

(k) associated offending such as vehicle conversion, detention or abduction of victims and hostage-taking;

(l) the impact on victims;

(m) evidence of there being gang activity; and

(n) multiple offending.

The Court then considered different combinations of the features of offending. For instance, the robbery of commercial premises where members of the public can be expected to be present, targeting substantial sums in tills or in a safe by a group, with a lethal weapon, disguises and other indications of preparation, should attract a starting point of six or more years. The presenting of a firearm to the police at the end of a dangerous car chase would require a starting point of at least nine years.

Near the other end of the spectrum street robbery for small amounts without actual violence would attract between 18 months and three years as a starting point; more if there was actual violence. Cases where imposition of suspended sentences for aggravated robbery is appropriate will be rare: a sentence of two years or less is available only if the elements which convert a robbery into an aggravated robbery are present to a small degree or the offender's participation in the crime and its planning (if any) was very much in a secondary role.

The respondent's sentence was considered under the old guidelines in order to avoid the appearance of unfairness and retrospective application of the new guidelines. It was increased to seven years imprisonment.

* * * *

4. Criminal Issues

Particulars of charges – time frames

In *R v Harris* CA15, 16, 19, 120, 121 and 122/00, 1 August 2000, three appellants appealed against their convictions on various charges, including cultivation of cannabis and money laundering. Numerous grounds of appeal were advanced. Various appeals were successful.

Between 1987 and 1993 Mr and Mrs Harris cultivated cannabis on a large commercial scale. During the period their son had lived with them from time to time. He lived and worked elsewhere for the balance of the period. The Crown's suspicion of the son's involvement in the offending was on the basis of a large quantity of cannabis found in his possession in May 1998.

The Court held the son's presence at times and his family relationship was not enough to link him to his parents' offending without further evidence. Unlike his parents the son was not an owner of the property. The Court found that there was no sufficient nexus with the appellant's prior offending, to inject the missing element. The appeal against his conviction was allowed.

The Court also set aside Mrs Harris' conviction for money laundering. The relevant part of s257A Crimes Act 1961 provides "everyone is liable to imprisonment for a term not exceeding seven years who, in respect of any property that is the proceeds of a serious offence, engages in a money laundering transaction." The conduct alleged as laundering was the same conduct constituting the "serious offence" and relied on as "the proceeds of [a] serious offence". The Court held that for s257A to be infringed the laundering must follow a discrete antecedent "serious offence". As that did not occur Mrs Harris' conviction on the money laundering charge was set aside.

Late introduction of part charges

In *R v Anania* CA 93/00, 7 December 2000, the late introduction of an issue about part charges and the possible use of s339 Crimes Act 1961 was sufficient for the Court to be compelled to order a retrial. The appellant was found "guilty – as to part" by the jury of theft by misappropriating proceeds under s224 of the Crimes Act.

The Court accepted that the case had been presented and defended on the basis that it was about the entire sum stated being critical. The issue of conviction on the basis of part misappropriation was not clearly apparent until the Crown's closing address. The Court held that an allegation cannot be altered without warning in this way and still have a process which is permeated with the essential integrity which is required in every criminal case. The Court considered that the issue was not adequately or

intelligibly set before the jury. The conviction was accordingly set aside and the matter remitted to the District Court.

Elements of offence not met by summary of facts

The appeal against conviction in *R v C* CA75/00, 5 December 2000, was on the basis that the summary of facts provided did not disclose burglary, the offence of which the appellant was convicted following a guilty plea. The summary of facts stated that he broke into and entered a vacant dwellinghouse. He carried with him certain pictures and items of women's clothing. In one case he also cut a picture of an 11 year old girl out of a family photograph found in the residence. These items were arranged in proximity to a chair or settee and a mirror was placed to face them. All items were left as is when he departed. The essential elements of burglary are breaking, entering and an intent to commit a crime. The last element of the offence was not satisfied by the summary of facts as the appellant's plan was merely to cross dress and masturbate. The Court rejected attempts by the Crown to create a post hoc justification in support of the scenario which was not in contention or contemplation in the District Court. The fact that *C* had pleaded guilty to the charges was also not determinative in this case.

The plea was vacated, the convictions set aside and the matter returned to the District Court.

Right to counsel at trial and sentencing

In *R v Page* CA4/00, 6 June 2000, the claimed breaches of fair process in the appellant's trial included : non-compliance with s10 of the Criminal Justice Act 1985 (legal representation at sentencing); the process by which an amicus was appointed on behalf of the appellant and related denial of the appellant's rights to cross-examine the complainant; and the failure to advise the appellant, as an unrepresented defendant, of his rights under ss364 and 365 of the Crimes Act 1961. Because there had been no miscarriage of justice the Court declined to quash the conviction. On sentencing, however, it did make an order by way of declaration that there had been a breach of s10(1) of the Criminal Justice Act; because of the release date, the appeal against sentence was not pursued.

The appellant had been convicted of indecent assault. The central issue at trial was identity. The appellant conducted the trial on his own behalf, but independent counsel as amicus curiae was appointed to cross-examine the complainant on his behalf.

The Court considered that s24(f) of the New Zealand Bill of Rights Act 1990, dealing with the right of persons charged to receive legal assistance without cost if the interests of justice so require, had been met as the appellant had been offered legal aid

and counsel but had refused. However, the Court concluded that s10 of the Criminal Justice Act had not been complied with. Section 10 provides that a full-time custodial sentence must not be imposed without the opportunity for legal representation. The Court commented that it is essential that trial Judges ensure compliance with s10 wherever an accused is unrepresented at trial and that a record of such compliance be kept.

The Court also considered that there had been a deficiency of process in that the appellant was not given the opportunity to cross-examine the complainant himself and was not given any election in respect of the appointment of the amicus. The Court stated that in such circumstances, the Court should endeavour to ensure due process is followed and hear from the accused and the Crown on the course the accused wishes to follow. In this case the Court, considered that these deficiencies did not give rise to a miscarriage of justice.

Duty of trial counsel to consult with client

R v Kerr CA504/99, 11 April 2000, concerned an appeal against conviction for wounding with intent to injure. The appeal was based on counsel's failure to consult with the client at trial. The appellant was convicted by a jury on one count of wounding with intent to injure. During its retirement the jury asked: "Can we find him guilty on a lesser charge of assault?" Counsel for the appellant, Crown counsel and the Judge agreed that the lesser charge of assault would not be open to the jury. The Judge informed the jury of this, and the guilty verdict was returned almost immediately afterwards.

The appellant's trial counsel admitted that he did not consult with the appellant or seek his instructions before agreeing to this course of action. He said the appellant sought his advice as to the implications of the suggested alternate charge, and that he gave it. The Court held that this was more than a mere mistake in tactics, and might have had a significant prejudicial effect on the outcome of the appellant's trial. In those circumstances, the appellant's conviction was unsafe, and a retrial was ordered.

Putting the defence case to prosecution witnesses in cross-examination

In *R v Dunasemante* CA150/00, 23 November 2000, the Court allowed an appeal against conviction and ordered a retrial on the basis that the accused's trial counsel had omitted to cross-examine the complainant on crucial matters. The accused's defence at his trial on a charge of sexual violation by rape was that the complainant had consented to the sexual intercourse, and indeed had engaged in foreplay in the accused's car before climbing up to the bank where the intercourse had taken place. This version of events was not put to the complainant by the accused's counsel during cross-examination. Nor had counsel exploited inconsistencies between the

complainant's initial statement to the police and her evidence at trial. The Court held that the accused's credit was seriously undermined by counsel's failure to put the accused's version of events to the complainant. When one added to this the failure to exploit inconsistencies in the complainant's evidence, the Court was left with real concerns about the fairness of the trial.

Cross-examination of hostile witnesses

In *R v O* CA9/00, 11 July 2000, convictions for aggravated robbery and receiving were appealed on the basis that the Crown should not have called one of the witnesses, as it knew he was not going to give evidence to his brief, the Judge should not have declared him hostile and the Crown's cross-examination of him was inappropriate. The appeal was successful and a new trial ordered.

The Court held that the Crown should not call any witness if that witness is known to be intractably hostile or likely to give false evidence. Special caution should always be exercised in deciding whether to call an accomplice or co-offender (the situation in the present case). If such a witness is known to be unlikely to give evidence favourable to the Crown case, the witness should not be called. Furthermore, the Court considered that it would ordinarily be unwise to call an accomplice or co-offender unless the Crown is confident that the witness will give favourable evidence.

In this case the witness in question was not known to the Crown to be intractably hostile. The witness' stance was equivocal and thus it could not be said that there was such a likelihood of him lying in the witness box that he should not have been called at all. However the Court considered that on balance the witness should have been seen as unlikely to give evidence favourable to the Crown. The Court did note that had this point stood alone it was doubtful that it would have constituted a sufficient ground to allow the appeal.

With regard to the Judge's ruling declaring the witness hostile the Court noted that the decision to see counsel in chambers was irregular. It was said that the jury should have been asked to retire and the Judge should have heard counsel's submissions in Court in the presence of the accused. The Court discussed the differences between hostile witnesses and simply unfavourable ones. It was held that while the inconsistency of the witness's evidence with their earlier evidence might give credence to the view that the witness was in fact hostile, it could hardly be determined solely on that basis. A record should have been kept of the ruling and of the Judge's reasons. In the absence of reasons for the ruling the Court did not finally determine whether the Judge's discretion was wrongly exercised but noted that the absence of written reasons was apt to leave a ruling unnecessarily vulnerable to challenge.

Next the Court considered the ambit of the cross-examination undertaken by Crown counsel after the hostility ruling. The Court noted that while it is sometimes assumed that a declaration of hostility entitles a party to cross-examine generally, it in fact gives no such right. The cross-examination must proceed in accordance with s10 of

the Evidence Act 1908. The first purpose is to allow the party calling the witness to demonstrate by reference to their earlier inconsistent statement that their present testimony is not to be believed. The second and usually subsidiary objective is to see if the witness will change course and adopt the truth of the earlier statement. The Court viewed this as very much a collateral consequence of the party being able to impeach the credit of the witness.

It was held that the cross-examination in the present case was clearly inappropriate. The witness should not have been taken through his previous statement in the detail in which he was. Many statements were put to the witness simply to ask him whether he had said what was recorded, there was no inquiry on a number of occasions as to whether the witness accepted the truth of the statements. This was viewed as constituting a miscarriage of justice.

Finally the Court held that the evidence of the other accomplice and a police officer as to the reasons why the pair had pleaded guilty should not have been led. The law is clear that such reasons do not provide evidence against a person on trial for the same crime. Thus the Court held that, in conjunction with the hostile witness aspect, there had been a miscarriage of justice.

Prosecution interview with complainant witness during evidence

In *R v Shepherd* [2001] 1 NZLR 161, the Court considered R8.05 of the Rules of Professional Conduct for Barristers and Solicitors, which provides that no practitioner engaged in a proceeding, civil or criminal, has the sole right to call or discuss the case with a witness. The Court held that while there had been a breach of the rule, this did not amount to miscarriage of justice and the appeal was dismissed.

The appellant was convicted on two counts of false accounting as an employee. The employer gave evidence at trial and the evening adjournment was taken before the cross-examination was completed. During the evening the employer sought out the prosecutor and spoke to her for an hour, expressing his concern at the cross-examination. At a meeting in Chambers, the prosecutor accepted she had been wrong to talk to the witness but stated that nothing untoward had passed between them. The Judge decided that a fair trial had not been prejudiced and refused the defence application for a discharge.

The Court stated that it is plain that the conduct of the prosecutor was in breach of the prohibition in R8.05 preventing a practitioner from speaking to the witness after commencement of cross-examination, except with the consent of the Judge and opposing counsel. The Court stated that the rule is designed to prevent the coaching or coaxing of a witness or the appearance of such. In this case, an hour long meeting gave ample opportunity for the prosecutor to direct, instruct or advise the witness. The highly irregular conduct of the prosecutor in this case gave rise to a suspicion that the interview involved some encouragement of the witness and an opportunity for him to discuss his re-examination. The onus was on the Crown to satisfy the Court

that no miscarriage of justice occurred. The Court read the evidence of the employer and could find no grounds for suspecting that the meeting between the prosecutor and the witness had any effect on his evidence thereafter, let alone one adverse to the defence. The Court concluded that there was no miscarriage of justice and dismissed the appeal.

Similar fact evidence in family sexual offending

In *R v W* CA226/00, 17 August 2000, the Solicitor-General applied for leave to appeal against an order declining to admit the evidence of two witnesses at the trial of the respondent on charges of indecent assault in relation to two complainants. The two witnesses and the two complainants were three stepdaughters and one daughter of the respondent. The issue concerned admissibility of similar fact evidence. This Court allowed the appeal and held that the similar fact evidence should be admitted.

The District Court Judge declined the application to admit the similar fact evidence as he considered that the support the evidence provided to the credibility of the complainants largely came from a consideration of propensity. The Court held that the evidence should be admitted. The Court recognised that the decision involved an exercise of discretion by the District Court Judge, but considered that the Crown had satisfied the burden on appeal of proving that the decision was clearly wrong. The Court accepted that there is a link between the evidence of the proposed witnesses and the complainants which is probative and admissible and outweighed the illegitimate prejudice.

The Court stated that there was here, if the evidence is accepted by the jury, evidence of members of the respondent's household complaining of similar repetitive touching by the person having paternal responsibility for them, at similar stages of their development and in similar circumstances. The nature of the alleged touching, in each case stopping short of penetration, is notable. Looked at in the round it is evidence of a pattern of parental conduct which meets the requirements for admissibility and that is not detracted from merely because there were some differences in the alleged conduct with the witnesses.

Questioning child complainant about previous sexual experience

In *R v Maddern* CA199/00, 11 September 2000 (reasons for judgment), the appellant was convicted of sexual violation and indecent assault of a child. Medical evidence showed that the child had been sexually molested. Counsel for the appellant wished to question the child complainant about whether she had been sexually molested by anyone other than the appellant, but was prevented from doing so by the trial Judge, who ruled any such evidence inadmissible under s23A Evidence Act 1908. On appeal the Court held that the trial Judge should have allowed the questioning. If the

defence is able to show a basis for the proposed questioning which is more than speculative, and that abuse by another person is relevant and accordingly "in issue in the proceeding", then the interests of justice may require that some questioning of the complainant be permitted. Counsel's inability to question the complainant on these matters prevented counsel from adequately advancing the defence.

The Court also held that, as there had been sustained and persistent questioning of the appellant about possible motives the child may have had in complaining, the trial Judge should also have given a strong direction to the jury that the appellant was not required to provide an explanation for the complaint. In addition, evidence of a second "recent complaint" should have been ruled inadmissible, as there was no good reason for admitting this evidence once consistency had been established by the first complaint.

The appeal was allowed and a new trial ordered.

Admissibility of reports prepared for Family Court proceedings

R v H [2000] 2 NZLR 257 concerned the admissibility in a criminal trial of evidence about reports prepared by a lawyer who was counsel for the child and by a psychologist, prepared under s29A of the Guardianship Act 1968, for earlier Family Court proceedings. The applicant was being tried for wilful neglect, assault and indecent assault of his daughter. None of the reports disclosed any complaints of physical abuse or ill treatment by the applicant of his children. After considering the role of counsel for the child and the role of a psychologist in the Family Court proceedings, the Court of five held that the appropriate test for considering the admissibility of such evidence was s35 of the Evidence Amendment Act (No 2) 1980. Assessing the likely significance of the evidence in this case to be slight, the Court held the balance required by s35 to be heavily in favour of maintaining confidentiality in both cases. The complainant could however be questioned about her failure to make any complaint to the psychologist or counsel for the child.

Exhibit withdrawn at trial – effect on jury

R v Moore CA159/00 and 160/00, 27 July 2000, was an appeal against convictions on the grounds that a miscarriage of justice had resulted from the effect on the jury of the withdrawal of an exhibit at trial. The issue at trial was the identity of two assailants. The complainant identified the defendants as the assailants. A crucial piece of evidence relied upon by the Crown when opening its case in linking the defendants to the scene could not be located. The evidence was subsequently ruled inadmissible. It was agreed between the Court and counsel that no reference would be made to that evidence. Shortly after the jury retired to consider their verdicts they nevertheless asked about the exhibit. The Judge indicated to the jury that there was no evidence

before them relating to this matter and they should put the matter out of their minds. Guilty verdicts were returned before the end of the day.

The Court considered that the question on appeal was whether when viewed objectively the trial process was fundamentally flawed. In this case the Court concluded it was. The crucial nature of the evidence meant that its importance and impact could not be minimised. The Court cited the comments of the trial Judge at sentencing in which he effectively said that the trial was unfair and should have been aborted. Comments by the trial Judge concerning the credibility of the complainant as a witness were also deemed inappropriate. In these circumstances the Court held that it was essential for the convictions to be vacated and a new trial directed.

Directions on recent complaint evidence

In *R v Kora* CA489/99, 11 May 2000, the Court provided further guidance on when it is appropriate to give a direction to the jury as to the use to which recent complaint evidence may be put. The appellant was convicted on two representative counts of sexual violation by unlawful sexual connection. The appellant appealed on two grounds.

The first was that the complainant gave hearsay evidence of a conversation between the appellant and her sister. The Court held this evidence was appropriately admitted as a statement against interest of the appellant. In this situation, the jury could consider that the question put to the appellant by the sister gave rise to the reasonable expectation of a response from the appellant if innocent, indicating either that he did not understand what the question was about or that nothing happened. The lack of response could constitute a partial admission against interest.

The second ground was that the complainant's mother gave recent complaint evidence without the Judge giving the appropriate warning to the jury about the use to which this evidence could be put. The Court held that a direction as to the use that recent complaint evidence may be put was appropriate in the circumstances of the case, but the lack of such direction did not give rise to a miscarriage of justice.

The Court held that the complainant's evidence of her complaint to the sister is not recent complaint evidence. It was only the evidence of the complainant's mother of what she was told by the complainant that was hearsay of a nature that called for consideration of the exception permitting evidence of recent complaint of sexual offending. It is only where evidence of complaint is given both by the complainant and the person to whom the complaint is made that there arises the need for the conventional warning to the jury. The need for the direction to the jury is to avoid use by the jury of the evidence of the person to whom the complaint is made as corroborative of the complainant's evidence (as reviewed in *R v T* [1998] 2 NZLR 257). What another witness says the complainant told him or her cannot be taken as independent verification that the offence occurred. It adds nothing probative to the complainant's account.

In the present case, the Judge omitted to direct the jury on the use to which the

mother's evidence of the daughter's complaint could be put. This left the possibility that what the mother said she was told was taken by the jury as evidence that what was said actually occurred. However, even if this happened, there would have been no addition to the evidence on the essential elements of the offences charged. The misuse of the evidence the jury direction is designed to prevent would not have been prejudicial to the appellant in the circumstances of the case. There was no miscarriage of justice and the convictions were upheld.

Directions on lies

In *R v Walker* CA106/00, 11 July 2000, the appellant successfully appealed against his conviction for sexual violation by rape on the basis that the trial Judge did not direct the jury on lies.

The complainant gave evidence that there had been consensual sexual activity between her and the appellant to the extent that they were naked and engaged in mutual oral sex. She said that the appellant wanted to have intercourse with her but that she told him several times that she would not have sex without a condom. It was her evidence that the appellant had intercourse with her notwithstanding. It was strongly put to her in cross examination that there had been consensual intercourse, interrupted only by conversation about the condom, whereupon sexual intercourse ceased.

The appellant did not give evidence at his trial. In his statement to police he agreed that he had been involved in consensual sexual activity with the complainant but denied that they had had intercourse. He was prepared to agree that the two had got pretty close to intercourse, but that because of the absence of any protection both of them had refrained.

The case was complicated by the fact that a transcript of the trial Judge's summing up was not available.

The Court was of the opinion that the dominating concern in the case was the fact that the Crown made considerable play of the importance of the discrepancies in the video statement as against what was being advanced in cross-examination. In the Court's view there was a danger of the jury simply assuming guilt as a result of the earlier inconsistent story.

The Court held that, in combination, the absence of a record of the summing up, the absence of any lies or equivalent direction, and another concern about whether a standard recent complaint direction was sufficient in the circumstances, led to a miscarriage of justice.

Directions on similar fact evidence

The Court took the opportunity in *R v Sanders* [2001] 1 NZLR 257 to give some guidance to Judges who are instructing juries on "similar fact" evidence. The appellant had been convicted of six charges of indecent assault. The charges related to two of the appellant's students. The Crown was seeking to rely on the evidence of each complainant to support the charges relating to the other complainant. There were sufficient similarities to justify putting the respective allegations before the jury as being to an extent mutually supportive: the appellant was the pottery teacher of both girls, both had formed an attraction for him, and both alleged that the indecencies began with his kissing them in the kiln room at the back of the pottery classroom.

The Court stated that at the outset of an instruction on "similar fact" evidence, it is desirable that the Judge should emphasise to the jury that:

- they must separately consider each charge and bring in a separate verdict in respect of each; and
- if they are satisfied the accused did commit a particular offence, it is an unsafe and improper reasoning process to conclude that he must therefore be guilty of the other offences with which he is charged.

The jury may be directed that experience and common sense tell us that if two or more complainants give sufficiently similar accounts of what the accused has done to them, and there is no reason to suspect collusion, the evidence of each may be taken as supporting the evidence of the other.

The jury should however be cautious about how to approach the question of sufficient similarity before the evidence of one complainant can be treated as supporting the evidence of another, there must be a similarity in the detail of the evidence of each which goes beyond the commonplace. There must be a discernible pattern in the detail of what each complainant says which gives their individual accounts such a distinctive similarity as to reinforce what the other says. If the jury find the necessary distinctive similarity in the accounts of the complainants, they may use the evidence given by the other complainant(s) to help them in deciding whether the charges against the accused in respect of each complainant is established beyond reasonable doubt. But if they are not satisfied as to the existence of the necessary distinctive similarity, then they must not use the evidence of other complainants in this way. They must put the evidence of other complainants entirely to one side in deciding on the charges in respect of each complainant. They should also have their attention drawn to the possibility that the similarity of the complainants' stories may be the result of collusion, or the result of the personal motives of a complainant – if that has been suggested by the defence.

The trial Judge, in dealing with issues of similar fact, should ensure that directions are not expressed merely as abstract concepts, but are given in terms of the evidence of the particular case.

In this case, because some of these matters had not been pointed out to the jury, certain aspects of the defence case had not been adequately put before the jury in summing up, and certain hearsay evidence was allowed to be given, the verdict was regarded as unsafe, and a new trial was ordered.

Comment on failure of spouse to give evidence

In *R v Singh* CA470/99, 4 April 2000, the Court held that there had been a miscarriage of justice at the appellant's trial after Crown counsel had commented on the appellant's failure to call his wife to give evidence.

The appellant was convicted of arson and making a fraudulent claim on his insurance company after allegedly setting fire to his business premises because of financial difficulties. During cross-examination counsel for the prosecution had questioned the appellant about whether he had asked his wife to come and give evidence, suggesting that she could confirm what the appellant was saying if she wanted to. Later in the cross-examination it was put to the appellant that he was worried about what his wife had said to police so he had asked the police to disregard her statement and had then not called her as a witness. Again in the closing address counsel for the Crown commented that the appellant's wife "curiously has not come along to tell us what happened".

It was accepted by Crown counsel on appeal that this was a clear breach of s366(2) of the Crimes Act 1961 which provides that no comment adverse to the accused shall be made if the accused refrains from calling their spouse as a witness. However counsel sought to uphold the conviction on the basis that the Judge had cured the problem in summing up or that in any event it was an appropriate case to invoke the proviso in s385(1) of the Crimes Act.

The Court did not consider that the Judge's direction was sufficient to remove the prejudicial effect of the questioning or the comments in the Crown closing. At the very least what was required was a clear and firm direction from the Judge that the Crown's adverse comment was impermissible and the jury should put it completely aside and not draw any adverse inference against the appellant for refraining from calling his wife. The Judge's direction did not come close to doing this. The Court held that it was clearly not an appropriate case for the application of the proviso as the risk of impermissible reasoning was too great. The convictions were quashed and a retrial ordered.

Defence not properly put to jury

In *R v Maney and Henriksen* CA450/99 and 463/99, 30 March 2000, the Court allowed an appeal against conviction and granted a re-trial on the basis that the

defence of one of the accused had not been properly put to the jury. The accused had advanced two defences at trial. First, that the victim's death, the body not being found, was the result of a fishing accident or gang killing. Alternatively he argued that even if his co-accused had killed the victim, he himself took no part in the killing or in its aftermath. This second defence was not put to the jury even though the accused had established an evidential foundation for it through cross-examination. Two of the Crown witnesses who gave evidence of the accused's involvement admitted under cross-examination that they had not implicated the accused in the killing in either their first or second interviews with police and further admitted to some police pressure to name the accused as a participant. In these circumstances the Court considered the trial Judge had an obligation to put that defence before the jury in his summing up.

In *R v Li and Wu* CA140/00 and 141/00, 28 June 2000, the appellants had been convicted of offences following a fight between two gangs outside a nightclub. In summing up the defence of the appellants to the jury, the Judge omitted to mention the evidence from the appellant that the complainant was holding a knife. As the appellant's defence was one of self-defence, the Court held that this was a significant omission by the Judge, and resulted in an inadequate statement of the defence case. The appeal was allowed and an order made for a new trial.

The Court also took the opportunity to reinforce its guidance to trial Judges on appropriate directions to the jury in cases involving self-defence. The preferable approach is that taken in *Shortland v Police* (High Court Invercargill AP74/95, 23 April 1996; see *Adams on Criminal Law* 48.07).

Comment of Judge during summing up

The appellant in *R v Rolton* CA257/00, 6 November 2000, raised three grounds of appeal, one of which was that the Judge made an inappropriate comment during summing up. The Court dismissed the appeal, stating that although the Judge's comments were not to be encouraged, they did not amount to a miscarriage of justice.

The appellant submitted that a comment of the trial Judge during summing up amounted to an expression of incredulity and a suggestion that the defence was nonsensical. The Judge commented, "Well, I suppose that is possible. Anything in life is possible. It is possible, for example, that Martians might after all land in Hagley Park, but in this case, is this reasonably possible? I ask you to adopt a common sense approach when approaching that issue." This Court stated that the comment was directed towards a submission made by counsel for the appellant and was a comment the Judge was entitled to make. However, the Court stated that the Judge's manner of expression is not one to be encouraged. In the event, it had not amounted to a miscarriage of justice given the context.

Replaying of videotape to jury

In *R v S* CA215/00, 28 August 2000, the Court allowed an appeal against conviction and ordered a retrial. This case involved allegations of sexual offending by the accused against his step daughter. Following the complaint, the complainant had been interviewed by a social worker. The interview was video-taped and the tape became part of the evidence in chief of the Crown. The complainant also gave evidence by way of video-link but this evidence was not taped. During the course of deliberations the jury asked that the video of the complainant's evidence be replayed in full. The Judge agreed to the request. The Court ruled that the circumstances amounted to a reinforcement of the main plank of the Crown's case and the Judge should have taken steps to balance the effects of this. This will particularly be the case where the reinforcement is in the form of a video where not only what was said but the manner in which it was said is reinforced. The Court indicated that appropriate steps would depend on the circumstances but could include reading the transcript of the cross-examination or a reminder to the jury of the essential elements of the defence case and the evidence supporting it.

Communication by Judge to jury in response to question

The role of the jury as determiners of guilt and Judges' communications with them on this matter were at the heart of the appeal against conviction in *R v Childs* CA164/00, 24 August 2000. The appellant was charged with eight counts of using a document to defraud the Accident Compensation Corporation. While considering its verdict the jury sent a note to the Judge which indicated the jury may have reached a unanimous decision on all counts but queried whether they could go on record as saying the ACC procedures in this case were inadequate, and whether the court would consider clemency. In response the Judge advised that he agreed with them on these matters. The matter was later discussed with Counsel in chambers. However prior to coming to chambers Counsel had been advised that the jury had reached a unanimous verdict.

The Court considered that there was no dispute about the three relevant principles applicable to this situation. First, that any communication between the Judge and jury touching upon the trial ought to take place in open Court in the presence of the jury, counsel and the accused. Second, the jury is concerned solely with guilt or innocence, not penalty. Third, if the jury itself raises questions about penalty, and in particular the possibility of recommending leniency, they should be directed that they must try the case on the evidence according to their oath and leave questions of penalties to the Judge. However the jury may still, after returning their verdict, add a rider which would then be given such attention as was thought proper.

The Court found that these principles were clearly not adhered to in this case. Rather the Judge ought to have convened the Court, informed counsel of the content of the jury question, or provided them with a copy, and allowed opportunity to comment. He should then have called the jury into the Court and provided them with an answer. Concluding that the communication by the Judge may have influenced the jury's

verdicts the appeal was allowed and conviction quashed. The proviso to s385 of the Crimes Act 1961 was rejected as inapplicable in this case.

Inconsistent verdicts

In *R v H* [2000] 2 NZLR 581 the Court found that a guilty verdict which was apparently inconsistent with acquittals on closely related counts might not be "unreasonable" if it could be explained by the jury's innate sense of fairness and justice. The appellant challenged jury verdicts of guilty on the basis of their inconsistency with verdicts of acquittal in respect of closely related counts. The appellant had been charged with seven counts of sexual offending against his partner's daughter. A jury convicted the appellant on four counts and acquitted him of three. Argument in this Court focussed on two representative counts of rape which together alleged the same type of offending over a four and half year period. The counts were originally a single rape count but the indictment was amended to show two counts of rape to reflect a change to the statutory definition of rape in 1994 (which did not bear on this case). The evidence in relation to the two counts was identical and no distinction was drawn between them. Despite this, the jury returned one verdict of guilty and another of not guilty. On appeal the appellant relied on the ground of appeal in s385 of the Crimes Act 1961 that the Court shall set aside a verdict if it was unreasonable or could not be supported having regard to the evidence.

The Court held that a guilty verdict which is apparently inconsistent with an acquittal might be held to be not "unreasonable" if the innate sense of fairness and justice of the jury might properly have been applied in reaching the verdict of acquittal, for example, to avoid an unnecessary double conviction. In this case the appellant faced two counts of rape only because of a law change. The jury, out of its sense of justice and fairness, might therefore have refused to find two counts proved purely because of a legislative quirk. This was an acceptable reason for the different verdicts. It was thus not necessary for the reasonable explanation for the apparent inconsistency to be found in the evidence.

The Court observed that there should be a reluctance to accept a submission of inconsistency given the respect for the function that the law assigns to juries and the general satisfaction with their performance as illustrated by research carried out for the Law Commission.

Power to discharge an accused

The correct test for the exercise of Court discretion to discharge an accused under s347 of the Crimes Act 1961 arose as a ground of appeal in *R v F* CA211/00, 16 August 2000. The appellant, *F*, had been tried indictably in the District Court before

a Judge alone on six counts of fraud and convicted on each. Following the completion of the Crown's case *F* and his co-defendant B had applied for orders for discharge pursuant to s347(3) of the Crimes Act based on alleged insufficiency of evidence.

The trial Judge adopted a test of whether there is credible evidence which, if accepted, establishes facts capable of supporting the inferences that the Crown submits with relation to lack of honest intention or belief? Applying this test the trial Judge dismissed the applications for discharge. *F* subsequently gave evidence. B then invited the Court to give further consideration to his discharge. In light of the testimony of *F* the trial Judge granted the discharge.

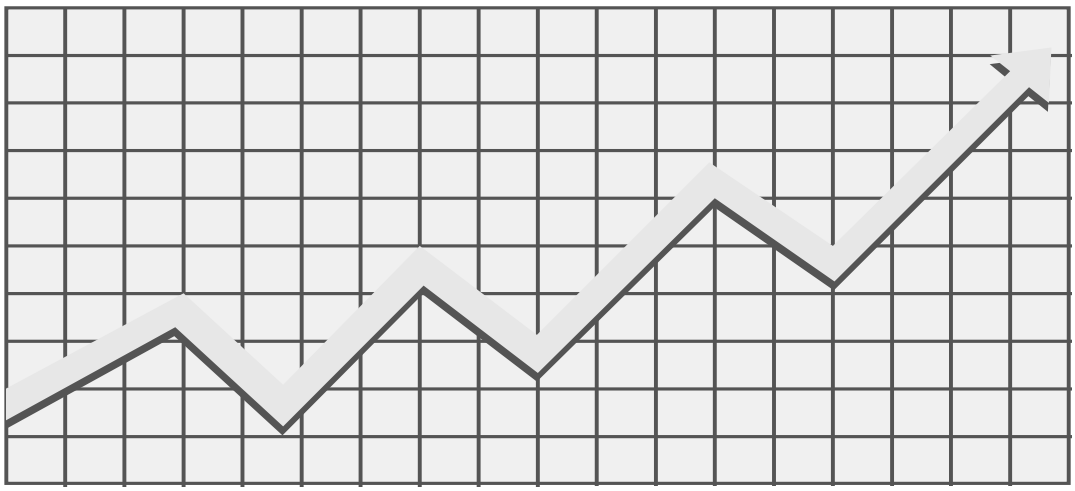
On appeal the Court considered that the correct judicial approach to the s347(3) application based on alleged insufficiency of evidence is the same as dealing with an application of no case. As applied by the trial Judge this means that "[w]here, as here, the Crown case is dependent, in whole or in part, on inferences, the credible evidence must establish facts capable of supporting the inference. The Court should not decide on such an application or submission whether the relevant inference should be drawn."

Having established the necessity of a distinction between judicial determination of the adequacy of evidence on one hand, and acceptance of it on the other, the Court considered that a case with adequate evidence may continue with the question of its acceptance to be determined at a later stage. The approach of the trial Judge was therefore approved and the appeal dismissed.

* * * *

5. Address given by Sir Ivor Richardson at The Legal Research Foundation Seminar, 2 March 2001

Trends in Judgment writing in the Court of Appeal



Court of Appeal : Statistical Analysis in selected years

Table 1 : Data for all decisions

Table 2 : Data for five Judge cases

Table 3 : Specific categories of case

Figures 1-4

Trends in Judgment Writing in the Court of Appeal

Dr Russell Smyth's empirical analyses of decisions of appellate courts in Australia and New Zealand are a valuable contribution to the understanding of the functioning of the courts concerned. As well, because he has used essentially the same framework and the same format for each study, they lend themselves to a comparative analysis.

In focussing on the Court of Appeal of New Zealand for this seminar we thought it might be worthwhile to see what conclusions might be drawn from a set of data derived from analysis of the body of decisions which the court has delivered over the last 40 years. The Judges' Clerks involved have scanned all the decisions of the court delivered in the selected years, 1960, 1980, 1990, 1997 and 2000, and have recorded a range of facts about each of those years' decisions. The base document is the result of that analysis.

Our material can usefully be read alongside Dr Smyth's. There are two obvious differences between the two studies. First, Dr Smyth's is a snapshot of the current state of affairs, valuable in its own right and for comparison with appellate courts in other jurisdictions. Our base study shows changes over time. As a trend analysis for the past it is also something of a springboard for the future. The second difference concerns the decisions selected for examination. Dr Smyth's analysis is of decisions reported in the New Zealand Law Reports. Our base study is of all the decisions of the court in the selected years. We did that for two reasons: (1) to show the complete pattern of the court's work; and (2) to allow for changes in the pattern of reporting and in the readier availability with modern technology of the whole database. The proportion of decided cases actually reported in the New Zealand Law Reports has fluctuated over the years. For example, in 1960 86 percent of the decisions were reported in the NZLR; in 2000 it was 26 percent. Editorial discretion plays a part. More significantly, the development of specialised reports in some areas, eg New Zealand Tax Cases, Procedure Reports of New Zealand and Criminal Reports of New Zealand, has tended to reduce the number of decisions published in those reports which are also selected for reporting in the New Zealand Law Reports. As well, unlike in earlier years, courts, lawyers and academics can now easily access the database of all the decisions of the court.

I should mention why the particular years were selected for the base study. 1960 was chosen not simply as a round number. The permanent court with three full time judges had started in 1958 and was in full sway. 1980 was 20 years on. As well, it was the first full year in which the court functioned with five permanent judges plus visiting High Court judges, each for two to three months, and some shorter appointments, also allowing the court to sit at times in two divisions. By 1990 the court had its sixth permanent judge. That year also preceded the impact of the Bill of Rights which came into force on 28 September 1990. In 1997 the court had seven permanent judges. It had reorganised its systems and processes which provided for five judge courts in the first half of the month and the Criminal Appeal Division, the Civil Appeal Division and three judge permanent courts in the second half of the month. 1997 was the first full year of those changes and the data for 2000 reflects that same regime.

Against that background I want today to make some comments on that data about the past and to suggest some possibilities about the future.

Number of decisions

The first heading in Table 1 is "Number of decisions".

Perhaps the most striking fact revealed by the data is the increase in the number of decisions delivered by the Court of Appeal per year since 1960. As you can see from Table 1, in 1960 the number of decisions was 78. By 1980 it was 246 – an increase of 215 percent. In 1990, 396 decisions were delivered by the court. And by 1997 the number had risen to 462. The upwards trend appears to have reached a plateau, with 458 decisions having been delivered in 2000. But between 1960 and 2000 there has been a 500 percent increase in the court's caseload. Figure 1 in the base document illustrates just how dramatic this change is.

How is this to be explained? Only part of the increase in the number of criminal appeals is explained by increases in population. Another factor is the increase in the convictions for serious crime since 1960. That is reflected in the increase in prison numbers. In 1960, there were 7.5 prisoners for every 10,000 New Zealanders. By 1998 this had risen to 12.9.[1]

But there has been a similarly dramatic rise in the number of civil appeals heard. The rise in population since 1960 is only part of the answer. The growth in the New Zealand population in the 40 years since 1960 was 48 percent as compared with 500 percent in the number of decisions[2]. More plausible explanations than population growth are increased economic activity and an increase in litigiousness among New Zealanders since 1960.

Clearly such questions need to be explored because of the implications for the resources of the courts and the utilisation of alternative dispute resolution processes on the civil side.

Judgments per judge

The dramatic increase in the number of cases heard per year suggests that the workload of individual judges has increased over the years. And indeed, the average number of judgments per Court of Appeal judge, and taking multiple judgments into account, rose from 31.2 in 1960 to 63.4 in 1990. Since then it has fallen slightly to 53. Again, I have included a graph (figure 2 in the base document) which illustrates this trend.

[1] Department of Statistics *New Zealand Official Yearbook on the Web 1999.*
[2] Supra.

I should emphasise that these statistics are necessarily approximate because of the difficulty of building into each of the selected years appropriate factors for the High Court judge contributions to the work of the court. In broad terms it was equivalent to another 2.5 permanent Court of Appeal judges in 1997 and 2000. In earlier years it was equivalent to .5 in 1960, 1.3 in 1980 and 1.5 in 1990.

Length of decisions

There is nothing particularly noteworthy in the statistics. But they may dispel some preconceptions about length and prolixity. Around 70 percent of decisions have been and are no more than 10 pages and the proportion over 30 pages has come down from 10 percent in 1960 to just over three percent in 1997 and 2000.

Multiple judgments

The incidence of multiple judgments has significant implications for the workload of individual judges and for the court as a whole. Clearly where there is a dissent there have to be at least two judgments. That aside, there have been distinct changes in our practice over the years. In 1960 multiple judgments were delivered in 22 percent of the cases, in 1980 it was 25 percent, in 1990 nine percent, 1997 and 2000 six percent and four percent respectively. What is all the more striking is that multiple judgments and dissents are confined largely to civil matters, except perhaps in the early Bill of Rights years. That reflects the requirement of s398 of the Crimes Act 1961 for a single judgment except where, in the opinion of the court, the question is a question of law on which it would be convenient that separate judgments should be pronounced. It reflects the legislative importance attached to the certainty and finality of the result.

More broadly, the proportion of multiple judgments is a matter of judicial approach. There are at least three factors at play. First, workload pressures may encourage dividing judgment writing responsibilities. Second, at the particular time the court may put a lot of emphasis on trying to send a clear statement - perhaps at the expense of burying or blurring differences in detail or masking complexity. Third, there is the influence of the personalities and attitudes of the particular set of Judges in the court at the time.

Case citations: English decisions

Turning to case citations, the most striking finding is the fall in the citation of English decisions by the court over the years. In 1960 citations of English cases accounted for 69 percent of the total number of cases cited. By 1990, that figure had fallen to 35 percent. In 2000 it was just 17 percent. That amounts to a 75 percent decrease since 1960. Figure 3 in the base document brings this home.

Unsurprisingly, the fall in citations of English cases has been accompanied by a rise in citations of New Zealand cases. From 26 percent of citations in 1960 they rose to 51 percent in 1990 and 74 percent in 2000. This trend is in line with what has occurred in Australia and Canada.[3]

What is the explanation? The decline of judge-made common law and the increasing prominence of statutory law is probably the most significant factor. New Zealand has enacted new statutes which have partially codified and reformed parts of the common law. Such statutes include the Illegal Contracts Act 1970 and the Contractual Remedies Act 1979. Then there are many New Zealand statutes which have drawn on legislation in countries other than the United Kingdom. Examples include the New Zealand Bill of Rights Act 1990 and the Fair Trading Act 1986. In addition, there is indigenous legislation such as the Accident Insurance Act 1998, the State-Owned Enterprises Act 1986 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. In the many cases in which these statutes are invoked, reference to English common law cases is ordinarily unnecessary. New Zealand cases interpreting the legislation and foreign cases are more relevant.

A second factor contributing to the decline in citations of English cases is the dramatic increase in the number of cases decided by New Zealand courts since 1960. I have already referred to the increase in the number of cases heard by the Court of Appeal per year. There are now simply more New Zealand decisions which counsel can cite in argument than there were in 1960. In many years in past decades, there was only one volume of the New Zealand Law Reports. For the last 12 years, there have been three each year. And, where a New Zealand court has pronounced on a matter, its decision is likely to be regarded as more significant in later New Zealand cases than English decisions on the same point of law.

A third factor is the sense that the United Kingdom centre of gravity is moving inexorably towards Europe and European law, which is less directly significant for New Zealand except perhaps in Bill of Rights and Human Rights questions.

Finally, our heightened sense of independent nationhood has presumably increased our confidence in New Zealand decisions and in our ability independently to shape our own law.

Case citations: Australian decisions

Of interest too is the trend in citation of Australian decisions. As a percentage of the total number of decisions cited in any one year, the number of Australian decisions rose from four percent in 1960 to 12 percent in 1990. But since then it has gradually fallen back down to five percent. Figure 4 illustrates this trend.

[3] Russell Smyth "What Do Intermediate Appellate Courts Cite? A Quantitative Study of the Citation Practice of Australian Supreme Courts" (1999) 21 Adel LR 51, 66 and Peter J McCormick "Judicial Citation, the Supreme Court of Canada, and the Lower Courts: The Case of Alberta" (1996) 34 Alberta L Rev 870, 879.

That Australian decisions should be cited frequently is unsurprising, given the cultural and economic affinities between New Zealand and Australia. And New Zealand statutes such as the Fair Trading Act 1986 and the Commerce Act 1986 have drawn on Australian legislation, making Australian decisions particularly relevant in many New Zealand cases. It is therefore perhaps surprising that the court's citation of Australian decisions has recently decreased. A partial explanation is the difficulty of dealing succinctly with decisions of the High Court of Australia. Many contain multiple judgments, with the different judges often taking somewhat different approaches to a single legal issue.

Other citations

As one would expect, citations of Canadian and United States cases and of cases in the European Court of Justice and the European Court of Human Rights have increased over the years. This is largely a response to the Bill of Rights. But it also reflects an increased receptiveness to new ideas on the part of lawyers as well as judges.

It is interesting to note that the average number of references to law reform material and legal periodicals per case has increased since 1960. Dr Smyth has referred to suggestions that activist judges tend to cite such material more often than their conservative brethren.[4] But I suggest that part of the explanation is to be found in the background of the judges who now sit on the New Zealand Court of Appeal. Four of the seven permanent judges, as well as the Chief Justice, have studied at United States law schools, and reference to legal periodicals in judgments has traditionally been more common in the US than in the Commonwealth. Another factor may be an increased willingness on the part of judges to acknowledge the academics on whose ideas they so often draw. And the increase in the number of academic articles and law reform papers published over recent decades is no doubt another contributing factor.

Age of cases cited

My penultimate comment regarding citations relates to the age of cases cited in decisions. In 1960 43 percent of the New Zealand cases cited by the court were less than 10 years old. By 1980, 63 percent of the cases cited were less than 10 years old, and for 2000 the figure is 71 percent. There has been a corresponding decrease in the number of New Zealand decisions cited which are more than 20 years old. Numerous possible explanations exist. It might be thought that the rate of social change has accelerated since 1960. Perhaps legislation is being reformed at a greater rate than in the past. And perhaps the common law is having to adapt more quickly, with the result that cases are becoming obsolete much faster. But perhaps for entirely different reasons, old cases are now seen as less authoritative than they were in the past.

[4] "What Do Intermediate Appellate Courts Cite?", supra, 69.

Perhaps our regard for the wisdom of those who went before us has decreased. Or perhaps old cases are now cited less often simply because they have not been entered into the electronic databases which are now frequently used for legal research.

Average number of citations per case

One final point about citations. It is interesting to note that the average number of case citations per decision has fallen. It was five in 1960 and 3.5 in 2000. One possible explanation is that cases are considered less important today than they were in times when the doctrine of precedent enjoyed greater prominence. However, precedent remains important, and counsel and judges draw much assistance from analogies with decided cases. There are two more plausible influences affecting the number of citations per case. One is the increase in the amount of new statutory law. Many cases which come before the court today involve the interpretation of recently enacted statutory provisions that have not been previously considered by the courts. Another is the increase in the number of criminal appeals heard. Many of these can be disposed of by the Criminal Appeal Division in very short decisions without the need to cite many authorities. A third possibility is that some of our predecessors may have tended to cite more cases in support of propositions.

Data for five judge courts

Up to this point I have been discussing the data in table 1 which relate to all the decisions of the court in the selected years. Table 2 contains data relating to decisions of courts of five for 1990, 1997 and 2000. It is interesting to compare these data with those for decisions overall. It is immediately apparent that the length of the decisions delivered by courts of five is greater than the length of decisions delivered by courts of three. In table 1, less than 10 percent of the decisions for 2000 exceed 20 pages in length. In table 2, almost two thirds exceed 20 pages.

In terms of case citations, the data for the five judge courts reflect the same trends as the overall data – a rise in citation of New Zealand cases and a decline in citation of English cases. But more cases are cited by courts of five than by courts of three. And legal texts, legal periodicals and law reform materials are also cited more frequently. For example, in 2000 there were on average 0.29 references to New Zealand legal periodicals for every decision of a court of five. The figure in table 1 for decisions overall is only 0.04.

All this suggests that the legal questions which confront courts of five are more complex than those which courts of three address. This is confirmed by the fact that oral judgments are delivered more rarely in five judge cases. So, it is unsurprising that there are also more dissents and separate judgments in five judge cases than in three judge cases. Judges can reasonably reach different views on the questions of social and economic policy which these cases often raise.

One final word about dissents. Despite the tendency of the media and academics to emphasise dissents, the reality is that we have never had fewer dissents. In 1960, six percent of all cases carried dissents; that was down to three percent in 1990 and two percent in 2000.

Table 3 focussing on subject matter

I turn to table 3. It divides cases into categories based loosely on subject-matter. The data relating to the New Zealand Bill of Rights Act 1990 and the Matrimonial Property Act 1976 reveal much about the impact of new legislation on the court. The Bill of Rights Act has been cited in 485 cases since 1990. References to the Act peaked at 69 in 1993, but remain frequent. By contrast, references to the Matrimonial Property Act 1976 were at 13 in 1980 but have decreased considerably since then. There were only two in 2000. What explains this? Perhaps most of the significant ambiguities in the 1976 Act were resolved in the decade following its enactment, so that there is now little reason to bring matrimonial property cases to the Court of Appeal. Perhaps, by contrast, the scope for application of the Bill of Rights Act is much wider and can be explored only gradually. But one reason for the difference may lie elsewhere. Perhaps most parties in matrimonial property disputes simply cannot afford to take their cases to the Court of Appeal. On the other hand, the greater availability of legal aid to criminal defendants, to whom the Bill of Rights is particularly relevant, may allow them to bring the Bill of Rights before the court more frequently.

My final observation – at least before I make some predictions – concerns the impact of changes in economic conditions on the cases before the court. The surge in summary judgment proceedings, guarantee and insolvency cases in 1990 reflects the consequences of the collapse of the sharemarket and the property market in the late 1980s. It illustrates how the court's role changes as social conditions change. When there is a rise in crime and a corresponding rise in criminal appeals, the court's role in supporting the workings of the criminal justice system assumes greater importance. Similarly, following an economic downturn and a rise in insolvencies, the court plays an important role in addressing debt recovery.

Conclusion

It is time briefly to offer some predictions by way of conclusion. I expect that citations of English cases will continue to decline as English law is ever more influenced by that of the European Union – and as New Zealand develops more indigenous statutory law. This will be all the more so if the Privy Council appeal is finally abolished. And I do not expect any significant increase in citation of Australian cases relative to other jurisdictions. But I would like to hope that academics and practising lawyers will provide the courts with more empirical

material. *Williams v Aucutt*[5] provides a recent example of how useful empirical data can be for a court when faced with social policy issues. In that case we had the benefit of a survey by Nicola Peart of the University of Otago of all claims by children under the Family Protection Act 1955 over a ten year period.

Finally, as the world continues to become more inter-related and as Parliament increasingly draws on overseas legislation, I expect to see a significant increase in the use of foreign cases and legal materials by the court.

✧✧✧✧

[5] [2000] 2 NZLR 479.

APPENDICES

A. Important Civil Cases

Ngai Tahu Settlement and Ngati Apa Claim

The question in *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659 was whether, in the Ngai Tahu Claims Settlement Act 1998 which settles the Ngai Tahu Treaty claims, Parliament had deprived the people of Ngati Apa, who live on the West Coast of the South Island, of the status to raise their own claim. The Trust sought judicial review of a decision of the Maori Appellate Court made in 1990. The High Court struck out the application on the grounds that the Settlement Act and the Te Runanga O Ngai Tahu Act 1996 were based on an understanding by Parliament that Ngai Tahu's claim over its takiwa (its area) was exclusive and that valid claims by other tribes were non existent. By a majority, the Court allowed the appeal and permitted Ngati Apa to amend its application to request a declaration that the order was invalid on stated grounds.

By the Arahura Purchase of 1860, the Crown acquired approximately seven million acres of land on the West Coast of the South Island. Further land had been acquired under the Kaikoura Purchase of 1859. The case stated to the Maori Appellate Court by the Waitangi Tribunal under s6A of the Treaty of Waitangi Act 1975 was:

> Which Maori tribe or tribes according to customary law principle of "take" and occupation or use, had right of ownership in respect of all or any portion of the land in question at the date of the respective deeds;
>
> If more than one tribe held ownership rights, what area of land was subject to those rights and what were the tribal boundaries.

The Maori Appellate Court decided that the Ngai Tahu tribe had the sole rights of ownership in respect of the lands comprised in both the Arahura and Kaikoura Deeds of Purchase at the respective dates of those Deeds. The appellant had not been represented in that proceeding.

On 9 June 1995, Ngati Apa brought a claim to the Waitangi Tribunal in respect of a portion of this land. They did not claim exclusive interest in the land, but did argue that the Appellate Court was wrong to exclude them from any interest whatever.

The Court held that the High Court's jurisdiction to grant declarations may allow the possibility of a declaration in respect of part but not the whole of the 1990 decision and in respect of the validity of the Ngati Apa claim to the Tribunal. The High Court's inability to set aside the Order did not prevent Ngati Apa from alleging as part of its claim to the Waitangi Tribunal that the making of the Order and indeed the

legislation based upon it represented a breach of its Treaty rights. Whether such an allegation would be well founded still remained an "entirely open question".

Sports drug testing procedures

In *Bray v New Zealand Sports Drug Agency* CA215/00, 6 December 2000, a urine sample supplied by the appellant to the respondent was found by the testing laboratory in Sydney to contain an impermissibly high level of nandrolone metabolites. The respondent determined that the appellant had committed a doping infraction. The focus of the appeal was whether the two week delay in getting the sample to the laboratory was fatal to the respondent's decision. The Court found that it was.

The Court stated that the New Zealand Sports Drug Agency Act 1994 and the Sports Drug (Urine Testing) Regulations 1994 require that a urine sample obtained under the Act must arrive at the testing laboratory as soon as practicable after being obtained. The respondent's submission that the Act and Regulations are complied with where a sample is *sent* as soon as practicable even if it is *received* only after a lengthy delay was rejected. "Send" in the regulations referred to causing a sample to reach its destination rather than merely setting it on its way, and expedition was also required by the scheme of the Act.

The Court also noted that, given the Agency's statutory role and function, it was inappropriate for the Agency to adopt an adversarial or confrontational stance in appeals against determinations that doping infractions have occurred.

Commencement of time for appeal

White v New Zealand Stock Exchange, CA162/00, 21 December 2000, concerned the commencement of time for appeal where the plaintiff's application for judicial review had failed and judgment had been ordered for the defendants. The respondent argued that the appeal was out of time as the 28 days allowed to appeal to the Court of Appeal ran from the date the decision was given and not from the date the judgment was sealed.

Rule 6(2) of the Court of Appeal (Civil) Rules 1997 provides that, unless a case is covered by R6(1), time to appeal runs from the date of sealing. Rule 6(1) provides that time runs from the date of decision where:

(a) An action is dismissed or a judgment of non-suit is pronounced; or
(b) An application is refused; or
(c) The order is one to which R268 of the High Court Rules applies.

The defendants argued that because the action was "dismissed" time ran from the date of the decision.

This issue had last been fully traversed by Thomas J sitting on the High Court in *Nimmo v Westpac Banking Corporation* [1994] 1 NZLR 472. He decided that previous case law holding that the phrase "application is refused" was wide enough to encompass cases where judgment is given for the defendant was wrong. The phrase "action is dismissed" referred only to interlocutory applications, such as strike outs, which resulted in a proceeding being dismissed in limine.

In the present case the Court, by a majority, disagreed with *Nimmo*. Gault and Keith JJ held that, *Nimmo* aside, it has been the "consistent interpretation and practice of this Court" to measure the time for appeal from the date of judgment for the defendant. The Judges considered that the inclusion of the phrase "action is dismissed" in 1955 supported this conclusion as more naturally applying to judgments for the defendant. They saw no reason to depart from this settled interpretation and therefore held that the appeal was filed out of time. The Court, however, granted special leave to appeal.

Thomas J, dissenting, would have upheld the interpretation given in *Nimmo*. His key reasons were the plain meaning of the words in R6(1); the unlikelihood that, in 1955, the Rules Committee used the phrase "action is dismissed" to obscurely indicate "judgment for the defendant", instead of only those cases where an action is dismissed in limine; the desirability of retaining consistency between appeals from the District Court and those from the High Court; the practice established since *Nimmo* and its endorsement by New Zealand procedural texts; and the manifest difficulties in applying the contrary interpretation to marginal cases (especially when also involving a successful counterclaim).

Damages for tort and Bill of Rights breaches

In *Dunlea v Attorney-General* [2000] 3 NZLR 136 a Court of five considered appeals by six appellants arising out of the actions of members of the Armed Offenders Squad (AOS) and the Criminal Investigation Branch (CIB) of the police in September 1995.

The Police had received information that a suspect in two armed robberies, thought to have a firearm, was in a flat (flat 2) which was one of two in a house. The six appellants were in the other flat (flat 1). The police information about the layout of the house was inaccurate. They obtained a search warrant to search the whole house and set up a cordon, intending to evacuate those in flat 1 and use a loudhailer to get the suspect and other occupants of flat 2 to give themselves up. However, when two of the appellants left flat 1, an AOS member, mistaking the appellants for the suspect and his associate, ordered them to lie face down on the ground. The appellants were handcuffed and searched for weapons. No weapons were found and, still handcuffed, the two were delivered out onto the road into the charge of CIB officers who held them without arresting them for a further 15 minutes. After their handcuffs were

removed one of the men was subjected to a further search. Meanwhile, the four remaining appellants were evacuated from flat 1 to the street. As each emerged they had rifles trained on them briefly. On reaching the edge of the property four were subjected to pat searches and three to pocket searches. Eventually the occupants of flat 2 emerged and the suspect was arrested. Flat 1 was then searched before the appellants were allowed to return.

The appellants claimed under the New Zealand Bill of Rights Act 1990 for unreasonable search of themselves and the premises tenanted by three of them and arbitrary detention, and for the torts of assault, unlawful imprisonment, trespass to the person and property. The High Court Judge upheld some of the claims and dismissed others, awarding the appellants a total of $44,500, including sums totalling $11,000 for exemplary damages. The appellants appealed and the Attorney-General cross-appealed.

The majority, Richardson P, Gault, Keith and Blanchard JJ, held that the actions of the AOS in relation to the first two appellants were lawful and not in breach of the Bill of Rights. The AOS initially had reasonable grounds to suspect that the two men were the suspect and his associate and, once it became evident that they were not, the need to remove them from the area in the execution of the Arms Act 1983 search warrant justified their removal out onto the road. However, the findings of arbitrary detention and false imprisonment by the CIB officers once the two men reached the road were allowed to stand, as it was clear by that stage that they were not the two men sought.

Turning to the second group of four appellants, the majority found that the Arms Act justified the steps taken by the AOS to evacuate them from the house and onto the road so that attention could be focussed on the suspect without endangering others. While the Arms Act did not protect the pat down searches, they were part of the controlled evacuation and did not have any aggravating features. The three awards of $2000 made in respect of the pocket searches were set aside, as no allegations had been made about the searches and there had been no proper evidence of them.

The majority found that this was not an occasion for the award of exemplary damages, which should be reserved for truly outrageous conduct which could not be punished in any other way. The total awards of $18,000 and $16,000 for the first two appellants were however appropriate given the nature and extent of the wrongs done to them once they were out on the road. The awards of $1,500 for each of the tenants of the flat were also upheld. This was not an appropriate case to resolve the question of whether a different approach should be adopted to the fixing of compensation for a breach of the Bill of Rights as compared with the fixing of damages for a tort arising out of essentially the same facts. However, the majority commented that there were strong reasons for not adopting a different approach.

Thomas J (dissenting on the issue of damages) would have significantly increased the damages awarded to the first two appellants and the tenants, as he did not consider that the awards made were sufficient to vindicate their rights. He emphasised the distinction between private law and public law remedies. An award for a breach of a right protected by the Bill of Rights could not simply be equated with damages for

"equivalent" breaches of common law torts. Compensation for the former must include compensation for the intrinsic value to the plaintiff of a right having a constitutional significance.

Tort –duty of care

In *R M Turton & Co Ltd (in liquidation) v Kerslake* [2000] 3 NZLR 406 the majority of the Court (Henry and Keith JJ) dismissed an appeal against a ruling of the High Court that no duty of care existed between the engineer who had prepared specifications for incorporation into a building contract and the contractor who had undertaken the contract.

Turton was the successful tenderer for a contract to build a hospital for the Southland Area Health Board. The Health Board employed an architect to design the hospital, who in turn contracted with Kerslake, an engineering firm, to prepare the mechanical specifications for the hospital. The mechanical specifications were included alongside the other contract documents sent out to prospective tenderers. Turton gave the mechanical specifications to its engineering sub-contractor who prepared a tender quote submitted as part of the Turton bid. The mechanical specifications specified a type of heat pump to be installed and the minimum output capacity to be achieved. The specified heat pumps were off-the-shelf models supplied under contract by a supplier to Turton's sub-contractor. However, the specified heat pumps were unable to produce the required output and substantial remedial work was undertaken at the expense of Turton. Both the sub-contractor and the supplier went into receivership and Turton commenced proceedings against Kerslake in negligence for the cost of the remedial work.

The issue before the Court was whether a duty of care existed between Kerslake and Turton to take reasonable care in the preparation of the mechanical services specification. For the majority the issue of whether there was a duty of care depended upon consideration of all the circumstances including the contractual matrix. The test was whether it was fair, just and equitable to impose a duty of care in the particular circumstances. The principle of concurrent liability in tort and contract and that the existence of a contractual obligation does not of itself negate the finding of an equivalent duty in tort were affirmed. However the various contractual links between the relevant parties will be relevant to questions of the assumption of responsibility between the parties, a consideration that is integral to the test of whether a duty of care exists in the circumstances. For several reasons the contractual matrix between the parties was not consistent with a duty of care between the contractor and the engineer. The majority also considered the other factors relevant to the *Hedley Byrne* principle and concluded that Kerslake were not in possession of any special skill as against Turton who had the services of their own sub-contracting engineer, nor was there any clear evidence of Turton approaching Kerslake or otherwise relying on their skill and judgment. In these circumstances the majority ruled that there was no duty of care between Kerslake and the contractor Turton.

Thomas J, dissenting, held that there was no need for the Courts to enquire whether a

general duty of care existed in this case, because that question was already answered by the principle in *Hedley Byrne* which held that a duty of care exists for negligent misstatements. All that remained was to consider whether the requirements of the *Hedley Byrne* cause of action had been made out. He found that Kerslake was possessed of a special skill as an engineer, that it had assumed responsibility for the accuracy of its representations and that it was reasonable for Turton to rely on the representations. He held that the contractual matrix between the various parties did not negate tort liability available under the principle of concurrency. Accordingly he held that this case met the criteria of the *Hedley Byrne* principle and that a duty of care had been established. He would have remitted the case back to the District Court to determine whether Kerslake was in fact negligent.

Privacy – tape recording of telephone conversation

Harder v Proceedings Commissioner [2000] 3 NZLR 80 concerned a barrister who recorded two telephone conversations with a lay litigant against whom he was acting without her knowledge. The Complaints Review Tribunal had upheld the litigant's complaint and awarded her damages. The barrister's appeal to the High Court failed, although it reduced the damages ([2000] NZAR 104).

A Court of five was asked to consider whether the barrister's conduct constituted interference with the litigant's privacy in terms of the Privacy Act 1993, in particular whether it breached information privacy principles 3 and 4. The majority, Elias CJ, Thomas and Tipping JJ, held that there had been no breach and allowed the appeal. Gault and Henry JJ dissented on the basis that the appeal was by way of leave of the High Court on four specific questions of law, the answers to which resulted in the appeal necessarily being dismissed. The Court unanimously dismissed the Privacy Commissioner's cross appeal.

The appellant received a telephone call from the complainant, which he tape recorded, and in the course of which he arranged for the complainant to telephone him again. On the second occasion he asked her a number of questions and again tape recorded the conversation. The invasion of privacy was said to have been the tape recording of the conversations without the complainant's knowledge.

Contrary to the view of the Tribunal and the doubts of the High Court the majority held that the information in the first telephone conversation had been unsolicited and the unsolicited nature of it could not be altered by the fact that it was recorded or by the way in which it was recorded. The information in that conversation was therefore outside the scope of the Privacy Act. With regard to the second conversation the Court upheld the finding that the information was not unsolicited, the conversation being by arrangement and the information being solicited by the questions asked. The information was collected in terms of the Privacy Act.

In the High Court Mr Harder relied on s4(c)(iv) of Privacy Principle 3 that he believed on reasonable grounds that non-compliance was necessary for the conduct of

proceedings in the District Court. The Tribunal and the High Court had held that Mr Harder's failure to give evidence as to his belief was fatal to this defence. The majority disagreed, stating that there was no absolute requirement on a defendant to give evidence in order to discharge an onus of proof. He was entitled to argue that it was reasonable to infer such belief from the evidence led by the Privacy Commissioner. The majority considered that, had the matter not turned on other issues, Mr Harder would have been entitled to a remission to the Tribunal for it to reconsider the defence and the factual issues arising from it. The majority went on to hold that Mr Harder was not in breach of Principle 3. In the circumstances of the conversation between the complainant and Mr Harder, the various conditions of Principle 3 had either been complied with or did not apply. This was seen to reinforce the view of the majority that there was very considerable doubt whether the information concerned was personal information within any sensible application of the Privacy Act.

With regard to the alleged breach of Principle 4 the Court concluded that it was neither unlawful nor necessarily unfair to record a conversation without the knowledge of the other party. In the circumstances of the present case it was not unfair for Mr Harder to make a complete and fully accurate record. The purpose of the provision was not to prevent such conduct but to prevent people from being induced by unfair means into supplying personal information which they would not otherwise have supplied.

Litigation privilege and tape recorded conversations

The defendant in *Crisford v Haszard* [2000] 2 NZLR 729 had arranged to discuss the litigation by telephone with a friend. The plaintiff's solicitor arranged for the friend to covertly record the conversation. The plaintiff disclosed the existence of the tape in his affidavit of discovery, but opposed inspection on the ground that the tape was privileged as it had been brought into being for the purpose of submission to his legal advisers to enable them to conduct and advise on the litigation. The High Court ordered the recording to be produced. This Court agreed.

The Court discussed the general basis of litigation privilege. It protects the process of gathering evidence for consideration by a lawyer acting for a party to actual or reasonably anticipated litigation; it represents the fruits of the litigants' efforts in preparing for a case; and it applies only where work is carried out with the dominant purpose of conducting or advising on litigation. The Court went on to note that the High Court Rules and New Zealand civil procedure generally embrace the principle that the public interest is best served by limiting the circumstances in which information can be withheld.

The Court held that the conversation between Ms Harris and the defendant was not confidential and could not itself be regarded as privileged. It followed that the tape recording itself could not be privileged. In a sense it was actually the conversation itself – it was the conversation recorded in electronic form. Furthermore, the

recording of the conversation did not disclose anything about the plaintiff's or the defendant's case which was not revealed by the fact of the conversation having itself occurred. And since the recording was merely a reproduction of the conversation, it could not be argued that it had the stamp of the plaintiff's agents' opinions and impressions of the conversation. It in no way betrayed the advice or views of the plaintiff's solicitors regarding the plaintiff's case.

Application of divestment orders to party to s47 breach

In *Commerce Commission v Fletcher Challenge Ltd* [2000] 3 NZLR 670 the Commerce Commission appealed against the decision of the High Court ordering the filing of a further amended statement of claim, where the Court held that the power to order divestment under the Commerce Act 1986 did not extend to parties to s47 contraventions by others. The Commission applied to amend its cause of action, and Genesis applied to be struck from the proceedings entirely. The Court of Appeal allowed the Commission's appeal to the extent only of granting it leave to amend its claim. This Court also granted the application by Genesis to strike out the s47 (but not the s27) allegations against it.

The Court agreed with the decision of the High Court Judge that a "party" to a s47 contravention by another cannot be subject to a divestment order. Persons who were party to a contravention of s47 by another are expressly liable to pecuniary penalties, injunctions and damages, but not divestment. Further, the divestment remedy for a contravention will not survive assignment of the acquired assets to a third party as an *in rem* remedy; it is expressly to be ordered against the designated contravening person.

The Court did not see any advantage in permitting the Commission to amend its statement of claim to allege direct contravention of s47 by Genesis. The alleged dominance of the Fletcher group was neither created nor strengthened by Genesis's acquisition of ECNZ's interest in the Kupe field. An acquisition which does not result in dominance or strengthening of dominance cannot contravene s47 so as to trigger the divestment jurisdiction. It was clear that s47 was directed to acquisitions creating dominance and not those merely sustaining it. However, the Court was not prepared to strike out the s27 allegations against Genesis. The FCE/ECNZ contractual rights and obligations might or might not have passed to Genesis with the whole of the interest of ECNZ in the Kupe field. That would be a matter for determination at trial.

The Commission was allowed to amend its cause of action to amalgamate the Norcen and Western Mining acquisitions. What had been lacking was a clear pleading of the inference of a plan or scheme sought to be drawn. The Commission was given a last chance to plead a composite acquisition or accept that the Norcen purchase was nothing more than background and immune from divestment.

Consumer Guarantees Act 1993

Nesbit v Porter [2000] 2 NZLR 465 provided the Court with its first opportunity to consider the interpretation and application of the Consumer Guarantees Act 1993.

On 14 July 1995, Mr and Mrs Nesbit purchased a used Nissan Navara from a motor vehicle dealership. The dealership made no representation about the accuracy of the odometer reading. By January 1996 there had been various problems with the car. The Nesbits approached the dealership seeking payment for the repairs or the return of the vehicle. They did not receive an affirmative response and lodged a complaint with the Motor Vehicle Dealers Institute, which replied in February saying (correctly) that the vehicle was not covered by any warranty under the Motor Vehicle Dealers Act 1975. The Nesbits returned the vehicle to the dealership in April after a Disputes Tribunal referee recommended they do so. They decided to do so and to seek a refund. The Nesbits told the dealership in April 1996 through their solicitor that they regarded the return of the vehicle and the letter preceding it as a rejection of the goods.

The case came to this Court on questions of law stated by the High Court. The first question was whether the Nesbits purchased the vehicle as "consumers" within the meaning of the Act i.e. whether they bought a good that was ordinarily acquired for private or personal use. There was evidence that some 80 percent of those who purchased a Nissan Navara did so for commercial purposes. But it was clear to the Court from the definition of "consumer" that Parliament contemplated that some goods could be acquired for private use or for commercial use. The Court noted that there still remained about 20 percent of buyers who acquired Navaras for private use. Therefore, despite the high incidence of commercial use, there was nevertheless a regular practice of such vehicles being bought for private use. This was sufficient for the Navara to come within the Act, i.e. as a good ordinarily bought for personal use. The Nesbits were accordingly entitled to the benefit of the guarantee of acceptable quality in s6 of the Act.

The Court next considered whether the Nesbits had lost their right to reject the Navara because they did not exercise the right within a period in which it would be reasonable to expect the defect to become apparent. A reasonable time under s20 must be long enough to enable the consumer to become fully acquainted with the nature and cause of the defect. The Court pointed out that as a general rule the older the goods, the shorter is likely to be the reasonable time. The time may be longer if the goods are likely to be used infrequently or only at a particular time of year, or if regular inspection of the goods for defects is not customary. However, because of the wording of the section, it was not possible for the Court to find that the "reasonable time" may be longer to allow for consumers' attempts to get the seller to honour its obligations.

The Court held in cases like the present, with an ageing vehicle of uncertain overseas history, it would in general be reasonable to expect defects to become apparent by the time of the first warrant of fitness check (about six months after purchase). Allowing the Nesbits some time to decide whether to exercise the right, the "reasonable time" for the Nesbits to exercise their right of rejection therefore expired in February 1996,

and by not exercising their right within that time, they lost it. The purported rejection was legally ineffective.

Finally, the Court noted that there was a significant difference between the test of merchantable quality in s16(b) Sale of Goods Act 1908 and the test of acceptable quality in s7 Consumer Guarantees Act. Goods will be of merchantable quality if fit for any of the purposes for which that good is normally used; but will be of acceptable quality only if it is fit for all of the purposes for which that good is commonly used and meets other standards referred to in s7(1) Consumer Guarantees Act.

Validity of patent based on test of obviousness and lack of novelty

In *Ancare New Zealand Ltd v Novatis NZ Ltd* [2000] 3 NZLR 299 Novatis and Cyanamid applied under the Patents Act 1953 for revocation of a patent held by Ancare. Prior to trial Ancare applied to amend the patent specification. The statement of defence stated that in the event the Court determined the patent to be invalid, the defendant sought an order allowing the specification to be amended instead of the patent being revoked. No proposed amendments were particularised. In the High Court the patent was held to be invalid on the grounds of lack of novelty and obviousness. The Judge did not hear argument on the question of amendment. After judgment a new application for amendment was made with the proposed amendments being very much more extensive than originally indicated. These amendments were formulated to meet the grounds of invalidity upheld in the judgment. Ancare appealed but the Court ordered that the amendment application be ruled upon before the appeal heard. The amendments were subsequently disallowed on the ground that they would not overcome the invalidity on the ground of obviousness. Ancare appealed both judgments. This Court dismissed the appeal.

Ancare held a patent for a liquid combination of anthelmintic compositions relating to the treatment of parasitic worms (helminthiasis) in farm animals. The patent was for a broad-based anthelmintic formulation in liquid form to control both tapeworm and roundworm. In particular, the claimed invention was to combine the anthelmintic praziquantel, which was effective in treating tapeworm, with at least one of a number of listed anthelmintic formulations, which were successful in treating roundworm. In finding that the invention lacked novelty the High Court held that elements of Ancare's patent had been disclosed by the prior publication of a patent belonging to Bayer. With regard to obviousness, the High Court held that the formulation of a composition treatment would have been an obvious approach for a skilled person or team to take if they intended to provide a combined drench for controlling both roundworm and tapeworm.

In dismissing the appeal, the Court stated that the test for obviousness was a question of fact: whether a person or team skilled in the field but not inventive, and invested with the common general knowledge available in that field at the priority date, would have seen the alleged inventive step as obvious and would have recognised it as

something that could be done or was at least worth trying, without bringing any inventiveness to bear. The skilled person or team to be postulated in the case was one sufficiently interested to read the Bayer patent and to consider how the treatments might be combined to produce a broader spectrum of activity. The element of inventiveness necessary to resist such an attack was not high, but in deciding what was already known or used, the Court was not restricted to the scientific literature but had to consider what was happening in the market. There was no error in framing the question in this case as whether it would be obvious in seeking a product for treating both roundworm and tapeworm to formulate a composition of the two treatments.

In relation to the proposed amendments, the Court commented that these amendments sought to incorporate "matter not in substance disclosed in the specification before the amendment" and accordingly could not be made under s40(1) of the Patents Act. In addition, the amendments related only to the question of novelty under s41(1)(e) of the Act and could not affect the finding on obviousness under s41(1)(f) of the Act. Therefore, they would not overcome the invalidity.

The Court observed that except in special circumstances, it is not appropriate to support an existing patent and then in subsequent amendment proceedings seek to support an amended version of the patent. The Court commented that it is inconsistent with the fundamental requirement that a patentee must clearly define the invention and with the need for competitors to know the scope of the monopoly into which they cannot trespass that a patentee can engineer a situation in which two versions of the patent are supported and a court, after finding invalidity, is required to consider further evidence directed to an issue already decided. It will be for the Court to direct whether the amendment is dealt with prior to, or at, trial.

Oppressive contracts

Greenbank NZ Ltd v Haas [2000] 3 NZLR 341 involved an appeal from a refusal to enter summary judgment on the basis that a credit contract was arguably oppressive in terms of s9 of the Credit Contracts Act 1981. The Court held that it was not and remitted the case to the High Court for the entry of summary judgment in favour of the appellant.

The respondents personally guaranteed a loan of $140,000 to their company, Transworld, from the appellant to pay the deposit on a block of land. The sum was to be repaid with interest of 21 percent in one sum on the earlier of 60 days from the date of the advance or the day on which the respondents received a GST refund in relation to the land purchase. The aspect of the loan agreement said to have rendered it oppressive was the stipulation that a fee of $45,000 be payable to the appellant no later than 90 days after the date of the advance. Because of the short duration of the term, the fee resulted in a finance rate of 217.3 percent as per s6 of the Credit Contracts Act.

Transworld defaulted in its obligations to repay the loan and was also unable to

complete the purchase of the land. The parties entered into a further agreement under which the appellant became the purchaser of the land and credited the respondents with the repayment of the amount deposited. The agreement also allowed a further interest free period of 12 months to repay the balance.

The Court of Appeal held that in determining whether a contract or a term of it is oppressive a court may have regard to whether the finance rate is oppressive. A finance rate is not a term of the contract but could be influenced by other terms, such as the fee term in issue in the present case. As the court is only required to have regard to an oppressive finance rate it could not be said that an oppressive finance rate automatically led to the conclusion that a contract or term is oppressive.

The Court went on to say that the various words which together form the definition of the term "oppressive" contain the underlying idea that the transaction is in contravention of reasonable standards of commercial practice. Something which is in accordance with reasonable standards would not be oppressive, although evidence would need to be led about such practices in all but the plainest of cases. It was held that the respondents had not raised an arguable case of oppression. They had no money and were anxious to hold onto what they saw as an advantageous contract that would be very profitable. Mr Haas was an experienced businessman and the respondents acted with independent legal advice throughout. The transaction was also a high risk one for the appellant which would be seriously exposed if the contract fell through.

There was no evidence that in these circumstances the $45,000 fee should be regarded as oppressive. There was thus no basis for saying that the appellant was not entitled to some premium by way of fee to reflect the nature of the transaction and the risks it was taking. Nor was there any evidence to support the view that the premium was excessively high. As such the respondents had done little more than assert that the fee was oppressive, insufficient to raise an arguable case. Similarly the Court held that there was insufficient evidence to support a defence of undue influence and allowed the appeal.

Interpretation of contracts

Yoshimoto v Canterbury Golf International Ltd CA103/99, 27 November 2000, involved contract interpretation and led to a detailed discussion on the use of extrinsic evidence by Thomas J. The contract related to the sale of shares in a company formed to promote and develop an international golf course. The agreed price was payable in three instalments. The second payment was conditional on the "necessary" planning authorisations or resource consents being secured within 12 months to enable the development to proceed. The issue at trial, and on appeal, was whether this condition precedent had been satisfied as one resource consent had not been obtained within the specified time.

The trial Judge held that because of that failure the condition precedent had not been

met. Although on a pragmatic approach the Judge found that the payment was not dependent on every authorisation or consent being obtained, but only those which were required to enable the project "in essence" to proceed, he concluded that this consent was essential. This interpretation was based on what he perceived to be effectively the plain meaning of the clause.

In separate judgments the Court allowed the appeal on the basis that on the proper construction of the contract the particular resource consent was not a "necessary" consent. It became a "wash-up" consent, technically necessary but no more.

Thomas J considered that if reference could be made to certain extrinsic evidence there could not be any doubt that the "plain meaning" of the clause was at odds with the parties' actual intentions. The five draft contracts prepared and considered before the final contract was signed were held to indicate no change in the parties' thinking or in their position that the consents required for the second payment were those 'presently applied for'.

As to the admissibility of such extrinsic evidence Thomas J cited the shift away from black-letter law seen in the recent House of Lords decision in *ICS Investors Compensation Scheme Ltd v West Bromwich Building Society Ltd* [1998] 1 WLR 896. This purposive approach was seen to presage a common-sense approach to contractual interpretation. However this approach still held that the parole evidence rule is absolute if the evidence relates to prior negotiations.

The Judge went on to discuss his conviction that the rule that evidence of the precontractual negotiations are not receivable is not absolute and may be flexible enough to permit a departure in circumstances such as this case. Having reviewed the academic writings on the rule and the policy underlying it he concluded that in this case he would prefer to accept that the extrinsic evidence in issue was both receivable and reliable. However, having regard to the Privy Council's position as New Zealand's final court of appeal and their recent decisions, Thomas J held that the Court must accept that, until the rule is reviewed by the Privy Council (or House of Lords), the evidence is inadmissible.

Mutual wills – family protection action

In *Lewis v Cotton* CA 152/00, 18 December 2000, the Court upheld a decision of the High Court that the wills made by a husband and wife in 1983 were not made in circumstances preventing revocation where one survived the other.

Lloyd Cotton and his wife Dawn Cotton made wills in 1983 each leaving the other a life interest in their respective estates. They further agreed between them that since their son Graeme had shown a strong disposition to farming that they would leave the majority of the farm real estate to him but would make provision for the two daughters, in particular the appellant Gae Lewis would be able to purchase a block of land 'Thompson Block' for $25,000. Following Dawn's death, Lloyd Cotton changed

his will a number of times and made his final will in August 1994. In this will he bequeathed the Thompson Block to his other daughter Susan. Gae was forgiven a $100,000 debt and given a one third share in a beach house and in the residue. During the intervening years between the 1983 wills and the final will, Gae had married and prospered in farming with her and her husband acquiring net assets in excess of $1 million.

The issues before the Court were first whether the doctrine of mutual wills applied to the 1983 wills so that those wills were irrevocable in the circumstance that one of the testators died. Secondly, whether there was a breach of moral duty by Lloyd Cotton under the Family Protection Act 1955.

The Court considered the history of the doctrine of mutual wills and concluded that there are two general types of mutual will. One involves a promise not to revoke the will secretly or openly at any time, and the other, a promise not to revoke the will secretly during the other will-maker's life-time, denying him the opportunity to change his accordingly. Consideration for either such promise is not necessary. A promise not to revoke may be express or implied but must be more than consultation and co-ordination between testators and an agreement to make their wills in a particular way. What is required is an intention to bind the two will makers to a future course of inaction. The standard of proof for this requirement is the balance of probabilities but the claim must be scrutinised with great care as with all claims to the property of a deceased. The Court was satisfied that the High Court had turned its attention to the correct issue of law, being the intention of the parties at the time of making their wills, and held that the facts supported the High Court finding that there was no intention to make the wills irrevocable.

The Court also upheld the High Court decision not to make an order under the Family Protection Act. The appellant had not shown any need for maintenance. The appellant also failed to show any need for further support in recognition of her membership in the family and importance to her father. She had received significant support from him in her lifetime and also under his will.

Continuing fiduciary relationships after dissolution of partnership

In *Sew Hoy v Sew Hoy* [2001] 1 NZLR 391, the Court considered whether duties were owed to each other by former partners in relation to land which had been compulsorily taken from the partnership (a family partnership) by the Crown under the Public Works Act 1928 was not needed by the Crown and was offered back to the former owners under s40 of the Public Works Act 1981; and whether the duties had been breached. The duties alleged were those surviving the dissolution of the partnership arising from the family relationship. The alleged breach was the failure of the trustee of the estate of the dead partner to fully consult the appellants and to disclose certain information concerning the valuation and zoning of the land. The High Court rejected the claim. This Court confirmed that decision.

The offer back under s40 was not part of "the affairs of the partnership" or "transactions begun but unfinished" as required by s41 of the Partnership Act. Section 41 was spent in 1982 on distribution of the final compensation payment. Nor was there any breach of any duty arising within the family partnership and relationships. The respondents bore no responsibility for the decisions of the appellants not to accept the offer. They did nothing which prevented the appellants from accepting the offer and joining in the purchase.

Duties of selling mortgagees under s92 of the Property Law Act

In *Bank of New Zealand v Adsett* [2000] 3 NZLR 446 the Court of five allowed an appeal by BNZ against a refusal to strike out a claim by the respondents based on allegations that BNZ failed to give proper notice under s92(1) of the Property Law Act 1952 and thereby wrongfully exercised its power of sale under the mortgage ((1999) 8 NZCLC 262, 112).

The respondents were guarantors of a loan made by BNZ to their company Bedrock Industries Ltd. Under the terms of the guarantee the respondents agreed to pay on demand whatever was owed by Bedrock to BNZ and gave BNZ a first registered mortgage over their residential property. Under the loan agreement with Bedrock, BNZ held a first registered debenture over the assets of Bedrock and registered chattels security with certain items of plant. Bedrock defaulted in its payments under the loan agreement and BNZ accelerated the re-payment of principal and interest. At the same time as accelerating repayment of the loan, BNZ issued a demand on the respondents for payment of the accelerated amount under the guarantee. The repayment demand was not met and Bedrock was placed in receivership and notices under s92(1) Property Law Act were issued against the respondents resulting in a mortgagee sale of their residential property. The issue to be decided was whether BNZ was required to give the respondents notice under s92(1) Property Law Act of the earlier default by Bedrock in not making its loan repayments.

The Court held that no such notice was required. Section 92(1) does no more than prevent a monetary liability becoming payable by reason of a default in the performance of a covenant under a mortgage. Under their mortgage to BNZ, the respondents covenanted to pay on demand all monies that the mortgagors have become liable for under any guarantee they have given to the Bank. Under the terms of the guarantee, the respondents become liable on demand for all monies owed by Bedrock to BNZ. Therefore it cannot be said that liability for the accelerated debt became payable by reason of any default in payment of money secured by the mortgage. The mortgage only secures money payable by the respondents under the guarantee and does not secure money payable by Bedrock under the loan agreement. Therefore the requirements of s92(1) do not apply to the respondents in respect of a default by Bedrock under its loan agreements but only in a default by the respondents of the demand made under the guarantee, that demand being for the entirety of the accelerated debt.

The Court found it unnecessary to answer the alternative proposition of BNZ that s9(1)(c) of the Receiverships Act 1993 would operate to render s92(1) inapplicable. The Court did observe that there was considerable force in the submission that where payment of money is secured by a debenture, s92(1) has no application even if that debenture is also secured by a mortgage of land.

When head lessee acquires fee simple in land

The question of law in *Robert Bryce & Co Ltd v Stowehill Investments Ltd* [2000] 3 NZLR 535 was whether a sub-lessee remained under an obligation to pay ground rent under the head lease where the head lease and fee simple subsequently became vested in the same person but there was no merger of those estates. Robert Bryce & Co Ltd was granted subleases of two adjacent properties by Stowehill Investments Ltd. The subleases contained a covenant whereby Bryce promised to pay all ground rent due under the head leases to the head lessor. Some years later, Stowehill purchased the fee simple in both properties. Bryce took the view that its obligation to pay ground rent in relation to the head lease ceased at that point, because the head lease was now unenforceable, both parties to it being the same person relying on *Rye v Rye* [1962] AC 496, 513. The argument failed both in the High Court and this Court.

The Court doubted whether their Lordships (other than Lord Denning) intended to go so far in *Rye v Rye* as to prohibit a person from being both landlord and tenant. Nevertheless, the Court noted that in New Zealand, the decision in *Rye v Rye* gave rise to concern about the validity of titles to many residential apartments.

The legislature enacted s66A Property Law Act 1952 in order to overcome the difficulties pointed out by the House of Lords in *Rye v Rye*. This section provided that covenants made by a person with him or herself could be enforced. Therefore, s66A made it possible for a lease to be created where the lessor and lessee were the same person. The Court was of the opinion that the common law of New Zealand must be taken to have adjusted for consistency with the purposes of s66A. Although the section did not apply to the situation before the Court, its influence on the surrounding areas of common law must be recognised in order to avoid incongruities between leases which were created with the same person as lessor and lessee, and those where the two estates come into the same ownership after the term commenced.

The Court concluded that the purchase of the freehold estate by Stowehill (the lessor) did not invalidate the head lease. Bryce's obligation to pay the ground rent continued. The Court also pointed out that at any rate, any renewal of the head leases would create new head leases for a further term, which would very arguably have revived Bryce's obligation to pay the ground rents from the date of renewal.

Doctrine of implied dedication

Man O'War Station Ltd v Auckland City Council [2000] 2 NZLR 267 addressed the question of whether the common law doctrine of implied dedication continues to operate in New Zealand, in respect of land with a registered title, and, if so, whether its requirements were satisfied in the circumstances of the case.

The appeal concerned the status of roads constructed by the Waiheke County Council (now Auckland City Council) in 1971-1972 over farmland owned by Mr Hooks. The road began to be used by the public when construction was finished in 1972. The appellants were companies owned by Mr Spencer, which bought the land from Mr Hooks and another in 1979. The sale agreement said nothing about the roads. After his companies acquired title to the land, Mr Spencer, in reliance on the registered title, blocked the roads. The Council brought proceedings against the appellant companies arguing that events prior to the purchase by Mr Spencer's companies had given rise to a dedication of the land as roads. The Council was largely successful in the High Court. The companies' appeal to this Court failed and the Council's cross appeal in respect of one part of the road succeeded.

A Court of five held that the doctrine of implied dedication continued to apply in New Zealand, in respect of land under the Land Transfer Act 1952. Under this doctrine, land in private ownership could be dedicated as a road. This could occur by the conduct of the landowner in allowing passage by the public over an area of his or her land with the intention that such use be permanent. The land becomes a road by this means when the owner evinces the required intention, and there is an acceptance of the dedication by or on behalf of the public (by a public authority spending money in forming or maintaining the land as a road or by public user of the land). A public right of way then comes into existence and the landowner cannot deny to the public what has been dedicated.

The Court saw no incompatibility between the Land Transfer Act and the common law doctrine of implied dedication. The Act itself did not expressly abrogate the common law rule. In terms of s64 of the Land Transfer Act, use by the public of dedicated land was not adverse to or in derogation of the title of the registered proprietor once the proprietor has the necessary intention to dedicate the land as a road. Although it would be rare nowadays for a local authority to rely upon the doctrine of implied dedication, it continues to apply in New Zealand.

The Court found on the facts that Mr Hooks had consented to the road, which was in fact formed and in public use. The council, by constructing the roads and opening them to the public, had accepted the dedication. Legal title had passed when the roads were complete and in use. The title remained notwithstanding the transfer of the farms to the companies.

Valuation and rating of "separate property"

In *Attorney-General v Rodney District Council* [2000] 3 NZLR 678, a Court of five considered the meaning of the term "each separate property" under the Valuation of Land Act 1951. Under that Act the Valuer-General prepared district valuation rolls in respect of "each separate property". Those rolls were used, among other things, for rating purposes. Although the 1951 Act has now been repealed, the parties saw continuing value in the rulings from these proceedings because the phrase "each separate property" is also used in the Rating Valuations Act 1998, which replaced the 1951 Act.

Three local authorities and the New Zealand Local Government Association (the respondents) adopted an "occupation approach" to the definition of "each separate property", emphasising the facts about the use of the land. They sought general declarations that the existence or availability of a surveyed area or a separate certificate of title was not a prerequisite to the existence of a "separate property". They were largely successful in the High Court ([2000] 1 NZLR 101). By contrast, the Attorney-General and the Valuer-General (the appellants) argued that for there to be a separate property there had to be an individual certificate of title. The Valuer-General also had a distinct power to treat a particular piece of land as a separate property if that was reasonable in the circumstances. The practical significance of the Valuer-General's refusal to treat various properties as separate was that local authorities could levy uniform annual general charges only on "every separately rateable property".

This Court concluded that the certificate of title approach was the correct one. The expression "separate property" as used in the 1951 Act meant a distinct piece of land identified as such through the land transfer system and in particular by the relevant certificate of title. This interpretation flowed from the plain meaning of the words in their particular statutory content and from their wider land law context and the valuation purpose of the expression. It was supported by indications in the 1951 and 1988 Acts that a "separate property" could have more than one occupier, use or user. The power to apportion charges between different pieces of land within the same certificate of title existed where that was necessary.

The Court observed that it was possible for land to be *treated* by the Valuer-General under the 1951 Act as a separate property if that was reasonable in the circumstances. However, because of the abstract way the case was presented, the Court declined to question particular decisions made by the Valuer-General in relation to particular properties. The appeal was allowed and the cross-appeal dismissed.

* * * *

B. Important criminal cases

Harassment Act 1997

In *R v D* [2000] 2 NZLR 641, the Court considered the application of the Harassment Act 1997 for the first time. The appellant had been convicted in the District Court on a charge that she harassed the complainant, "knowing that the harassment was likely to cause [her], given her circumstances, to reasonably fear for her safety".

The appellant and the complainant had been friends for 18 months. Upset that the complainant had had a relationship with someone else, the appellant left abusive messages on the complainant's phone and placed a letter on the complainant's desk at work which contained sexual references and a wish to turn the tables on the appellant. The appellant wrote another letter to the complainant several weeks later apologising for her behaviour, but never sent it.

The Court noted that the Act required that the appellant have knowledge that in the particular circumstances the harassment is likely to reasonably cause fear for safety. There was no evidence that the complainant's concern was communicated to the appellant. Some caution was necessary in drawing any confident inference that the phone calls made in the context of the argument would have been appreciated by the appellant to be so distressing to the complainant. The seriousness with which the complainant regarded matters did not seem to have been brought home to the appellant until the complainant asked her to stop calling, about a month after the argument and consequent phone calls.

Nor was it possible to draw inferences from the letters about the appellant's knowledge without considering the context in which the letters were written. While the letters may have caused the complainant to become fearful, whether the appellant would have appreciated that fact is not self-evident. This depended upon the context of the relationship between the two and whether the language and content, in context, were not unexpected. There was evidence that the two had discussed sexual matters in the past, but the District Court Judge did not consider this relevant. In inferring the required knowledge from the letters alone, the Judge focused principally upon the reaction of the complainant to the appellant's conduct. In the result, the Court held that the Judge misdirected himself in law on the critical issue of the appellant's knowledge.

The enquiry into the appellant's knowledge required proper attention to be paid to the sequence of events and their context, rather than to the concern caused to the complainant. The existence of the required knowledge needed to be assessed at the time of each of the incidents relied upon by the prosecution. It was not enough that the appellant later came to realise that she had caused such concern to the complainant. Evidence about the relationship between the complainant and the appellant and about the knowledge the appellant had of the complainant's attitude to the sexually explicit material contained in her letters was clearly relevant to the

question whether the appellant had the required knowledge. The conviction was based on material errors of law, and was therefore quashed.

Setting traps "likely to injure any person"

In *R v Fitzgerald* CA536/99, 20/99 and 29/00, 13 April 2000, the appellants were convicted of knowingly and wilfully permitting a device to remain on property they occupied in such a condition that a person was likely to be injured by it. The offence related to a perimeter fence around the appellants' gang headquarters, which included continuous barbed wire, attached to an electric fence unit that could be attached to mains power.

The Court held that because the fence required human intervention (i.e. a person to turn on the power) before it would be in such a condition that others were likely to be injured by it, it did not come within the meaning of s202(2) Crimes Act 1961. Although this interpretation did not result in a satisfactory state of affairs, it was in accordance with the wording of the statute and the usual approach of construing penal statutes against the Crown.

Forgery – mental element

R v Taylor CA336/00, 1 November 2000, concerned the requirement in the definition of forgery in s264 of the Crimes Act 1961 that a defendant intend that false documents be used or acted upon as genuine. The appellant had photocopied $20 bank notes. Evidence conflicted about whether these notes were 'completed' by having the other side of the notes copied and being cut from sheets into individual notes. Having reviewed the trial Judge's assessment of the evidence the Court concluded that the safe evidence went no further than the appellant photocopying one side of the notes only and that there were sheets of $20 notes.

The Court accepted that the mere fact that an apparently authentic sheet of Treasury notes is uncut, or printed on one side only, does not remove it from the definition of forgery in ss263 and 264(3) and (4) of the Crimes Act. However Crown counsel accepted that in this case the photocopied sheets were of such poor quality that, even if they had existed, the Crown could not establish that the appellant possessed the intent that they be in any way used or acted upon as genuine as required by s264(1). The appeal was allowed and the appellant's conviction set aside.

Receiving stolen property – knowledge requirement

In *R v Kennedy* [2001] NZLR 314, the Court quashed the appellant's conviction for

receiving on the basis that he did not know that the relevant property was stolen at the time that he "received" it. A man had asked the appellant if he could store some goods in the appellant's garage. The appellant, not knowing that the goods were stolen, agreed and the property was left in his garage in black polythene bags. About a month later the police executed a search warrant at the appellant's house and found stolen electronic equipment and ski clothing in the house.

The mental element required for receiving is that the receiver knows that the thing received has been stolen or dishonestly obtained. The act of receiving is complete as soon as the person has possession or control over the thing, or aids in concealing or disposing of it. The High Court Judge accepted that the appellant did not have "possession or control" (for the purposes of the act of receiving) until he became aware that the goods were stolen, which was when he moved them into his house. That conclusion was reached by reference to cases decided under the Misuse of Drugs Act 1975.

The question of law stated for the Court was whether the test for possession of drugs also applied to the provision relating to the act of receiving. The Court found that the issues were more appropriately addressed in terms of the legislative provisions themselves rather than in terms of a comparison with the drugs legislation. The Court held that it is at the moment of receipt that knowledge that the goods have been stolen or dishonestly obtained must exist. Possession or control for that purpose had both factual and mental elements, the latter being limited however to the knowledge that the person possesses or controls the thing and the intention to exercise possession or control. There is no justification for holding as criminally liable someone who for some time has innocent possession or control over a thing, completely ignorant of its being stolen, from the moment they discover that it has been stolen. However, were such a person to subsequently make use of the property they may well be liable for theft or fraudulent conversion.

The District Court Judge did not find that the appellant had the requisite knowledge at the point that he obtained control (at least) over the goods (when they were put in his garage). The Court accordingly quashed the convictions.

Social Welfare Fraud – relationship in the nature of marriage

In *R v Batt* CA47/00, 3 August 2000, the appellant appealed successfully against her conviction on seven charges of social welfare fraud on the basis that the trial Judge had misdirected the jury as to the elements of the offence.

The charges covered a period between 1985 and 1998. Two charged the appellant with wilfully omitting to tell an officer that she was living in a relationship in the nature of marriage, and five charged her with fraudulently using a document capable of being used to obtain a benefit.

The Judge directed the jury that there were four elements of the offence that the

Crown had to prove: that the appellant was living in a relationship in the nature of marriage, that she wilfully omitted to inform Work and Income that she was doing so, that the wilful omission was for the purpose of misleading Work and Income and that the misleading itself was for the purpose of continuing to receive a benefit. He went on to note that as the appellant had accepted in evidence that if she was living in such a relationship she was obliged to disclose it to Work and Income, the jury was therefore entitled to conclude that the appellant "has in effect acknowledged the second to fourth elements of the offence."

The Court held that this was a misdirection in relation to mens rea as it ascribed to the appellant a concession which she had not made. The Judge had effectively told the jury that the appellant accepted she knew she was in a relationship in the nature of marriage, when her defence had been that she was not, and necessarily had no knowledge that she was. The Court noted that this distinction between proof of the fact of the disqualifying relationship, and proof of knowledge by the accused of that fact, was an important one. A majority held that there had been a miscarriage of justice and a new trial was ordered.

Drink driving causing death

The issue of whether s61(1)(a) of the Land Transport Act 1998 requires proof of excess blood alcohol to be causative of the injury or death resulting, or whether it is simply a temporal consideration, arose by way of case stated from the District Court in *R v Ten Bohmer* [2000] 3 NZLR 605. The appellant was charged under s61(1)(a) with, being a person in charge of a motor vehicle, causing death to a motor cyclist while the proportion of alcohol in his breath exceeded 400 micrograms per litre of breath. Counsel for the appellant had argued that this section required the Crown to prove a causative link between the excess breath alcohol level and the collision. The District Court Judge held that such a link was not required and convicted the appellant. The High Court Judge affirmed this decision and dismissed the appeal. This Court agreed.

On appeal the Court declined to follow the appellant's interpretation of s61 due to critical changes in the wording of s61 in the 1998 Act and a finding that the interpretation given to previous equivalent sections had been strained. The natural and ordinary meaning of s61 was held to require the Crown to prove three elements:

- that the defendant was in charge of a motor vehicle;
- that the fact that the defendant was in charge of or driving a motor vehicle caused the death of the deceased; and
- that the proportion of alcohol in the defendant's breath or blood exceeded the statutory prescribed limit.

The Court noted that causation does not import any notion of fault. The word "causes" must be given its conventional meaning in criminal law. The appeal was dismissed.

Provocation

R v Rongonui [2000] 2 NZLR 385 concerned the meaning of the words "a person having the power of self control of an ordinary person, but otherwise having the characteristics of the offender" in s169(2)(a) of the Crimes Act 1961. While the Court of five was unanimous in allowing the appeal on the basis that the Judge erred in ruling that the accused had to testify if she wished to lead evidence as to her state of mind, they could not agree on the correct application of this statutory test for provocation.

The majority, Richardson P, Blanchard and Tipping JJ, held that on reading s169(2)(a) it was clear that the power of self-control of the ordinary person must be the primary focus. The words "but otherwise" mean that in respect of self control the accused is deemed to be the ordinary person. The relevance of the characteristic of the accused is thus limited to its effect on the gravity of the provocation. In other words, the accused must exhibit the power of self-control of the ordinary person in the face of provocation of that gravity. If the accused's asserted characteristic demonstrates only a generally reduced power of self control in the face of any kind of provocation, it is not a qualifying characteristic and the defence should not be left to the jury. In taking such an approach the majority considered that it was following the cases of *McCarthy* and *Campbell* and avoiding a return to the difficulties which followed the decision in *McGregor*.

The majority considered that an approach in which the characteristic is held to be relevant simply because it generally reduces the accused's power of self-control was difficult, if not impossible, to reconcile with the statutory language. They noted that if such an approach was intended the statute would read "having the characteristics of the offender but otherwise having the self control of the ordinary person." While the majority recognised the problems inherent in the wording of s169(2)(a) it held that, whatever else it does, it ascribes to the hypothetical person the power of self control of the ordinary person. Tipping J (supported by the others in the majority) suggested the form of a jury direction.

The minority (Elias CJ and Thomas J) held that such a literal interpretation deprived the section of its purpose, which was to ameliorate the harshness of the wholly objective test. It was stated that the addition of the reference to "but otherwise having the characteristics of the offender" would not have effected any real change to the objective test if they were construed to exclude the characteristics from consideration in relation to the exercise of self-control. They instead considered that s169(2)(a) invests the ordinary man with the characteristics of the accused. Those characteristics may be taken into account in assessing whether the words and conduct of the victim were sufficient to cause the accused to lose self-control. It was accepted that such characteristics must go beyond ill-temper, impulsiveness, violence or intoxication which an ordinary man may experience, but this was the extent of the significance of the "self-control of an ordinary person". They went on to say that if the accused's characteristics are such as to deprive them of the ordinary power of self-control, they are made relevant to the sufficiency of the provocation under s169(2)(a). Elias CJ stated that she was following the approach taken in *McCarthy*. However, she considered that *McCarthy* had not departed from the interpretation advanced by the

Court in *McGregor*, which interpretation was rejected by the majority. The minority approach was seen to accord both with the structure of the objective test contained in the clause and the policy of the defence of provocation.

The appellant in *R v Makoare* [2001] 1 NZLR 318 was convicted of murder following a successful appeal and a retrial. The appellant stabbed the victim because he mistakenly believed that the victim had raped the appellant's girlfriend a few days earlier. At the re-trial the appellant claimed that he did not have murderous intent when he stabbed the victim, or that he was acting under provocation. The jury rejected both defences. He appealed on the grounds that the New Zealand law relating to provocation should be changed to be in line with English law as very recently stated by the House of Lords, and that certain expert evidence should not have been excluded by the trial Judge.

A Court of five dismissed both grounds of appeal. It declined to revisit the law on provocation, stated in *R v Rongonui*, pointing out that the English cases are based on a statutory provision that is worded differently from New Zealand's s169. *Rongonui* was a considered, very recent decision of the Court, and the Court thought it wrong to reopen the matter.

The Court also declined to overturn the trial Judge's ruling excluding expert evidence sought to be admitted in the appellant's defence. The evidence sought to establish that the appellant came from a sub-culture of violence and heavy drinking, in which the danger of putting knives in people was routinely underestimated. The Court held that this evidence was rightly excluded, as it was not supported by a body of reliable knowledge, and was not based on admissible evidence that sufficiently connected the evidence relating to the sub-culture generally with the behaviour of the appellant. There was not sufficient evidence to form a basis for the suggestion that the appellant was so de-sensitised to the effects of violence that he would not be conscious of the likely result of stabbing someone. Accordingly, the appeal was dismissed.

Bill of Rights – detention throughout alcohol testing procedures

In *Rae v Police* [2000] 3 NZLR 452 the appeal concerned the application of s23(1)(b) New Zealand Bill of Rights Act 1990 (the right to consult and instruct a lawyer without delay and to be informed of that right) after a positive evidential breath test and before an election is made to undergo a blood test.

In accordance with the provisions of the Land Transport Act 1998, and after speaking by phone with a lawyer, Ms Rae underwent an evidential breath test. This produced a result of 445 micrograms of alcohol per litre of breath, giving Ms Rae the option of requesting a blood test within 10 minutes. Ms Rae was advised again of her right to consult and instruct a lawyer but, as it happened, she was not able to make contact again with the lawyer, and she remained confused whether she should have a blood test. The 10 minutes elapsed without Ms Rae electing to have a blood test, and she was later convicted in the District Court on the basis of the evidential breath test. The

s23(1)(b) right would apply only if Ms Rae had been "arrested or detained under any enactment" during the 10 minute election period.

The Court held that Ms Rae had been detained during that period. Although on a literal reading of the statute, a person may be free to go during that 10 minute period, the statute had to be interpreted in a manner consistent with the Bill of Rights. The election to have a blood test resulted in the motorist being obliged to submit to the very invasive act of the taking of a blood specimen. Parliament was not to be taken to have created a situation in which the detention ceased, and the Bill of Rights protection was withdrawn, during the crucial time in which the election had to be made, only to revive again once the motorist had made the election. Richardson P, Thomas, Keith and Blanchard JJ also concluded that had Ms Rae not been lawfully detained, she would certainly have been actually (and therefore arbitrarily) detained by police in breach of s22 of the Bill of Rights.

In a separate judgment, Tipping J said that one could not rely on the Bill of Rights to "create" a situation of detention. But he agreed that Ms Rae had been lawfully detained during the 10 minute period, on the basis that on a reading of the provisions as a whole it would simply be illogical to have a hiatus of non-detention during that 10 minute period.

Because Ms Rae was lawfully detained during the 10 minute period, the majority concluded that she had the right to consult and instruct counsel during that period. They considered that the time reasonably taken in exercising that right should be excluded from the calculation of the 10 minutes, to enable an exercise of the right and a short period of reflection upon the lawyer's advice. The majority cautioned that the calculation of time by the police officer during this period should not be overly strict. Tipping J pointed out that the Bill of Rights could not somehow of itself extend the statutory period of 10 minutes. But he noted that s64(2) Land Transport Act required only reasonable compliance by police officers with the provisions of the Act. If an officer extended the 10 minute period to accommodate a motorist's right to take legal advice, Tipping J was of the opinion that although there was not strict compliance with the Act there would have been reasonable compliance.

The case was remitted to the High Court for it to determine whether Ms Rae's rights under s23(1)(b) had been breached.

Witness anonymity

In *R v Atkins* [2000] 2 NZLR 46 a Court of five dismissed appeals against witness anonymity orders made in the High Court under s13C of the Evidence (Witness Anonymity) Act 1997.

The four accused were charged with murder arising from an assault. They were either members or associates of a gang. The assault was witnessed by over 100 people and of these, eleven witnesses agreed to give evidence about the identity of the assailants

provided they received anonymity.

What test was to be applied in deciding s13C applications? The Court rejected the argument that the Crown had to prove a danger to the safety of the witness on the balance of probabilities. All that the word "likely" requires is a real risk or a distinct or significant possibility of harm. In terms of procedure the Court was required to make its own evaluation of the evidence properly withheld from the parties opposing the application.

The next issue was whether the anonymity orders in these circumstances would deny the accused a fair trial. The Court considered the potential disadvantages relating to the difficulty of testing the reliability and credibility of the witnesses. The Court stated that these concerns did not amount to a denial of a fair trial. Some of the disadvantages were inherent in the idea of an anonymity order and must have been contemplated by the legislation. Other effects of the orders could be minimised by the trial Judge's proper control of the proceedings and in particular the lines of questioning. Finally the legislation required the Court to consider, overall, whether it was in the interests of justice that the orders be made. The Court was satisfied that the trial Judge had exercised his discretion in this regard appropriately and would have come to the same conclusion itself.

An application by the Crown for a 13G order requiring the witnesses' images to be visually distorted for all viewers, including the trial Judge and jury was dismissed by the Court on the ground that there was no real evidence that the witnesses would be endangered by the jury knowing their faces. Importance was placed on the ability of the jury to see and hear the witnesses clearly as they are cross-examined. The Court also called attention to the assistance that independent counsel could provide in terms of s13E of the Act.

Lost search warrant application

R v Thompson and Birch [2001] 1 NZLR 129 involved an application for a pre-trial ruling on the consequences flowing from the loss of the affidavit in support of an application for a search warrant where a prosecution is brought in reliance on evidence obtained during a search executed pursuant to the warrant.

The District Court held that the search warrant should not be ruled invalid as a matter of public policy and that the Crown could adduce a reconstituted affidavit as evidence of the information placed before the Deputy Registrar. On appeal the Court of five dismissed the appeal noting that there is no legal requirement that the information on the basis of which a search warrant is obtained be retained. While the Court said that it is desirable that the Police retain a copy of their records in case the originals are lost, it held that the absence of the original record did not automatically render a search invalid. Where the original document is lost or unavailable, secondary evidence may be given in the usual way, and it will be for the court considering the challenge to the issue of the warrant to assess the weight to be given to that evidence.

A cautious approach to the secondary evidence should, however, be taken, recognising the possibility that the absence of the original record may hinder the accused in the exercise of a right pertaining to defence against a criminal prosecution. It appears that the foregoing is subject to there being no evidence of deliberate destruction of the affidavit or impropriety on the part of the Crown such as to constitute an abuse of process.

The Court found that the reconstituted affidavit was a fair and accurate reflection of the original, and that the evidence disclosed to the Deputy Registrar justified the issue of a search warrant.

Addressing the arguments based on the New Zealand Bill of Rights Act 1990, the Court said that if reliable secondary evidence is available, it then seems impossible to argue that the search under the warrant could be characterised by reason of the loss of the original record as an "unreasonable search and seizure" or that s24 or s25 of the Bill of Rights has been infringed.

Bill of Rights – admissibility of confession, delay

R v Whareumu CA204/00, 12 December 2000, concerned the admissibility of a "confession" allegedly given to the Police by Mr Whareumu during an interview conducted after his arrest, and after the time when he should, it was argued, have been brought before a Court, as required by s23(3) of the New Zealand Bill of Rights Act 1990. Mr Whareumu denied making the confession.

On the issue of delay in bringing the appellant to court, the Court held, as was accepted by the Crown, that a breach was made out. There was not however a "real and substantial connection" between the breach and the inculpatory statement. This finding was strongly influenced by Mr Whareumu's own explanation that it was the reading of the statement of his co-offender that led to the acknowledgement that he too had participated in the burglaries. The appeal was dismissed.

Bill of Rights - use of police informer with video camera

The issue of whether covert participant video recording constitutes an abuse of process or unreasonable search and seizure under s21 of the New Zealand Bill of Rights Act 1990 was considered by a Court of five in *R v Smith* [2000] 3 NZLR 656. The exclusion of the videotape evidence was denied at pre-trial application. The appellant was subsequently convicted of 23 drug charges and sentenced to 12 years imprisonment.

On the matter of abuse of process due to unfairness the Court considered that balancing the competing public interests in bringing criminals to justice and

maintaining proper standards by the Police required consideration of the totality of the Police conduct. The issue of fairness may then be decided by the Judge as a matter of judgment rather than by reference to the onus of proof. In this case the Court held that on the balance the evidence was properly admitted.

On the issue of s21 the Court followed *R v Fraser* [1997] 2 NZLR 442 in considering that usually where the conduct of the authorities is held to be reasonable it will not be material to decide whether or not there has been a search or seizure. In this case the Court held that, as for audio recording, participant recording is not inherently unreasonable where its purpose is to obtain a full and correct record and enhance the reliability of the evidence to be given. However it is still a matter of assessing time, place and circumstance. In this case the Court held that the evidence was properly admitted. The appeal was dismissed.

Inadmissibility of police officer's comments during video taped interview

In *R v Hunt* CA178/00, 26 September 2000, the appellant appealed against his conviction on one count of sexual violation by rape. The appellant submitted that evidence had been admitted which was unfairly prejudicial, that his trial counsel had failed to have the evidence excluded and that the trial Judge had failed to direct the jury on how they should treat the evidence. This evidence formed part of a video interview of the appellant with a police officer.

The Court held that the video interview could have affected the jury's assessment of credibility, even though the appellant gave evidence himself. The officer was described in submissions for the appellant, with which the Court agreed, as raising his voice, becoming sarcastic, referring to his own sexual behaviours with his wife, swearing, abusing the appellant and delivering a powerful but legally irrelevant set of supposed beliefs and opinions.

The Court stated that this material should not have been placed before the jury, but once it was, the jury should have been told that the assertions and opinions of the officer were not evidence and should be ignored to the extent they were not adopted by the appellant. Assessment of the credibility of the appellant as against that of the complainant was the only issue for the jury. The Court concluded that they were left with real concern for the safety of the verdict, and accordingly allowed the appeal and ordered a new trial.

In *R v Mahutoto* CA342/00, 13 December 2000, the Court referred to *Hunt* and commented that the police officer should not have intruded his own opinion into the evidence or introduced what an offender had had to say to him which was inadmissible hearsay against another offender. The Court expressed concern that this inadmissible evidence of a police officer giving his opinion of events which were denied by the offender being interviewed was introduced by the police officer in Court. However, the Court considered that in the circumstances the admission of the evidence of the police officer's opinion did not amount to a miscarriage of justice.

Breath and blood alcohol prosecutions – roles of Judge and jury

Third and subsequent convictions for drunk driving are indictable offences and accordingly those charged with such offences have the right to elect trial by jury. In *R v Livingston* [2001] 1 NZLR 167 a Court of five was asked to consider the respective roles of Judge and jury in blood and breath alcohol prosecutions. While the Court's ultimate conclusion was that it had no jurisdiction to decide the applications at the pre-trial stage, it did go on to offer guidance on the primary points arising.

The elements of an offence under s56(1) of the Land Transport Act 1998 are:

[a] driving or attempting to drive,

[b] on a road,

[c] while the proportion of alcohol in the breath exceeds 400 micrograms of alcohol per litre of breath,

[d] as ascertained by an evidential breath test undergone under s69.

The first three elements were held to be questions of fact for the jury. The Court held that in practical terms everything would usually turn on whether the ostensible result was "ascertained by an evidential breath test undergone under s69."

This concept was said to contain two discrete ingredients; first there must have been an evidential breath test as defined in s2, second it must have been undergone under s69. The first ingredient could be further broken down as to whether the device is of an approved kind and also whether it has been operated in an approved manner. The Court stated that when an approved device is operated in an approved manner, the statutory intent must be that the result is generally presumed to be reliable.

However, the Court went on to say that there may be occasions when it is not the general reliability of the device or its operation which is in issue, but rather a specific complaint that the device did not for some particular reason produce a reliable result on the particular occasion. Lack of proper maintenance or damage to the machine prior to the test were given as examples. In such a situation the Court held that it must be open to the person accused to challenge the reliability of the device in relation to their particular test.

Whether the device was of an approved kind, or whether it was operated in an approved manner, are definitional issues and as such are to be treated as matters of law, even if they involve issues of fact, they are for the Judge to decide if put in issue. The Judge determines any issue of operator error, any issue of mechanical error is for the jury. However in order to have the point left to the jury the accused must satisfy the Judge that the jury could be left with a reasonable doubt about the reliability of the device. If there is such a foundation, the Crown must establish reliability beyond reasonable doubt.

Whether an evidential breath test has been undergone under s69 requires the Crown to establish, if the matter is properly put in issue, that all the necessary procedural steps involved in s69 have been properly carried out. These are questions of law, or at least questions of mixed fact and law. They are akin to matters of admissibility as they govern whether the test is 'evidential.' As such, they are for the Judge and must be proved by the Crown on the balance of probabilities.

Finally the Court considered the potential for the Crown to be ambushed at trial by an undisclosed challenge to the breath alcohol result. The Court stated that there was no basis for requiring the defence to disclose its hand in this respect before trial. However the Court went on to say that if no or insufficient warning has been given of a particular line of defence, being something the Crown could not reasonably have anticipated, the Crown will generally be entitled to call evidence in rebuttal. The trial could be adjourned for this purpose or if necessary the jury discharged under s374(1) of the Crimes Act 1961 and a retrial directed.

Sentence indications by a Judge prior to guilty plea

The Court considered the issue of sentence indications in *R v Gemmell* [2000] 1 NZLR 695. At a pretrial hearing in the District Court, the Judge gave a sentence indication of nine to twelve months imprisonment. The appellant subsequently pleaded guilty and was sentenced to two years imprisonment. The appellant appealed against his conviction on the ground that he based his decision to plead guilty on the sentence range indicated by the Judge. The Court upheld the appeal, set the convictions aside and remitted the matter to the District Court for the appellant to have the opportunity to plead again.

The Court held that the departure from the prior indication was so great that it was a miscarriage of justice to induce the guilty plea with the indication and then impose a more severe sentence without offering the defendant the opportunity to seek leave to set aside the guilty plea. The discrepancy between the indication and the actual sentence appears to be due to the Judge considering tariff authorities, and revising his initial consideration.

The Court considered that such sentence indications present difficulties. In principle it seems inappropriate for matters of sentence to have any judicial consideration prior to conviction and without the aid of essential pre-sentence and victim impact reports. Any indication given in such circumstances must be so qualified as to be no real indication at all and certainly no reliable basis on which to plead. It is the role of counsel to advise on possible sentence implications when assisting an accused in deciding how to plead.

Suspended sentences in cannabis dealing cases

In *R v Andrews* [2000] 2 NZLR 205 a Court of five considered an application for leave to appeal by the Solicitor-General concerning the suspension of sentences of imprisonment for cultivation of cannabis and possession of cannabis for supply.

At sentencing the Judge held the cultivation was at the lower end of category two *R v Terewi* [1999] 3 NZLR 62. Prompt guilty pleas to the cultivation charge reduced the starting point of two years imprisonment to 18 months. The Judge then considered whether there were any "special circumstances in terms of s21A of the Criminal Justice Act 1985" which might enable the sentences to be suspended. In Mr Andrews' case the Judge identified his post-arrest addiction rehabilitation efforts and longstanding problem with arthritis as justifying suspension. Mr Devitt's suspension appears to have resulted from a desire to avoid disparity in sentencing what was a joint operation. The respondents were each sentenced to a total of 18 months imprisonment, suspended for two years, together with periodic detention for six months.

The Court rejected these factors as sufficient to justify suspension. The Court endorsed *Terewi* and considered it established that if the offending involves any commercial element at all the power to suspend may be exercised only in truly exceptional circumstances. As such the Court held that the Judge was in error and the sentences should not have been suspended. However the Court considered it the respondents' mischance to have been the vehicle to reinforce the need for exceptional circumstances before lower end category two sentences of imprisonment may be suspended. Accordingly, although the Solicitor-General was granted leave to appeal, the appeals themselves were dismissed.

Sentencing for cannabis cultivation

In *R v Edbrooke* [2000] 3 NZLR 360 the Court clarified that a minimal commercial element may not be sufficient to raise a cannabis offence into category two of *R v Terewi* [1999] 3 NZLR 62. The appellant and her partner grew cannabis for their personal use. Following sales to friends both were convicted of cannabis related offences and sentenced to five months imprisonment.

The sentencing Judge considered himself bound by the decision of the Court of Appeal in *R v Andrews* [2000] 2 NZLR 205 to place the offending within category two of *Terewi* even though the commercial element in the case was very small. This led to a starting point of 15 months. He then deducted five months for the guilty plea and five months for mitigating circumstances, resulting in a five month sentence.

The Court considered that treating the appellant and her partner on an equal footing was an error. The Court perceived her partner as the driving force in the cannabis operation. Considering the appellant discretely the Court perceived imprisonment as unduly harsh. The classification of the appellant's involvement in the enterprise, and minimal sales among a group of friends, as "commercial" was found to be an

overstatement.

Having regard to this and other matters the Court found a non-custodial sentence would have been appropriate. The appeal was allowed and a sentence of five months periodic detention substituted.

Taking into account the prosecutor's stance at sentencing on Crown appeal

In *R v Tipene and Edmonds* CA309/00 and 310/00, 30 November 2000, the Court was concerned with the ability of the Solicitor-General to appeal a sentence on the ground that it was manifestly inadequate, when the Crown itself had submitted to the sentencing Judge that the starting point used by the sentencing Judge was appropriate.

The two accused were convicted in relation to the death of the young daughter of one of the accused following prolonged abuse of the child. Ms Edmonds had been sentenced to five years imprisonment on a charge of manslaughter, and Ms Tipene to 18 months imprisonment on a charge of ill-treating the child in a manner likely to cause her bodily harm. The facts surrounding the death were described by the Court as tragic.

At sentencing, Crown counsel submitted that an appropriate starting point for constructing a sentence for Ms Edmonds was eight years imprisonment. The Judge adjusted that to seven years for Ms Edmonds and two years for Ms Tipene and then reduced the sentences for the guilty pleas to five years and 18 months respectively. The Solicitor-General submitted on appeal that the starting points should have been much higher.

The Court concluded that the Crown is not debarred on appeal from taking a stance different from that taken at first instance. However, the fact that the Crown had taken a particular stance, with which the sentence imposed was not inconsistent, is relevant to the appearance of justice when the appropriateness of the sentence is considered on appeal. But there may be cases where, notwithstanding this appearance of injustice, an appellate Court may be unable to avoid the conclusion that there is an even greater perception that justice has gone wrong because the sentence imposed was so manifestly inadequate.

In this case, the Court considered the duration of the cruelty inflicted on the child, the nature of the injuries and of the neglect by the child's mother and caregiver, were of the most serious degree. The sentencing Judge had taken a much too lenient view of the offending, and this resulted in the sentences being manifestly inadequate. The appropriate starting point for Ms Edmonds was not less than 12 years, and for Ms Tipene, not less than four years. When the accuseds' early guilty pleas and the fact that this was a Solicitor-General's appeal (on which it is not appropriate to adjust sentences to more than the minimum extent necessary to remove the element of manifest inadequacy) were taken into account, the appropriate sentences were considered to be eight years imprisonment for Ms Edmonds and two years three months imprisonment for Ms Tipene.

Impact of assistance to Police on sentencing

The appropriate reduction in sentence for assistance to Police was discussed in *R v S* CA236/00, 30 October 2000. *S* was convicted on one charge of attempted aggravated robbery, two charges of aggravated robbery, one charge of impersonation, one charge of aggravated wounding and one charge of assault with intent to facilitate flight. Taking into account *S's* guilty plea on all charges and his assistance to the Crown in the investigation of a murder the Judge sentenced S to four years imprisonment for the first aggravated robbery and six years for the second, to be served cumulatively. For the rest of the offences *S* was sentenced to two years imprisonment on each charge to be served concurrently as between themselves but cumulatively upon the aggravated robbery sentences. This resulted in a total sentence of 12 years imprisonment.

Applying *R v Mako* [2000] 2 NZLR 170, the Court considered that the appropriate starting point for the aggravated robberies to be 14 years imprisonment. The guilty plea alone was seen to warrant a discount of two to three years.

Significant allowance was also required to recognise the value to the State of the risks and consequences for *S* of his assistance to the Crown. Following *R v Cashel* CA 62/96, 27 May 1996, the Court mentioned the risk of reprisals, more onerous sentence requirements, the gravity of the offending (both the offender's and the assisted offence) and the nature, extent and quality of the assistance as relevant factors as to the amount by which a sentence is to be reduced. The Court considered a reduction of three to four years to be appropriate, in addition to the allowance for the guilty plea. The appeal was allowed and an effective total sentence of eight years was substituted.

Home invasion sentencing

The Crimes (Home Invasion) Amendment Act 1999 requires home invasion to be treated as an especially aggravating feature, with more weight than was previously given to it. In *R v La'ulu* CA560/99, 20 March 2000, the Court provided guidance on the method to be applied when sentencing for crimes involving home invasion where there is no fixed starting point for the offence.

Mr La'ulu was convicted of counts of aggravated robbery, kidnapping and arson, on all of which he was sentenced to concurrent terms of seven years imprisonment. The offences occurred when the appellant entered an occupied house. The Solicitor-General applied for leave to appeal.

The Court noted that it was important to take account of the new legislation on home invasion crimes, but care must be taken to avoid double counting (counting twice the aggravating feature of the offence being committed in a home). The sentencing process undertaken by the Judge should therefore be carefully articulated. The Judge need not specify exactly what components of imprisonment relate to the home invasion, but should make clear that there has been a conscious recognition of that

factor and the need to avoid double counting.

In some cases, it would be possible for the sentencing Judge to imagine the commission of the same offending, with all its other elements, in a place other than a home. The Judge could then determine the appropriate sentence on that assumed basis, and add an additional penalty for the home invasion, having regard to the manner in which Parliament has adjusted the relevant maximum sentences in the home invasion legislation.

But in cases like the present, it was not possible to take that approach, because it was not sensibly possible to envisage the events occurring except in the setting of a home. In such cases, the preferable approach is for the Judge to assess the sentence that would have been imposed before the home invasion legislation and then, by reference to the increased maximum sentence(s), make an upwards adjustment ("topping up" the sentence). The adjustment should be made with an expressed recognition that it takes into account that there is within the first figure arrived at an element of punishment for invasion of the home.

In the present case, prior to the home invasion legislation, an appropriate sentence for the offending would have been 11 or 12 years. This sentence would have taken the home invasion into account. Having made allowance for that fact, the additional penalty warranted by the home invasion (having regard to the relevant maximum penalty increases for home invasion contained in ss17B and 17C Crimes Act 1961) would increase the sentence to at least 13 or 14 years. After making a substantial allowance for the mitigating factor (an early guilty plea), a sentence of at least 10 years was warranted. The appellant's seven year sentences were therefore replaced by 10 year sentences.

Precise location of home invasion offence

The definition a "dwellinghouse" was the question before the Court when reviewing the application of s17B(1) of the Crimes Act 1961 in *R v Clarke* [2000] 3 NZLR 354. The appellant was convicted of one count of injuring with intent and one count of theft. On sentencing the trial Judge found that the injuring with intent involved home invasion and subsequently applied s17B(1) in handing down a four and-a-half year sentence for this offence.

In order to qualify as a "dwellinghouse" a building or structure or part of it is required to be "used by the occupant principally as a residence". The premises on which the offence took place comprised a record and book shop and the victim's living area. Access to the living area was through the store. The incident occurred late one night in the shop portion of the premises as the victim returned home. The trial Judge concluded that the offence was committed in a dwellinghouse because the victim regarded this building as his place of accommodation and returning that night intended it to be principally his residence.

On appeal the Court considered that Parliament clearly contemplated that the new home invasion provisions were to apply only to those parts of the building used principally as a residence. Whether this applies to the location of the offence must be assessed objectively on the facts of the case. The trial Judge's reliance on the subjective belief of the victim was rejected. The Court held that the front part of the premises was clearly a shop while the rear clearly a residence. The mere fact that access to the residence was through the store did not alter the shop's essential nature. The Court also held that premises do not change their character over the course of the day.

The correct approach to sentencing outside home invasion legislation is the application of traditional sentencing guidelines. Location has always been a factor in sentencing. The fact that the location does not qualify as a dwellinghouse so as to invoke the increased home invasion sentencing regime does not mean that the same considerations, such as privacy, that underpin that regime may not be considered. Judges must continue to apply sentencing practice prior to the home invasion legislation to the same offending subsequent to its enactment.

The appeal was allowed. The four and-a-half years imprisonment was quashed and a sentence of three and-a-half years substituted. This represented a six month increase on the sentence the trial Judge said he would have imposed had s17B(1) not been applicable.

Manufacture of methamphetamine – categorisation of offending

R v Atkinson, Williams and Wilson CA546/99, 553/99 and 69/00, 19 April 2000, involved a direct application of the *R v Wallace and Christie* [1999] 3 NZLR 159 sentencing guidelines for offending involving manufacture, supply and possession of class B controlled drugs.

Each appellant had been found guilty of manufacturing methamphetamine in the garage of a residential property. There was no evidence of the precise amount of the drugs manufactured, nor of their strength or street value. However the trial Judge considered that there was evidence of a significant operation of some sophistication extending over a period of approximately two weeks and that it could be safely inferred that significant quantities of methamphetamine were produced. The Judge categorised the offending as commercial activity of some considerable scale, towards the bottom of category one or just over the top of category two, and took a starting point of nine years.

The Court held that the offending had been miscategorised. The Court held that it was implicit in the way the second category in *Wallace and Christie* was expressed that the first category must involve "massive quantities" or "prolonged dealing." Neither had been established on the facts of the case. It was held that the offending was properly categorised as in the upper half of category two, with an appropriate starting point of seven years. The appellants' sentences were reduced, to varying degrees, in light of this recategorisation.

Principles applicable in considering the availability of home detention

R v Barton [2000] 2 NZLR 459 involved an appeal against conviction on a charge of possession of cannabis for supply and against the refusal of leave to apply for release into home detention following the imposition of a sentence of nine months imprisonment. The Court refused leave to appeal out of time on the conviction appeal, as the Court considered that there was no concern for a miscarriage of justice. The Court allowed the appeal against the refusal of leave to apply for release into home detention, and granted such leave.

The appellant was found with two lots of cannabis in his car, along with the sum of $1,750 on his person. While it was common ground that one lot was for his personal consumption, the Crown maintained that the second lot of 18 "tinnies" was for supply. The appellant was found guilty of one charge of possession of cannabis for supply and sentenced to nine months' imprisonment.

The Court held that an order either granting or declining to grant leave to apply to a District Prisons Board for release to home detention was a sentence and an application for leave to apply for home detention constituted an appeal against sentence. The Court then considered the purpose and scope of s21D of the Criminal Justice Act 1985, which confers a wide discretion on the sentencing Judge to grant leave to apply for home detention. This discretion is not to be fettered by any strict guidelines.

The Court recognised that a decision under s21D(3) amounted to the removal of a barrier to application for home detention rather than the granting of home detention. The role of the Court was to sift out those cases where it can clearly be said that home detention was not relevant. In considering whether or not to grant leave, s21D(3) was not to be seen as an exclusive code of matters the Court could consider. Matters such as the accused's criminal history and age could also be considered. It was not expected, however, that Judges would give extensive reasons for the grant or refusal of leave and appellate Courts would not readily interfere with sentencing Judges' discretionary assessments. The Court commented that the approach to the jurisdiction is evolving satisfactorily.

In this case, the sentencing Judge had placed too much emphasis on the gravity of the offence and on the previous conviction. The nature of the offending was not such that home detention would have been inappropriate.

Minimum non parole periods

In *R v Namana* CA335/00, 27 November 2000, the appellant challenged a minimum non-parole period of 18 years imposed following a plea of guilty to the murder of a Police Officer.

The sentencing Judge followed the required two-step approach in considering the imposition of a minimum sentence under s80 of the Criminal Justice Act 1985. The first step was an assessment of whether the circumstances were sufficiently serious to justify a minimum non-parole period of more than 10 years. This requires an evaluation of the whole of the circumstances surrounding the murder. In this case the Judge found the threshold to have been met. The extraordinary brutality of the infliction of the fatal injuries was cited as one factor. Another was the offender's knowledge that the deceased was a Police Officer carrying out his duty.

The second step was the determination of the duration of the minimum period. The Judge considered victim impact statements, the offender's age, his plea of guilty, his previous offending, the brutality of the attack and the intention and knowledge that he was killing a Police Officer acting in the course of his duty. These factors were found to require strong denunciation and a clear message of deterrence so as to justify the 18 year term.

On appeal the Court found the imposition of a minimum term to be part of the sentencing process. As such victim impact statements must necessarily be included in consideration, as they are in the sentencing of a finite term of imprisonment. The Court considered that victim impacts could also be perceived as "within the circumstances of the offence" in the s80(2) assessment. The Court found the statements had been properly considered and weighed in this case.

The brutality of the attack was also perceived by the Court as sufficiently serious to justify an increased minimum period of imprisonment even if the deceased had not been a Police Officer. This finding was considered to be in accordance with Parliament's intent in lowering the threshold for the imposition of a minimum non-parole period from circumstances "so exceptional" to those "sufficiently serious". This change was accepted as intended to widen the section to embrace a wider range of circumstances and thus apply to a great number of cases. However the Court rejected the suggestion that this means that there should be an increase in the level of imprisonment imposed under s80. The 1999 amendment altered only first step of the test – the threshold for the imposition of an increased non-parole period – not the test for its duration.

The public interest in protecting Police from unwarranted attacks while discharging their duties was also recognised as justifying the sternest denunciation and a significant deterrent sentence.

The Court then considered the question of duration. All of the factors referred to in justifying the imposition of an increased minimum non-parole period, as well as the offender's limited remorse for the killing, were considered to put the sentence within the range open to the Judge. While this case did not involve the multiple offending which may have justified such a sentence in the past the Court held that the killing of the Police Officer justified emphatic denunciation in this case.

However the appellant's guilty plea did compel the Court to disturb the sentence. Guilty pleas can be a relevant factor in determining minimum periods of

imprisonment under s80, with the exception of preventive detention. In this case, while the trial Judge had adverted to the guilty plea, it was not clear that an allowance had been made for it. If an allowance had been made the Court considered that the minimum period would otherwise have been in the order of 20 to 22 years. Considering that such a sentence would have been self-evidently inordinate the Court concluded that no allowance had been made. As such the Court determined that an allowance must be made, however the reduction was to be less substantial that may ordinarily be the case due the offender's lack of any real remorse.

The appeal was allowed to the limited extent that the minimum 18 year non-parole period was quashed and a minimum period of 16 years substituted.

Name suppression pending conviction appeal

Assistance in determining if and when a suppression order should be made pending a possible retrial was provided by the Court in *B v R* CA308/00, 1 September 2000. The appeal concerned the revocation of an order prohibiting the publication of the appellant's name as a Crown witness in a trial. The revoking Judge had concluded that the possibility of success on appeal was remote and that fair trial considerations did not justify the continuation of the suppression order.

The Court rejected such speculation on the outcome of an appeal as an unsound approach. A Judge could refuse a suppression order if he or she considered the appeal was not genuine but one undertaken for the very purpose of delaying the publication of the purported appellant's name. While Courts should continue their tendency to be firm in declining to suppress the name and information in the context of an appellant seeking a new trial, some flexibility must still be allowed for exceptional cases. Suppression orders could be properly be made where the prejudice at any possible retrial of the publication of the identity of the applicant would be so great that it could not be met by adopting measures to counter that prejudice with the result that any appeal would be rendered nugatory.

Finding that this was such an exceptional case the Court made orders to continue the orders that had been revoked.

✧✧✧✧