Court of Appeal Report for 2001

Appendices

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1. Introduction

Overview

The Court of Appeal, located in Wellington, has existed as a separate court since 1862. Until 1957 it was composed of Judges of the Supreme Court sitting periodically in panels. In that year the Court of Appeal was reconstituted as a permanent court separate from the Supreme Court. It now consists of the Chief Justice, the President and six other permanent members.

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

Civil decisions on first appeal from the High Court are in general appealable to the Judicial Committee of the Privy Council, in some cases as of right, in others with leave either of the Court of Appeal or the Committee. Criminal decisions may be appealed with the leave of the Judicial Committee.

In 2001 the Court dealt with 413 criminal and 180 civil cases. The 2000 figures were 509 and 162. One criminal and five civil cases awaited judgment at the end of the Court year.

Over the year, the Court dealt with 270 miscellaneous matters, up 49 from 2000. As usual, notices of discontinuance comprised the largest single group: 70 such notices were received this year, compared with 62 in 2000. Forty-nine appeals were deemed to be abandoned in 2001 (the 2000 figure was 42). This drop-off rate, of about one-third of appeals filed, is consistent with figures collected over the last three years. No settlements were advised to the Court in 2001: it no longer seems to be usual practice to do so, none being reported in 2000 either.

The Court ended the year with 55 civil cases awaiting hearing (compared with 47 in 2000). Forty of these had confirmed fixture dates. The remaining 15, eight of which had been filed in December, will be assigned fixture dates early in the new year.

There was a further drop-off in the number of criminal appeals filed. From 478 in 2000, only 431 were received at the Court in 2001. The number of pretrial appeals declined again: 52 such appeals were filed this year, from a peak of 102 filed in 1999.

As a proportion of the whole criminal workload, sentence appeals also dropped:

	1997	1998	1999	2000	2001
Appeals against conviction, or conviction and sentence	233	205	221	196	194
Appeals against sentence only	203	164	193	188	160
	46%	44%	46%	49%	45%

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

The Criminal Appeal Division continued to handle a large portion of the criminal caseload. For reasons that are discussed below, its usual throughput of about eight cases a week rose substantially above that figure for some months of the year. The Court is grateful for the support and expertise supplied by the High Court Judges who participated in divisional sittings and assisted with a very heavy workload of appeals.

Timeliness in processing criminal appeals was a major issue for the Court this year. In 2000 it met its usual standards of disposing of about 75% of its cases within 90 days and 90% within 120 days. This year it met the first standard in 55% of the cases, and the second in 78% of them. In addition, in 2000, it was able to have 90% of its cases ready for hearing and assigned a fixture date within 30 days of filing. By contrast, in 2001 in only 47% was that standard reached and it took 95 days for 90% of appeal cases to be assigned a fixture. The change is entirely due to the changed responsibilities, for both counsel and now the Legal Services Agency, in legal aid processing, but it has brought about a level of delay in the criminal justice system that the Court finds hard to accept.

Those changed responsibilities also explain why, at the end of 2001, only 46 of the 134 cases comprising the current criminal caseload had a fixture date. Twenty–two had been filed in December, of which 14 had, to the knowledge of the Court, requested legal aid. Two of the remaining eight cases had been given a fixture. Of the 68 filed before the end of November that lacked a date of hearing, 48 were awaiting a legal aid decision. Early in 2002 the Legal Services Agency was able to reduce its backlog which should allow the Court to catch up significantly by mid–year.

This slower throughput had two effects on the workload of the Court. Twenty–five more cases were on hand at the end of 2001 than at the end of 2000. But because of the special arrangements which operated for most of 2001, awaiting the passage of new criminal appeals legislation, the number of oral hearings needed to move the cases through the system was 338 compared with 207 in 2000. The Court thus held more sittings to deal with fewer appeals filed, but still ended the year with more cases on the books than in previous years.

On the civil side, seven cases whose applications for fixture came in before 1 December were without fixtures at year end. All are being monitored in the Registry and at least four may, for various reasons, not proceed to a hearing.

Programme for Court sittings

The Court sat in benches of three, five and, in one case, seven judges. In the divisional Courts the contribution of High Court Judges amounting to 89 judge weeks was of considerable significance and is much appreciated. They showed great flexibility and stamina as the fixtures list for divisional Courts often combined a heavy complement of criminal and one–day civil cases. This was particularly valued during May, June and November when 52, 56 and 43 cases – the vast majority of them criminal – were heard.

The now usual monthly cycle of a five–Judge fortnight at the beginning of the month, followed by a fortnight for three–Judge Courts and divisional sittings in either Wellington or Auckland, was followed this year. Two divisional court weeks were held in Christchurch in 2001, applying the method used in 2000 of establishing "anchor" cases in the civil jurisdiction well in advance and then assembling other criminal hearings as local cases became ready.

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

	2000	**2001**
Permanent Court – 7 Judges	1 criminal case	1 criminal case
Permanent Court – 5 Judges	50 (25 civil and 25 criminal cases)	47 (30 civil and 17 criminal cases)
Permanent Court – 3 Judges	104 (79 civil and 25 criminal cases)	110 (86 civil and 24 criminal cases)
Civil Appeal Division	58 cases	64 cases
Criminal Appeal Division	263 cases	285 cases

Year–end workflow statistics are:

	1998	**1999**	**2000**	**2001**
Criminal appeals awaiting hearing as at 31 December	115	143	109	134
Civil appeals set down for hearing as at 31 December	55	54	47	55

The 2002 programme for appeal hearings is in place and will follow much the same pattern, although it relies heavily on the Criminal Appeal Division to clear the more aged criminal cases from 2001. The programme over the early part of 2002 has been adjusted to take account of this factor. In addition the usual provision has been made for any urgent cases that may emerge for the attention of the Court immediately after the summer recess.

Changes in legislation, rules and practice notes

Amendments to the Crimes Act 1961, in force from 10 December 2001, clarified and regulated the Court's powers to deal with appeals on the papers. For most of the year, in anticipation of these new procedures, the Court had been offering oral hearings to appellants in all but a very few cases; the new legislation empowers a single judge of the Court to decide whether a case should proceed by this means or by way of a hearing on the papers. If the latter course is followed, the processes by which written submissions are received and dealt with, and judgments made, are now set out in Part

XIII of the Act. More details are supplied in the new Rules. Copies of the Practice Note and the most frequently used forms for criminal appeals have been widely distributed to prisons, the profession and other courts. The Practice Note is published in *Law Talk* 575 (28 January 2002), in Garrow and Turkington *Criminal Law* 1191 (Issue No 60 February 2002) and will be published in the NZLR.

On the civil side rules were made raising fees and legislation conferred power on the Registrar to waive fees in cases of undue hardship or where it is in the public interest to do so. Judges were granted the power to review the Registrar's decision. The new powers came into force on 1 October and for the three months until December 2001 13 applications were received. Nine were granted on hardship grounds, including one on review; two were granted on public interest grounds and one was declined. One application was pending at the end of the year.

Members of the Court

The Chief Justice, the head of the New Zealand Judiciary, is a member of the Court of Appeal by virtue of that office and sits periodically as well as sitting in the High Court. The President and six other permanent appellate judges constitute the full–time working membership of the Court.

The Chief Justice is the Rt Hon Dame Sian Elias, GNZM. She studied law at the University of Auckland and Stanford University in the United States, before practising as a barrister in Auckland. Dame Sian was appointed a Queen's Counsel in 1988 and was heavily involved during her career at the bar in litigation concerning the Treaty of Waitangi. She was appointed a Judge of the High Court in 1995 and became Chief Justice in 1999.

The President of the Court of Appeal is the Rt Hon Sir Ivor Richardson. Sir Ivor graduated LLB from Canterbury University College and LLM and SJD from the University of Michigan. Before his appointment to the then Supreme Court in February 1977 he had been a partner in an Invercargill law firm, Crown Counsel at Crown Law Office, Professor and Dean of the Victoria University of Wellington Law School and partner in a Wellington law firm. He was appointed a Judge of the Supreme Court in May 1977 and of the Court of Appeal in October 1977. He became President in February 1996.

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

Rt Hon Justice Sir Kenneth Keith, KBE, studied law at the University of Auckland, Victoria University of Wellington and Harvard Law School. Before his appointment as a Judge of the Court of Appeal in April 1996 he had been employed in the New Zealand Department of External Affairs and the United Nations Secretariat, a member of the Law Faculty of Victoria University and a member and, at the time of his appointment, President of the New Zealand Law Commission.

Rt Hon Justice Blanchard holds LLM degrees from Auckland and Harvard Universities. He was a partner in the Auckland law firm Simpson Grierson and director of several listed public companies until his appointment as a Judge of the High Court in 1992. He became a Judge of the Court of Appeal in 1996.

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

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

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

Justice Anderson replaced Rt Hon Justice Thomas who retired in September 2001. He had been a Judge of the Court since 1995 and of the High Court since 1990. In the New Year's Honours list 2002 he was awarded DCNZM for services to the Court of Appeal.

In 2001 the Chief Justice sat in the Privy Council for two weeks in January–February and Justice Keith for a month in October–November.

Members of the Court delivered papers and lectures to legal, university and other audiences in New Zealand and overseas. Four members of the Court gave papers to a seminar organised by the Legal Research Foundation now published in Rick Bigwood (ed) *Legal Method in New Zealand* (2001). Three Judges gave papers to the combined LAWASIA/New Zealand Law Conference in Christchurch.

Other audiences were the Fourth Worldwide Common Law Judiciary, Vancouver; Trust Law Conference; Inland Revenue Department Conference; Australasian Banking Conference; the Jury Trial Judges' Conference; the International Law Association (UK Branch), London; the Constitution Unit, London; the Public Law Group at Cambridge University; a seminar on CER, Auckland; and a Pacific Regional Red Cross/Red Crescent seminar, Auckland.

Three members of the Court attended a seminar organised by the Australian Institute of Judicial Administration on Appellate Courts. One attended a Conference on Genetic Engineering and the Law in Hawaii.

2. Statistics

Criminal appeals

	Hearings	Allowed	Dismissed	Dismissed on the papers
Conviction & Sentence	110	*31	68	7
Conviction	71	22	36	9
Sentence	112	43	59	10
S–G Appeals	18	16	2	0
Pre Trial	49	10	31	7
Other	12	1	6	1
Sub Total	372			
Abandonments/No Jurisdiction	52			
Total	**424**	**123**	**202**	**34**

NOTE: The number of cases heard does not equal the number allowed and dismissed. Three cases required two decisions and 11 additional hearings were held. In addition five cases were heard and adjourned. One case heard in 2000 was decided in 2001 and one judgment for a 2001 case is reserved.

*Includes 14 cases where the appeal against sentence was allowed or was reduced and three where conviction on one count only was set aside: appeals on the other counts in the case were dismissed.

Criminal caseload

	Permanent Court	CAD	On the papers	Abandonments / No Jurisdiction	Total
Total	42	285	34	52	413

Civil appeals

	1998	1999	2000	2001
Motions filed	318	308	301	296
Appeals set down	179	185	149	203
Appeals heard	164	193	160	185
Appeals allowed	62	58	64	76
Appeals dismissed	99	130 + one adjourned sine die	94 + one adjourned sine die	107

NOTE: the number of cases heard does not equal the number allowed and dismissed. Five cases required additional hearings. Judgments in five cases were reserved, one case had two judgments, three decisions were given on the papers and six judgments came from cases heard in the previous year. The figures given also exclude four costs decisions and nine cross–appeals, one of which was allowed and eight dismissed. Five decisions concerned procedural or interlocutory matters not dealt with as miscellaneous motions.

Civil caseload

	Permanent Court	CID	Discontinued	Abandonments	Total
Total	116	64	70	49	299

Privy Council appeals

Date PC Judgment	Parties	Result	Whether NZ Judge sat
24.01.01	CIR v Auckland Harbour Board	Dismissed	Lord Cooke
1.02.01	Valentines Properties Ltd v Huntco Corporation Ltd	Allowed	Elias CJ
7.03.01	Dilworth Trust Board v Counties Manukau Health Ltd	Dismissed	Lord Cooke
8.03.01	The Contradictors v The Attorney-General	Dismissed	No
10.04.01	Harley v McDonald Glasgow Harley v McDonald	Allowed	Elias CJ
10.04.01	O'Neil & McDougall v CIR (in NZ: Miller & Ors v CIR)	Dismissed	Elias CJ
3.05.01	Wrightson Ltd v Fletcher Challenge Nominees Ltd	Dismissed	No
5.06.01	Richard Dale Agnew v CIR	Dismissed	No
2.07.01	Manukau Urban Maori Authority v Treaty of Waitangi Fisheries Commission Reuben Brian Perenara v Treaty of Waitangi Fisheries Commission	Dismissed	No
1.11.01	McGuire & Makea v Hastings District Council & Maori Land Court	Dismissed	Lord Cooke
27.11.01	Kena Kena Properties Ltd v Attorney-General	Dismissed	No
4.12.01	CIR v Colonial Mutual Life Assurance Society Ltd	Dismissed	Keith J
11.12.01	Bagnall & Maher v Mobil Oil NZ Ltd	Dismissed	Keith J
18.12.01	C J Brazier & Brazier Scaffolding Ltd v Bramwell Scaffolding (Dunedin) Ltd, B L Harvey & Bramwell Scaffolding Ltd	Dismissed	No

Total Heard	14
Total Dismissed	12
Total Allowed	2
Appeals from Courts of more than 3 Judges	9 (1 allowed 8 dismissed)
Appeals from Courts of 3 Judges	5 (1 allowed 4 dismissed)

Over the past five years 11 out of 41 appeals succeeded in whole or in part. Of the 23 appeals from five-judge courts four succeeded; of the 20 from three-judge courts seven succeeded.

3. Major Cases

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

Formation of contract

In *Electricity Corporation of New Zealand Ltd v Fletcher Challenge Energy Ltd* CA132/00, 10 October 2001, ECNZ successfully appealed against a declaratory order of the High Court that a Heads of Agreement (HoA) signed with Fletcher Challenge Energy Ltd was a valid and binding contract for the sale and purchase of gas for the Huntly power station over a 17 year term. It also successfully appealed against a finding that it was in breach of an obligation in the HoA to use "all reasonable endeavours" to agree on a full sale and purchase agreement within three months of the date on which the HoA was executed.

The majority of the Court of five (Richardson P, Keith, Blanchard and McGrath JJ) held that the courts will look first to whether the parties in fact intended, at the time the bargain is said to have been agreed, to enter into an immediately binding agreement. If such intention is found, a court will then look for agreement, express or found by implication, or the means of achieving an agreement (e.g. an arbitration clause) on every term which was either legally essential to the formation of such a bargain, or was regarded by the parties themselves as essential to their particular bargain. A term is to be regarded by the parties as essential if one party maintained the position that agreement on that term was mandatory before the creation of legally binding obligations was possible and manifested that position to the other party.

Those issues are to be determined objectively. However, in considering whether the negotiating parties have actually formed a contract, it is permissible to look beyond the terms of the alleged agreement to the background circumstances from which it arose – the matrix of facts. This can include statements made orally or in writing in the course of negotiations, drafts of the intended contractual document and subsequent conduct by the parties. Courts should keep in mind the dynamics of the negotiation process and the internal interrelationship of the terms of a commercial bargain.

The Court said it had an "entirely neutral approach" when determining whether the parties intended to be bound. However, if such an intention were found, the Court would "do its best to give effect to their intention and, if at all possible, to uphold the contract despite any omissions or ambiguities". The approach in *Attorney-General v Barker Bros Ltd* [1976] 2 NZLR 495 was affirmed and doubt expressed about *May and Butcher Ltd v The King* [1934] 2 KB 17 (HL). However, the majority recognised it may be impossible for the Court to "fill the gaps". The Court cannot effectively make a contract for the parties by imposing terms which they have not themselves agreed and for which there are no reliable objective criteria.

On the facts, the majority held that the parties never intended the HoA to be a binding agreement. It was therefore unnecessary to determine whether, had such intention been found, the HoA was sufficiently complete and certain to be enforceable.

However, in examining the terms of the HoA, the majority found that the Court could have overcome any omissions or ambiguities in the HoA.

The majority also held that ECNZ had not breached any obligation to use all reasonable endeavours to agree a full sale and purchase agreement within three months. First, if the HoA was held not binding, the High Court had held that it was impossible for the parties to be bound by any of its terms; and there was no cross–appeal on the point. The majority would in any event have had difficulty because of the nature of the "not agreed" items in holding that there was an enforceable obligation to negotiate further. Secondly, the majority said that, even if the clause were part of an otherwise binding agreement, the term was too uncertain to be enforceable. While leaving open the possibility that, in some cases, one could impose an obligation to use reasonable endeavours to negotiate an agreement, the majority said that, in a negotiation of complex terms, it is impossible to define what the parties ought to have done in order to reach agreement. In any event, the majority was unable to say that ECNZ had in fact acted unreasonably.

Thomas J, in his dissent, agreed with the majority that the HoA was sufficiently complete and certain to be enforceable. He agreed also with the majority's judgment that the decision of *May and Butcher* should no longer be regarded as sound authority. However, he found that, at the time of executing the HoA, the parties had in fact intended it to be binding until superseded by a full agreement. He rejected also the majority's conclusion that ECNZ had used all reasonable endeavours to negotiate a full agreement.

Confidentiality contracts for UK Special Forces members

In *Her Majesty's Attorney-General for England and Wales v R* CA298/00, 29 November 2001, the appellant sought to prevent publication by the respondent, a New Zealander and former member of the United Kingdom Special Forces, of a book about events in which he was involved in the Gulf War in 1991. The respondent had signed a confidentiality contract with the Ministry of Defence a few months before leaving the army, which created a life long prohibition on disclosure of any information relating to the work of the Special Forces without the express prior written authority of the Ministry. The High Court had held on a number of grounds that the confidentiality contract was invalid and unenforceable and refused to restrain publication.

Tipping J, with Keith and McGrath JJ concurring, held that the contract was valid and enforceable and accordingly upheld the appeal and dismissed the cross-appeal.

First, Tipping J found that the contract was supported by consideration, being the act of forbearing to terminate the respondent's engagement from the Special Forces – the stated consequence of a failure to sign a confidentiality contract. It was accepted that any promise of forbearance was unenforceable and thus insufficient consideration in law, as the Ministry had the right to dismiss the respondent at will, but the act of forbearing to dismiss the respondent was sufficient.

Next, Tipping J considered the High Court finding that the respondent had been unlawfully ordered to sign the confidentiality contract. He held that as the respondent

had the option of either signing the contract or returning to his parent unit, there was an element of choice which was inconsistent with the request that he sign being a command or order. While Tipping J accepted that it was an unwelcome choice (being returned to unit had a stigma attached to it and significant financial implications), he held that it was a genuine one.

Having found that the respondent was ordered to sign, the High Court not surprisingly also found that the contract was vitiated by duress. Having found no such order, Tipping J approached duress afresh. He held that the respondent had not been subject to any illegitimate pressure and, in line with his findings on the order issue, that the respondent had had a practical choice. Accordingly, the quality of the respondent's consent was held not to have been impaired to the necessary extent.

Tipping J then turned to undue influence. He held that there was no actual undue influence on the part of the Ministry, again referring to the fact that the respondent had exercised a voluntary choice to sign the contract. As to presumed undue influence, Tipping J held that there was no relationship between the respondent and his superiors raising a presumption in law of undue influence and that such a relationship could not be established in fact. He noted that the case involved the respondent's superiors generally, and it was not suggested that the respondent had any particular relationship with any particular superior officer, let alone one in which he placed particular trust and reliance in that officer. Indeed, Tipping J pointed out that during the period leading up to the signing of the contract, the evidence showed that the respondent had in fact materially lost confidence in his superiors.

The High Court finding that the contract was not an unconscionable bargain was upheld on the basis that the respondent had not suffered from a serious disadvantage and the Ministry were not guilty of exploitation or victimisation of him.

Tipping J also upheld the High Court finding that the contract covered literally any information relating to the work of the Special Forces, not only confidential or sensitive information.

As to relief, Tipping J refused to grant specific performance of the contract on the basis that it would be inequitable in the circumstances and in light of the fact that several other publications on the same subject matter were already in the public domain. However, Tipping J did note that, if the respondent chooses to publish, he will be doing so in breach of his contractual obligations and the appellant would be entitled to claim damages and an account of profits.

Keith J wrote separately about the remedies available in the case. McGrath J also wrote separately, on the extra territorial public law elements in the appeal.

Tax avoidance – meaning of tax avoidance arrangement

In *CIR v BNZ Investments Ltd* (2001) 20 NZTC 17, 103 a Court of five had to consider whether under s99 of the Income Tax Act 1976 there could be an arrangement having the purpose or effect of tax avoidance where one party to the alleged arrangement was unaware of the steps which were said to amount to tax avoidance.

The majority (Richardson P, Keith, Blanchard and Tipping JJ) dismissed the Commissioner's appeal. Richardson P, Keith and Tipping JJ held that an arrangement under s99 can exist only where there is a consensus, a meeting of minds between the parties involving an expectation on the part of each that the other will act in a particular way. The justification for construing the concept of arrangement in that way is that it would be inequitable for a taxpayer who enters into an apparently unobjectionable transaction to be deprived of its rights thereunder merely because, unknown to the taxpayer, the other party intended to meet its obligations under that transaction, or in fact did so, in a legally objectionable way. Blanchard J's concurring judgment was substantially to the same effect. Where a taxpayer believes on reasonable grounds that a particular and legitimate tax saving mechanism is to be used by the other party, whereas in fact the other party uses a mechanism amounting to tax avoidance, it would be difficult to conclude that the taxpayer had entered into an arrangement extending that far. However, a commercially realistic approach should be adopted when assessing the extent of the meeting of minds, particularly in cases where a significant feature of the arrangement is the obtaining, and sometimes the sharing, of tax benefits. Where that feature is present, a court is unlikely to find persuasive the stance of a taxpayer who professes to have had no knowledge or expectation of the mechanism by which the benefit was to be delivered. In such circumstances a consensus could properly be found in respect of the use of that mechanism.

In his dissenting judgment Thomas J focused on the fact that s99 permits the Commissioner to set aside arrangements merely because they have the effect of tax avoidance and on the fact that s99 was deliberately drafted in wide terms so as to provide effective protection against tax avoidance schemes. For Thomas J it was plain that tax avoidance for the purposes of s99 does not turn on what the taxpayer knew or intended. No element of mens rea is required. He emphasised the fact that BNZI entered into the transactions in question because of its desire for a tax advantage. From the outset, the transactions were tax–driven and based on a rate of return made possible by sharing tax savings. Without this tax advantage the transaction would not have been commercially viable and the monies subscribed for the transactions would have been utilised for conventional lending transactions or for other purposes.

Legal representation of prison inmates cannot be denied absolutely

The appellant in *Drew v Attorney-General* [2002] 1 NZLR 58 successfully appealed against the High Court's refusal to grant judicial review of his conviction on a disciplinary offence under the Penal Institutions Act 1954.

The appellant, a serving prisoner, was charged with an offence against prison discipline. The charge was heard under s34 of the Act before the prison's Deputy Superintendent. The appellant took legal advice before the hearing but, due to reg 136(4) of the Penal Institutions Regulations 1999, was not permitted to have a lawyer speak for him at the hearing itself. The appellant was convicted. The appellant requested that a Visiting Justice rehear the case under s35 of the Act. However, the appellant was again denied legal representation at the hearing (reg 144) and the appellant's conviction was upheld. The regulations were made under the power to make regulations ensuring the discipline of inmates, including (without

limitation) regulating the laying of complaints relating to offences against discipline and prescribing the procedures for the hearing of such complaints (s45(1)(19)).

The Court of five took into account the substantial penalties potentially faced by inmates convicted of disciplinary offences, at either a Superintendent or Visiting Justice hearing. The Court considered also the ability (or lack thereof, as the case may be) of inmates putting forward an adequate defence to disciplinary charges. While the Court said that most cases will involve inmates of mature years and of average intellectual ability facing relatively simple facts, the Court recognised that less able inmates could struggle to adequately defend themselves without legal representation. While Superintendents and Visiting Justices would often help inmates in presenting their cases, the nature of disciplinary hearings under the Act remained largely adversarial. The Court rejected the respondent's submission that the independence and role of the Visiting Justice, along with the pre–hearing procedures and the right to take advice from a lawyer before the hearing, would always ensure that an inmate receives a fair hearing.

The Court held that it would have been permissible under s45(1)(19) to make a regulation which denied legal representation where that was appropriate to the particular circumstances and the particular inmate. But the Court held that s45(1)(19) cannot have been intended by Parliament to authorise the making of a regulation which could result in some hearings being conducted in a manner contrary to the principles of natural justice. Legal representation could not be denied absolutely. The Visiting Justice should have considered whether, in the particular circumstances, natural justice required that a lawyer represent the appellant at the hearing, as requested. This discretion, the majority of the Court (Richardson P, Keith, Blanchard and Tipping JJ) said, applied also in Superintendent hearings, although the majority noted that legal representation would be rare in such cases. The appeal was allowed. The appellant's conviction under s32A(1)(a) was quashed and a declaration was issued that reg144 is ultra vires s45(1)(19) of the Act and is void accordingly.

McGrath J, in a separate judgment, agreed that reg144 is ultra vires. However, he disagreed with the wider observations in the main judgment indicating that reg136(4) would also be ultra vires.

Anticipatory action before enactment in force

In *New Zealand Employers Federation Inc v National Union of Public Employees* CA32/01, 24 September 2001, a Court of five considered whether s11 of the Interpretation Act 1999 (the 1999 Act), which permits steps in anticipation of an enactment coming into force, permitted the Registrar of Unions to register unions under the Employment Relations Act 2000 (ERA) before the ERA came into force. A second issue was whether, if the Registrar's actions were unlawful, the Court should in the interests of administrative efficiency decline to quash his decisions.

The ERA came into force on 2 October 2000, but the Registrar purported to register various large unions under the ERA before 2 October. He invoked s11 of the 1999 Act, which permits the exercise of a power conferred by a statute which is not yet in force if its exercise is necessary or desirable to bring, or in connection with bringing, an enactment into operation. He purported to register the National Union of Public

Employees (NUPE) on 29 September 2000. The New Zealand Employers Federation argued that the Registrar had exceeded his powers under s11 and that NUPE and various other unions had not been validly registered.

The majority (Richardson P, Tipping and McGrath JJ) took the view that the scheme of the ERA indicated that registration could not occur before 2 October. Further, while s11 is not to be construed narrowly, there is a clear distinction under the 1999 Act between actions of the executive in readying the administrative machinery of an enactment (making regulations, appointing officials) and actions taken by others once the enactment comes into force. In essence, s11 is a governmental powers provision, and is not also directed to the exercise of private powers under the substantive provisions of enactments. It is clear from the scheme of the ERA that the earlier registration of unions was not necessary or desirable in connection with bringing the Act into operation. Registration is the exercise of a substantive right by private persons and is unrelated to the ERA's administrative machinery. Nor was it crucial to the effective coming into force of the ERA that unions be registered before 2 October. In any event, inability to register in advance did not prevent the preliminary vetting of applications before 2 October, and thus the inability to register before 2 October need not have prevented unions from being registered on 2 October. The majority also rejected the argument that because NUPE's certificate of registration was issued on 3 October and thus after the ERA came into force, NUPE's registration was not defective. It was clear from the evidence that the Registrar had intended registration to be effective from 29 September and that he had not turned his mind to NUPE's eligibility for registration afresh on 3 October. The majority did not accept that he should nevertheless be treated as having acted within his powers.

The majority refused to exercise its discretion to decline the administrative law remedy of quashing the Registrar's decision to register NUPE before 2 October. The desirability of avoiding administrative inconvenience and prejudice to the innocent unions was outweighed by the high public policy requirement to ensure that statutory officers do not exceed their legal powers. Furthermore, refusal of a declaration would not have prevented employers from challenging the validity of a union's registration in other proceedings, such as a claim for damages for an unlawful strike. Section 5 of the Judicature Amendment Act 1972 could not be used to overcome the defect in NUPE's registration because the Registrar's error was far more than a defect in form or a technical irregularity.

Keith and Blanchard JJ dissented. Keith J reasoned that s11 was not confined to the setting up of administrative machinery but also included the exercise of public powers on an anticipatory basis. He was of the view that the Registrar had the power to receive applications for registration before 2 October and to register unions as of 2 October. The unions themselves would not be able to exercise their rights before that date. NUPE's certificate of registration, which indicated that NUPE had been registered on 2 October, could be corrected under s5 of the 1972 Act. Blanchard J considered that even without s11, applications could validly have been received before 2 October. He did not accept that the Registrar as a matter of fact intended registration to take effect on 3 October when he issued the certificate. However, he took the view that, as the only deficiency was the timing of the act of registration, the Registrar's act acknowledging registration by issuing the certificate should be taken to

be in law an acknowledgement of registration at the point when the union ought properly to have been registered.

Retrospectivity – new and old competition tests under the Commerce Act 1986

In *Foodstuffs (Auckland) Ltd v Commerce Commission and Progressive Enterprises Ltd* (2001) 9 NZCLC 262,720 a Court of five considered which s47(1) competition test should be used to determine an application for clearance under s66 of the Commerce Act 1986 – the law in force at the time of the application or the test passed into law one day later. Progressive and the Commerce Commission considered that the old test continued to apply to the determination of the application. The High Court agreed. The majority of this Court did not.

Section 17(1)(b) of the Interpretation Act 1999 provides that the repeal of an enactment does not affect "an existing right, interest, … or duty". Section 18 provides that:

> (1) The repeal of an enactment does not affect the completion of a matter or thing or the bringing or completion of proceedings that relate to an existing right, interest, title, immunity, or duty.
>
> (2) A repealed enactment continues to have effect as if it had not been repealed for the purpose of completing the matter or thing or bringing or completing the proceedings that relate to the existing right, interest, title, immunity, or duty.

Progressive contended that its application was a "matter or thing" remaining to be completed at the point the old s47 was replaced. This argument required that each of the two subsections of s18 be read as stating two distinct propositions (with the split after "any matter or thing"), with the first not being controlled by the final clause of each. Therefore "an existing right, interest, title, immunity, or duty" was not necessary. They also contended that the application was "an existing right [or] interest" under s17(1)(b).

In rejecting Progressive's contention, Gault, Keith and Blanchard JJ reviewed ss7, 17 and 18 of the Interpretation Act, their grammar, their wording, their history, the wider context and the relevant principle. They held that each of the two subsections of s18 is to be read as a whole. At the point of application no right or duty "exists" in terms of s47 as required by ss17(1)(b) and 18. Section 47 applies to an acquisition – something which was to occur in the future and certainly after the application was made. Therefore any determination of rights and duties under s47 alone would be made by reference to its text at the time any acquisition occurred. In this case that text would be the new one, not the old. It made no difference when s47 was read with s66. The effects which the Commission had to assess under s66 were to occur or not in the future. The Commission is not investigating or determining an existing right. The High Court's ruling that Progressive had an "interest" in the completion of its clearance application was found to beg the question of what substantive law is to govern the completion.

The Judges noted and discussed the cases on the principles of non–retrospectivity and the broader policy supporting the legislative rules and case law bearing on that principle.

Thomas J concurred, stressing principle and common sense.

McGrath J dissenting, held the final clause in both s18(1) and (2), commencing with "that relate…", qualifies only "proceedings" and not "matter or thing". The plural "relate" is conclusive. This interpretation is supported by the context of both subsections, s18's status as a residual provision and the legislative intention to maintain in s18 the breadth of the position under the Acts Interpretation Act 1924.

Legal professional privilege and the Law Practitioners Act 1982

In *Auckland District Law Society v B* CA151/00, 16 October 2001, a Court of five was required to decide whether the common law legal professional privilege of solicitors who sought legal advice in litigation to which they were parties was removed by the Law Practitioners Act 1982 for the purpose of an investigation of a complaint of professional misconduct.

The Auckland District Law Society (ADLS) received several complaints. While investigating the complaints ADLS was provided with certain documents, which were said to have been created for the purposes of obtaining legal advice from and representation by counsel in respect of which Russell McVeagh claimed privilege.

The majority (Gault, Keith and McGrath JJ) held that if legal privilege applied during the investigative stage of the complaints process that would thwart the exercise of the powers of inquiry into complaints against law practitioners, seriously impeding their effectiveness. The frustration of the statutory policy if the privilege was allowed distinguished the position under the Act from the taxation legislation considered in *CIR v West–Walker* [1954] NZLR 191. The consistent theme in the legislation was that the public interest required ascertainment of the factual position expeditiously, usually by a complaints committee, after which statutory powers of intervention and disciplinary proceedings might follow. This could only be achieved by recognising that the scheme and purpose of the disciplinary provisions of the 1982 Act precluded general application of legal privilege. Accordingly privilege was overridden by the statute, but only to the limited extent that communications were relevant to the investigation. The appeal was allowed.

Elias CJ, dissenting, held that (1) lawful justification or excuse in s101(6) must as a matter of ordinary usage include any justification or excuse recognised by law including legal professional privilege and (2) s127 in preserving the privileges of witnesses and counsel is referring principally to the privileges and immunities of those participating in judicial proceedings and not evidential privilege which applies to the whole of the matter. Evidential privilege is preserved by ss126(5) and 101(6) depending on the stage of the complaint, otherwise privilege from self–incrimination and other privileges would also have been overridden.

Tipping J, also dissenting, held, among other things, that (1) the Act viewed by itself or in the light of its predecessors did not speak with sufficient clarity to support complete abrogation; (2) consideration of whether a particular concession was properly made should not have been undertaken; (3) the reasoning of the majority was on propositions that had not been subject to argument before the Court; (4) legal professional privilege is a vital adjunct to an important human right (the right to obtain legal advice) which is an element to the right to equal treatment before the law and there were no clear or express words of abrogation; (5) the public interest argument did not support complete abrogation; (6) when a lawyer under investigation is the bona fide client of another lawyer, it was highly arguable that privilege was not abrogated; (7) when s127 was drafted it was obviously decided that all four categories of investigations and proceedings in its predecessor section could be comprehended within the single concept of proceedings so that proceedings in s127 may well include investigations of complainants; and (8) privilege applied to communications made in good faith between a lawyer under investigation and a lawyer from whom advice is sought on personal circumstances or litigation matters whether or not a complaint was under investigation or imminent, but subject to forfeiture if the communication is covered by or sufficiently analogous to the common law fraud exception.

Manslaughter – degree of negligence

R v Powell CA192/01 and 202/01, 22 November 2001, concerned the degree or extent of negligence required to constitute the offence of manslaughter. The appellant was charged under s160(2)(a) of the Crimes Act 1961 with manslaughter by an unlawful act. The Crown advised that the unlawful acts were two offences under the Land Transport Act 1999. The main point in the appeal turned on the question whether s150A Crimes Act applied to these circumstances. That provision, enacted in 1997, requires that the omitting or neglecting to perform certain duties leads to criminal responsibility only if the omission or neglect is a major departure from the standard of care expected of a reasonable person. Section 150A defines the standard of care required of persons under a legal duty imposed by ss151-153 and ss155-157.

After reviewing the legislative history of s150A, a Court of five concluded that the higher standard in s150A applies to motorists if, as in the present case, the relevant conduct relied upon also falls within s156. Accordingly, the conviction was quashed and a new trial ordered. The Court noted that where the unlawful act relied upon involves negligence, the charge of manslaughter should be framed by reference to the sections of the Crimes Act to which s150A applies. Any other approach would leave people vulnerable to conviction on a lesser degree of negligence depending upon how the prosecution chose to frame the charge.

4. Criminal trial issues

This chapter summarises criminal cases where appeals against conviction succeeded.

Jury directions

Failure to put defence case adequately

The appellant in *R v Waaka* CA260/01, 24 October 2001, was convicted under s208(1)(a) of the Crimes Act 1961 of taking away a woman without her consent with intent to have sexual intercourse with her. The appellant and the complainant attended a party. She became grossly intoxicated and passed out on a couch. The Crown alleged that while she was comatose she was carried away from the couch by two men, the appellant and a Mr Tauroa. The Crown alleged Mr Tauroa then raped and had unlawful sexual connection with the complainant while the appellant watched.

The Court held that the trial Judge had erred in failing to focus the jury on all the relevant issues for the defence and failing to adequately put the defence case that the appellant was only ever assisting Mr Tauroa, that he was not a principal offender in his own right. The Court said the Judge's directions to the jury were too economical. The Judge should have explained to the jury that it was not sufficient when proving intention under s208(1)(a) to show an accused had a fleeting or passing thought of having sexual intercourse with the victim; a thought that had not developed into a firm intent was not sufficient. This had been an important plank in the defence case and a subtlety which could easily have been overlooked by the jury. The appeal was allowed accordingly and a new trial ordered.

Need to relate direction to defence case

In *R v Spencer* CA353/00, 5 April 2001, the Court set aside the appellant's conviction for manslaughter on the basis of errors in the Judge's directions to the jury.

The appellant was charged under s156 of the Crimes Act 1961 as a person in charge of a dangerous thing. Under s150A a person is criminally responsible for a breach of s156 (among others) "only if, in the circumstances of the particular case, the omission or neglect is a major departure from the standard of care expected of a reasonable person to whom that legal duty applies in those circumstances".

The Court held that in his direction to the jury the Judge did not relate his direction on "major departure" to a critical part of the defence case. The failure of the Judge to indicate that the departure element of the crime must be major gave rise to a real danger of a miscarriage of justice. Accordingly on the miscarriage of justice point alone the Court allowed the appeal and quashed the conviction.

The further ground that the manslaughter proceedings, taken together with an earlier prosecution of the appellant's company under the Health and Safety in Employment Act 1992, amounted to an abuse of process was not decided by the Court. A new trial was not ordered.

Need for lies direction

The appellant in *R v Whyman* CA252/01, 27 September 2001, was convicted of being in possession of methamphetamine for the purpose of supply. On appeal, counsel for the appellant drew the Court's attention to various comments or questions in the Judge's summing up which counsel submitted showed unwarranted and unbalanced attention to certain aspects of the appellant's evidence, including "[W]hy did he *lie* to the police when he said he was the only one there?" [Emphasis added].

The Court held that the Judge had erred in failing to give a lies direction to the jury, particularly having indicated to the jury an apparent rejection of the appellant's evidence and having expressly characterised his response as a "lie". Because the Crown case was not a strong one and because the Crown was relying upon the inference to be drawn from the appellant's conduct when the police arrived, the Court held there had been a "very real possibility" that the jury had reasoned that the appellant had lied about the presence of others. The jury should have been told that the mere proof of a lie was not sufficient for conviction. The standard lies direction, tailored to the situation, should have been given. The appeal was allowed accordingly and a new trial ordered.

A failure to direct the jury on lies resulted in the setting aside of a conviction for sexual violation and a new trial being ordered in *R v Manase* CA9/01, 26 June 2001. The appellant's niece (B), who at the time of the offending was aged three and a half years, was found to have gonorrhoea. Specialist evidence was that the transmission was likely to be sexual. B's mother told the three men living at the address, including the appellant, to get tested for the disease and made the necessary appointments. The mother and the other two men all tested negative for the disease. The appellant failed to attend two appointments for tests. When he was finally tested two weeks later he too tested negative.

At trial evidence was given by B's mother and father that the appellant admitted giving B the disease by sharing a lollypop with her. The appellant denied admitting B got the disease from the lollypop. He claimed that he did not go to his appointments at the clinic because he was out of town playing rugby at the time. At trial evidence was called to show there was no rugby at that time in which the appellant was involved. Further the appellant's records showed he had worked regularly in the area over that period. No direction was given to the jury on lies.

The Court considered it was plain that there was evidence which the jury could have regarded as lies which were more than mere denials of guilt. Juries are entitled to be told what to make of lies and to be cautioned from concluding, once lies have been proved, that they should therefore find the case proved. They have to be warned on the authorities about the possibility of there being other reasons for telling lies, preceded by the direction whether what is alleged is in fact a lie.

The appeal against conviction was allowed and a new trial ordered.

Adequacy of summing up in separating two defences

R v Christiansen CA196/01, 24 October 2001, was a successful appeal against conviction for assault on a constable with intent to obstruct the constable in the execution of his duty contrary to s192(2) of the Crimes Act 1961. The ground of appeal was that the Judge, in summing up, unsatisfactorily rolled together the appellant's two defences and inadequately directed the jury as to the requirement of intent under s192. The two defences raised at trial were a lack of intent under s192 and defence of another under s48 of the Crimes Act.

The Court held that it was necessary that the summing up in this case spell out that lack of intent and defence of another were separate defences which the jury had to consider separately and weigh in turn. Although recognising that there was a degree of common ground and factual overlap between the two defences, the Court considered that they are separate and have a different focus, one being subjective and the other objective. The Court held that as a result of the failure to direct the jury on the need to assess the two defences separately the Judge inadequately directed the jury about the requirement of intent under the relevant section. The appeal was allowed and the conviction and sentence quashed. In the circumstances, a retrial was not ordered.

Failure to direct concerning an unfairly conducted police interview

R v Lawton CA221/01, 30 October 2001, was a successful appeal against convictions on charges alleging sexual abuse of the appellant's niece. The focus of the appeal was on the way in which the appellant had been interviewed by the officer–in–charge of the case and the way in which the Judge dealt with the interview in the course of his summing up to the jury. The interview clearly conveyed the detective's views about the validity of the complainant's evidence and involved repeated assertions that it was up to the appellant to explain why the complainant might lie.

The Court noted that, although the interview was close to the line, its admissibility was not objected to at trial. The Court held it could not be said to have had a significant prejudicial effect on the outcome of the trial so as to bring the situation within the concept of miscarriage of justice. However, the trial Judge's failure to direct the jury to disregard what the detective said, except to the extent to which the appellant assented to it, and his failure to warn them as to the correct onus of proof in terms of *R v T* [1998] 2 NZLR 257 meant that the appeal must be allowed. Accordingly the convictions were quashed and a new trial ordered.

Reasonable belief in consent – documentary exhibits

In *R v Gutuama* CA275/01, 13 December 2001, the Court quashed a conviction for sexual violation because of late disclosure by the Crown and various forms of misdirection to the jury.

The first ground of appeal was that the defence was prejudiced by the late disclosure of the detective's job sheet concerning his conversation with the complainant's mother. The job sheet only came to the attention of the defence during the mother's re-examination during the trial. The complainant's evidence was that immediately before the appellant penetrated her she made it clear that she did not want to have intercourse. The job sheet suggested the contrary. The Court held it went directly to the central issue in the trial. The defence could have made an indirect use of the job sheet when cross–examining the complainant, although the job sheet could not have been put to the complainant herself in cross-examination. Secondly the document could have been used more effectively in cross-examination of the mother. The Court held that there was a danger of significant prejudice.

The second point on appeal concerned lies/onus of proof/reasonable belief in consent. It was common ground that the defendant had lied in his statement to the police. The difficulty in this case was the invitation to use the lie in assessing the appellant's credibility. Before credibility can arise there must be a factual assertion whose truth is challenged. By inviting the jury to use his lie for the purpose of assessing his credibility the Judge must have left the jury in a quandary. The trial Judge advised the jury that if they were satisfied that the accused had deliberately lied they could use that for assessing his credibility. The Judge then went on to say that is whether you can accept his defence that he believed on reasonable grounds that the complainant consented to sexual intercourse. The Court found this led to an inadvertent reversal of the onus of proof. It was for the Crown to prove that the defendant did not believe, on reasonable grounds that the complainant consented. It was not for the jury to decide whether it could accept the defendant's defence.

With respect to the third element of sexual violation the jury was advised "if the Crown proves that the accused intended to have intercourse, and was indifferent to whether or not the complainant consented, that will be enough to show a lack of actual belief or lack of reasonable belief". The Court found the word "indifferent" should be avoided in this context. Indifferent conveys the notion that the accused had no care or concern about consent. It is concerned with the accused's attitude. Attitude is not belief. What had to be proved was absence of reasonable belief in consent, not indifference to the whole subject. The Court then set out how they would prefer the direction on the third element to be given.

When considering the second element of sexual violation what must be conveyed to the jury is that the onus of proving absence of consent lies on the Crown. It is not for the defence to show that the complainant did consent.

When considering the overall impression on the jury the Court could not say the combined effect was insignificant. The conviction for sexual violation was quashed and a new trial was ordered.

Erroneous reversal of presumption of innocence

In *R v Mathers* CA149/01, 26 June 2001, the Court held that the Judge misdirected the jury on the shifting of the onus of proof from the Crown under the Maritime Transport Act 1994. The appellant had been convicted under s68(2)(g) of the Act of operating a vehicle knowing it did not have a Ship Safety Management Certificate, and under

s65(2)(a) for causing or permitting a ship to be operated in a manner which caused unnecessary danger or risk to another person. The second conviction was appealed on the ground of misdirection.

The appellant owned a fishing boat, the Hunter II. In 1998 Hunter II sank and three of its four crew members drowned. According to the prosecution, the absence of certain anchors required on the boat was critical to the sinking. At the time the appellant also did not have the Ship Safety Management Certificate which was required for the boat under the Maritime Rules. The provision of the relevant anchors was not a requirement to obtain the certificate.

Section 66(1) of the Act provides that when a person is charged with an offence against ss64 or 65 and a relevant maritime rule has been breached then, in the absence of proof to the contrary, it shall be presumed that the breach caused unnecessary danger or risk. In directing the jury the Judge suggested the logical way to approach the issues was to look first at the maritime certificate count. Then, if the jury found that charge proved, the reverse onus would come into play on the unnecessary danger count.

The Court held that the presumption in s66 was not relevant and should not have been invoked. On the evidence, the "manner which caused [the] danger" was allowing the vessel to go to sea without adequate anchors. There was no causative connection between the lack of certificate and the "manner". As s66 was at the centre of the Judge's jury direction there was a real prospect of a miscarriage of justice.

The conviction for breach of s65(2)(a) was quashed and a new trial ordered.

Conduct of defence counsel

Responsibility of trial counsel to obtain written instructions

R v Sandy CA325/01, 28 November 2001, concerned an appeal against conviction on nine counts of using a document to obtain a pecuniary advantage with intent to defraud. The appeal was based on the conduct of defence counsel at trial. In the course of the appellate hearing Crown counsel accepted that, in the absence of unequivocal material as to the instructions which had been given to trial counsel, the interests of justice required that the appeal should not be opposed. In light of that concession the appeal was allowed and the convictions quashed. The Court ordered a new trial.

Failure of trial counsel to follow the instructions of the accused

R v W CA216/01, 31 October 2001, was an appeal against conviction on a charge of assaulting a child under s59 of the Crimes Act 1961. The appellant contended that his trial counsel had failed to follow his instructions and that that failure denied him the opportunity of a fair trial. The sole issue at trial was whether the force used by the appellant to discipline the child, who has severe behavioural problems, was

reasonable in the circumstances. No evidence of any expert nature was called by defence counsel despite the fact that the appellant had given counsel a list of witnesses he wished to call to explain to the jury aspects of the child's behaviour and response to punishment. The witnesses included the child's teachers, a psychologist and a psychiatrist. Counsel interviewed three of those persons on a confidential basis and formed the opinion that none of them would give evidence of value to the defence at trial. She did not interview the remaining witnesses, including the child's psychiatrist. Her decision not to call any of these people to give evidence was not frankly discussed with the appellant and she took no instructions from him in writing.

While there was a conflict about the firmness of the instructions the appellant gave to counsel the Court concluded that instructions were given and, as they had never been revoked, remained extant. The question therefore, following *Tuia v R* [1994] 3 NZLR 553 was whether, objectively viewed, there was a reasonable suspicion that the evidence not called may have influenced the jury's verdict. The Court was satisfied that the evidence in this case was relevant to the central issue of fact at trial and that there was a reasonable prospect that the evidence may have influenced the jury's verdict, if they had been cognisant of it. It was of relevance that the appellant was not fully informed by counsel of the circumstances of her decision not to call the relevant evidence and was not sufficiently advised so as to be able to reach his own decision in the matter. Counsel had therefore deprived him of the opportunity to complete his instructions in an informed manner. The case illustrated the desirability of counsel giving advice and obtaining instruction in writing on key issues. The appeal was allowed and a retrial ordered.

Disadvantage from late withdrawal of trial counsel

In *R v R* CA238/01, 4 October 2001, a breach of fair process in the appellant's trial was alleged to have arisen as a result of defence counsel's late withdrawal from the case. Counsel had sought and been granted leave to withdraw on the morning of the trial leaving the appellant to conduct his own defence. The Court held that the Judge should have adjourned the trial in order to allow the appellant adequate preparation for trial. The potential for injustice in requiring him to go to trial on the spot was evident in the poor presentation of the appellant's evidence in chief and his failure to cross-examine any of the witnesses. Despite the strong Crown case the Court concluded that the appellant had not had a fair trial. The convictions were therefore quashed and a new trial ordered.

Radical error by trial counsel

R v Rickard CA46/01, 30 August 2001, was an appeal against conviction for sexual violation and unlawful sexual connection. The grounds of the appeal were that, due to defence counsel's conduct of the case, a miscarriage of justice had occurred. The particular errors alleged were that counsel had not put a detailed exculpatory statement by the appellant to the complainant in cross examination, and had made a last minute decision to call the unprepared appellant to give evidence.

The Court cited the test in *R v Pointon* [1985] 1 NZLR 109 to the effect that while a mere mistake in tactics in the conduct of the defence could not justify a new trial on the ground of miscarriage of justice, in rare cases a radical mistake in the conduct of a

defence could do so. In relation to this particular case, the Court held that the only defence which was available to the appellant was not adequately put. The gravity of the tactical error was such that the trial was unsatisfactory. The appeal was therefore allowed and a new trial ordered.

Incompetence of trial counsel

R v Mounsey CA397/00, 7 February 2001, an appeal against conviction for sexual violation by digital penetration, was allowed on the basis that the incompetence of trial counsel had resulted in a miscarriage of justice. Counsel was alleged to have been at fault in six respects. The Court was of the opinion that five of these grounds were without merit. The sixth ground was that trial counsel had failed to seek independent expert medical opinion on the complainant's claim that she received bruises as a result of force used by the appellant. On appeal, counsel for the appellant presented expert opinion to the effect that any bruising caused during the attack would have been visible to the doctor examining the complainant two days later. No such bruises were apparent to the doctor who examined the complainant at that time but bruises were noted five days after the attack. It was argued on appeal that expert opinion as to the visibility of the bruises, a matter raised by the appellant with his counsel before trial, would have provided a solid basis on which to attack the complainant's credibility at the trial.

The Court was satisfied that there was an unacceptable risk that a miscarriage of justice had occurred. However it was not clear that trial counsel could be considered to be incompetent. It was also not clear that the expert medical opinion reached the accepted criterion for the admission of fresh evidence. The Court found it unnecessary to resolve the question as to which ground was more appropriate, as the interests of justice required the appellant's conviction to be set aside. The Court stated that a question of classification could not be allowed to subvert disquiet at the real possibility that a miscarriage of justice had occurred. Therefore, despite the difficulty as to appropriate grounds, the appeal was allowed and a new trial ordered.

Unreasonable verdicts

Insufficient evidence to support convictions

In *R v Bayliss* CA45/01, 23 July 2001, an appeal against conviction on 19 charges of theft as a servant was allowed in part on the basis that there was insufficient evidence to support the particular convictions. At trial the Crown case depended on circumstantial evidence including stock variance figures, voided transactions and video footage. While not all the items of evidence were available in respect of every count the Crown had relied upon the inferences raised by the general modus operandi employed by the appellant to prove the alleged thefts.

Noting that it would have been helpful if the evidence relied upon by the Crown for the individual counts had been summarised and presented in scheduled or tabulated form, the Court went on to analyse the individual counts by reference to the evidence

relied upon. The Court concluded that in respect of four counts there was insufficient evidence to support the convictions entered. To that extent the appeal was allowed.

In *R v Koroheke* CA189/01, 190/01, 200/01, 226/01 and 243/01, 28 November 2001, five appellants successfully appealed against their convictions on one charge of sexual violation by the penetration of the genitalia of the complainant by a roll-on deodorant container on the basis that they were not supported by the evidence. (Challenges to other convictions failed and the sentences remained unchanged.) The complainant gave evidence that she had felt something slippery on the outside of her vagina. That was confirmed in cross-examination. No one asked her to elaborate on that in order to establish whether or not there had been penetration of the genitalia.

The Court was of the opinion that while the complainant's evidence might support the inference that penetration of the outer genitals must have taken place that required the assumption that the complainant was using the term vagina in the technical rather than the popular sense. As the complainant had not been questioned on this aspect of her evidence the Court held on balance that it was unsafe to regard the evidence as capable of establishing beyond reasonable doubt that there was penetration. The convictions on that count were accordingly set aside.

Retraction by principal Crown witnesses

R v Akatere CA114/01, 115/01 and 116/01, 16 October 2001, was an appeal against conviction by three appellants on a charge of aggravated robbery. In support of the appeal the two principal Crown witnesses tendered affidavits retracting their identification evidence. The affidavits also put forward facts indicating that the appellants were not involved and were not in the vicinity at the material time. The Crown did not contest the appeals and Crown counsel invited the Court to allow the appeals without directing retrials.

Noting that the affidavits raised serious questions about the conduct of the police the Court offered its sympathy to the appellants who had substantially served their sentences of imprisonment for a serious offence. The Court quashed the convictions. No retrial was ordered.

Inconsistent verdicts

The appellant in *R v Maddox* CA424/00, 1 March 2001, was acquitted of two counts relating to specific events alleging rape between 1981 and 1986 (counts 1 and 2) and a representative charge alleging sexual violation between 1986 and 1987 (count 3). However, he was convicted on two representative charges of rape and sexual violation by rape between 1981 and 1987 against the same complainant. He appealed against those convictions on the ground that the verdicts were inconsistent and thereby unreasonable and unsupported by the evidence.

The Court took into account that the prosecution's case had focused predominantly on the two specific events alleged in counts 1 and 2. The prosecution had then looked to prove a continuance of like offending for the purposes of the other representative

charges. However, with the jury obviously rejecting the complainant's evidence with respect to counts 1 and 2, the Court could find no logical explanation for the jury's acceptance of her evidence for the purposes of counts 3 and 4. No additional evidence had been presented in relation to counts 3 and 4 that had not been adduced in relation to the other charges. The Court held therefore that there was no satisfactory explanation for the differing verdicts and that the inconsistent guilty verdicts must be regarded as unreasonable. The appeal was allowed. No retrial was ordered.

R v Latu CA411/00, 26 March 2001, was a successful appeal against conviction on one count of sexual violation by unlawful sexual connection. The appeal was bought on the basis that the jury's verdict of guilty was unreasonable in the light of its verdicts of not guilty in respect of a further two related counts of sexual violation. All counts arose from one particular incident.

The Court discussed the principles relevant to submissions of unreasonableness in relation to inconsistent verdicts. It was noted that although resolving the issue of inconsistent verdicts requires an examination of the evidence, it may sometimes also require an appreciation of the innate sense of fairness and justice of a jury, having regard to all the circumstances of a case. However, this was not a case requiring such an examination, or a case where the alleged offending occurred at disparate times and places. The case in this instance concerned what was effectively one incident with different alleged facets of conduct occurring within a very short space of time. The fundamental issue was consent, and there was nothing in the evidence to support a rational finding that there might be consent or belief on reasonable grounds to certain forms of conduct, yet an absence of such consent to other forms of conduct at another point in time. The Court stated that there was no evidential basis for any rational distinction between the verdicts. Accordingly, the appeal was allowed, the conviction quashed and a new trial ordered.

Miscarriage of justice

Conviction appeal after a plea of guilty on legal advice

R v B CA419/00, 26 March 2001, was a successful appeal against a conviction in 1993 for sexual violation. At issue was the question of when an appeal can succeed after a plea of guilty has been made. In this instance a great deal of information which raised real concerns over the allegations made by the complainant had become available subsequent to the appellant's conviction and imprisonment.

The Court reiterated the well settled principle that, where the accused has pleaded guilty and has been represented by experienced counsel, an appeal against conviction will succeed only in exceptional cases. In this case, the appellant had pleaded guilty in view of his degree of intoxication at the relevant time, the legal advice he received, his trust of the complainant, and because he did not want to put the complainant through a court hearing. He had no recall of the alleged event. Subsequently however, an independent investigation undertaken by the police concluded that the complainant was not a reliable, credible witness. There was also evidence that she

had made and withdrawn allegations of sexual assault against two people other than the appellant and had retracted her allegations about the appellant to two independent witnesses. The Court also found it significant that the complaint itself was made a year after the violation allegedly occurred.

The Court concluded that it was understandable in the circumstances that the appellant had pleaded guilty and that the legal advice to him to do so was entirely reasonable. The complaint's history tended to support the conclusion that the original allegations were false and the Court took into account the complainant's retraction of her complaint. In view of these facts, the Court was satisfied that this was one of the rare cases where, notwithstanding a plea of guilty on legal advice, the conviction in question had been shown to have occasioned a miscarriage of justice. The appeal was allowed, and the conviction quashed. A retrial was not ordered.

Evidence

Disclosure of prejudicial material

In *R v McLean* [2001] 3 NZLR 794 a Court of five held that a substantial miscarriage of justice had resulted from the inadvertent disclosure of prejudicial material in the trial. The Court quashed the appellant's convictions on charges of sexual violation and assault on a female and ordered a retrial.

The appellant was committed for trial on eight charges relating to three women. The charges in relation to each woman were tried separately. The first trial resulted in an acquittal. The second trial is the subject of this appeal. The third trial did not eventuate.

The prejudicial material arose when the complainant in the second trial referred to the rape charges laid by the complainant in the first trial. The jury retired for about two hours before being directed by the Judge that the reference to the previous complaint of rape was "irrelevant to the matters you have to consider. You must completely disregard it."

The Court was satisfied that this comment was highly prejudicial to the accused's trial. The credibility of the complainant and the accused was the major issue. The comment was illegitimate similar fact material which the Crown had earlier sought to adduce and the trial Judge had firmly ruled out. The Court held that the direction given almost two hours later was insufficient to avoid a miscarriage of justice.

The Court also commented on two other matters raised – recent complaint evidence as important to the retrial and the giving of notes of evidence to the jury and directions on their use as important generally. In relation to notes of evidence in particular the Court stated that in principle it can be proper to provide the jury with the transcript of the evidence in appropriate cases. It is up to the discretion of the judge to determine in exercise of their broad discretion as to the conduct of trials, weighing the relevant considerations.

Discrete conduct, included charges, scientific hearsay

R v Mokaraka and Te Hira CA286/01 and 294/01, 17 December 2001, involved the principles applicable to included charges, scientific hearsay and similar facts. The Judge declined to leave a lesser alternative to the jury. The Court in applying s339 of the Crimes Act 1961 held that a lesser crime is "included" if the way in which the crime is defined in the statute, or the way in which it is expressed in the indictment, necessarily includes the commission of the lesser crime. Whether it is put to the jury is a matter of discretion for the trial judge. The judge is obliged to put an included charge to the jury only if necessary in the interests of justice. The threshold for whether included charges need to be considered at all is whether the evidence raises the very real possibility that all the elements of the included charge will be established without the additional elements required for the major charge.

Circumstances which count against putting the included charge would be where the principal charge is so grave and the lesser alternative so trifling that the latter could distract the jury from the real point of the case. Another situation would be where the question of included charges was raised so late that a party could have been prejudiced by the way in which the trial had been conducted up to that point. Following a jury inquiry the judge should generally remind the jury that the prosecution having decided to limit the indictment to the greater charge, the result of failure to prove any of the necessary elements of the greater charge must inevitably be an acquittal notwithstanding an admission or clear evidence that a less serious offence had been committed.

The Court did not see this as a case where the principal offence was so grave and the alternative so trifling that unlawful entry with intent would have been a needless distraction. The offence in this case would have attracted a substantial term of imprisonment. Although the issue of an included charge was not raised until late in the trial there was no suggestion that earlier notice might have affected the way in which the case was conducted up to that point. The fact the jury specifically inquired into the possibility of a lesser alternative was not determinative in itself. In this case there was no response to the risk in summing up. The Court found that there was concern that the jury might have convicted due to its reluctance to see him escape any sanction. A new trial was ordered for one of the two appellants.

The second point on appeal related to evidence of peer review relating to fingerprinting. The Court accepted that this evidence was hearsay, but noted that the Court would not want it to be assumed that because it was hearsay it was inadmissible. Scientific conclusions are frequently the result of team activity. In any event the Court was satisfied that the Judge made it clear that the jury was to confine its attention to the observations and opinions of the expert who actually gave the evidence. This ground of appeal failed.

The third point on appeal concerned evidence of discrete conduct. The Court held the real concern is not with similarity of facts per se but with the relevance of discrete conduct. Discrete in the sense that the conduct in question did not form part of the sequence or transaction with which the charge concerned. Discrete conduct evidence is relevant if conduct of a particular nature on a discrete occasion would make a fact now in issue in the trial more likely. If relevant in that sense it will be admitted if the probative value outweighs any prejudice inherent in the knowledge that the accused

was capable of such conduct on the discrete occasion. Since *Director of Public Prosecutions v P* [1991] 2 AC 447 there are no arbitrary limits upon the purposes to which such evidence can be put so long as it is logically relevant to guilt. Nor does there have to be anything in the nature of a "striking similarity", "characteristic signature" or a "similarity in the detail of the evidence of each which goes beyond the commonplace". To establish relevance all that it is necessary to show is that the existence of evidence that a man has acted in a particular way on the discrete occasion demonstrates a propensity and that someone with such a propensity would be significantly more likely to have acted in the manner alleged than a person drawn at random from the community.

Unavailable witnesses – admissibility of depositions

The appellant in *R v Tonga* CA107/01, 23 August 2001, was convicted of the rape of B. He appealed on the ground the trial Judge should not have ruled that, in exercising the Court's discretion under s18 of the Evidence Amendment Act (No 2) 1980, a depositions statement prepared and signed by F was inadmissible as evidence under s3(1)(a) of that Act, despite F being "unavailable to give evidence".

The Court held that the foundation for exercising the s18 discretion is the necessity of ensuring a fair trial. A judge must weigh the probative value of the evidence against any prejudicial effect that would arise through admitting the statement as evidence. While the Court recognised that there was undoubtedly some prejudice to the Crown in the absence of an ability to cross-examine F, the Court held that this could have been overcome by an appropriate direction to the jury. The depositions statement was too probative in all the circumstances to have been properly excluded. The appeal was allowed accordingly and a new trial ordered.

Similar fact evidence admissibility

R v Nicholson CA250/00, 5 February 2001, involved an appeal against conviction on the basis that certain similar fact evidence should have been held inadmissible. The Court held that the prejudicial effect of the evidence outweighed its minimal probative value. The appeal was allowed and a new trial ordered.

The appellant was convicted on two charges of sexual violation by unlawful sexual connection and one of attempted unlawful sexual connection. The appellant (then aged 45) was the complainant's (then aged 17) tutor. The appellant admitted performing the sexual acts on the complainant, but asserted that the complainant had consented, or that he had had a reasonable belief that he had consented. By contrast, the complainant's evidence was that he had not wanted these things to happen, but had said nothing as he felt trapped and scared.

The prosecution applied to call evidence from a Mr A concerning sexual activities occurring 11 years previously between the appellant and A when A was a 15-year-old boy attending a secondary school at which the appellant was a teacher. The Judge making the pretrial ruling admitted the evidence on the basis that there was very clear evidence in A's statement that the activities were non–consensual "which the accused was quite happy to persist in despite the lack of consent and despite that lack of consent being obvious". The Crown was entitled to rely on A's evidence "to show

that this man was perfectly happy to initiate and continue sexual activity with his pupils, being young males, without their consent".

The Court accepted that A's evidence showed that he was, initially at least, a reluctant partner who found the appellant's advances distasteful, but it also showed that he had been able to prevent the appellant from performing anal intercourse upon him and that the appellant had not persisted with the attempted penetration. While the evidence taken as a whole showed morally repugnant behaviour and indeed criminal behaviour towards a vulnerable youth, as well as a degree of persistence, the Court held that it did not plainly demonstrate a willingness to proceed where persistence did not obtain consent or apparent consent. Despite some similarity with the present case, the Court considered that A's evidence was insufficiently supportive of the prosecution case on the critical issue of consent.

5. An Aspect of Separation of Powers : Legislation overriding judgments

1641 and 2001

On 4 July 1641 Charles I assented to "An Act for declaring unlawful and void the late Proceedings touching Ship–Money, and for the vacating of all Records and Process concerning the same". According to G M Trevelyan that Act and others including the Habeas Corpus Act were

> passed without debate by the Houses and signed without thought by the King. The means of unparliamentary revenue – Ship Money, Forests, Knighthood, Tonnage and Poundage – were made illegal beyond further dispute. Another Act destroyed the Star Chamber and its kindred courts of Wales and the north. Thus were extinguished the judicial powers of the Privy Council, by the terror of which its administrative sovereignty could alone be maintained in a rebellious age. With the sovereignty of the Council fell the State system of the Tudors. Their Church system fell at another stroke, which ended the Court of High Commission, the coercive power of the bishops as derived from the Crown. (*England Under the Stuarts* (1904, revised 1946, Folio Society edition 1996) ch VII p192).

The preamble to the Act recited the steps in the issuing of the writs under the Great Seal for charges for shipping for His Majesty's service, the proceedings brought against John Hampden, the hearing of those proceedings by the Justices of the Courts of King's Bench and Common Pleas and the Barons of the Exchequer and the "extra judicial Opinion" of all the Justices and Barons endorsing the King's position. The preamble declared that the Ship–Writs "were utterly against the Law of the Land". It was accordingly enacted that the Charges, the said

> extrajudicial Opinion, the Writs and the said Agreement or Opinion of the greater Part of the said Justices and Barons, and the said Judgment given against the said John Hampden, were and are contrary to and against the Laws and Statutes of the Petition of Right made in the third Year of the Reign of his Majesty that now is.
>
> And it is further declared and enacted by the Authority aforesaid, That all and every the Particulars prayed or desired in the said Petition of Right, shall from henceforth be put in the execution accordingly, and shall be firmly and strictly holden and observed, as in the same Petition they are prayed and expressed; (2) and that all and every the Records and Remembrances of all and every the Judgment, Enrolments, Colour of any of the said Writs, commonly called *Ship-Writs*, and all and every the Dependants on any of them, shall be deemed and adjudged to all Intents, Constructions and Purposes, to be utterly void and disannulled; and that all and every the said Judgment, Enrolments, Entries,

> Proceedings and Dependants of what kind soever, shall be vacated and cancelled in such Manner and Form as Records use to be that are vacated.

About three and a half centuries later, the New Zealand Minister responsible for the Commerce Amendment Act 2001 which introduced a new test for acquisitions stated that a decision of the Court of Appeal given the day before, deciding that the new test applied to pending applications, given the day before, was "clear[ly] not what the government intended" and was contrary to "the clear intention of the House". (The decision was *Foodstuffs (Auckland) Ltd v Commerce Commission* (2001) 9 NZCLC 262,720, summarised in ch 3 above.) The Minister's tone, it might be noted, differs more than a little from that of the Long Parliament. The legislation introduced in response was designed to reverse the Court's ruling and to provide that the new test applied only to applications made after the change in the test.

According to the Commerce Committee to which the Bill was referred

> The main issue before the committee is whether the bill should apply to all parties who submitted clearance applications to the Commerce Commission before the new competition test came into force, or whether Progressive [who succeeded in the Court of Appeal] should be exempted. This issue concerns the application of constitutional principles to Foodstuffs, Progressive Enterprises and to the Court of Appeal decision.

The Committee, in its report, reviews the arguments made both by those appearing before it and within its own membership:

> On balance, Government and Green members recommend the bill must not attempt to contradict the decision of the Court of Appeal in the particular case of Progressive Enterprises versus Foodstuffs, which therefore should be exempted from the ambit of this bill. However, in the interests of commercial certainty the remaining 10 acquisitions should remain within the coverage of the proposed legislation.
>
> The Westminster political model provides for a separation of powers in terms of the branches of government, although it is not distinct compared say to those present under the constitutional arrangements of the United States. We have, nevertheless, a strong, independent and impartial judiciary of the highest order. The normative constitutional convention in New Zealand is for each branch to recognise and respect the different specific role of the other, and this is at its most pronounced between the legislature and the judiciary.
>
> This bill poses the committee with a difficult decision from a constitutional perspective. It is not a simple choice between an option that is constitutionally appropriate and one that is not. Each option has constitutional implications and the committee must balance these against considerations of the public interest and need for legal certainty to produce the fairest outcome in terms of constitutionality and commercial reality.

The Bill was amended to exempt the particular decision. The parliamentary and public debate emphasised constitutional and legal principle including the separation of powers on the one side and inconsistency and unfairness on the other.

One aspect of the inconsistency argument was what was seen as the contradictory position the government was taking at the same time in the Employment Relations (Validation of Union Registration and Other Matters) Amendment Bill which was designed to override the effect of the judgment of the Court of Appeal in *New Zealand Employers Federation Inc v National Union of Public Employees* CA32/01 24 September 2001 (also summarised in ch 3). The Court had held that unions that were registered or had applied for registration before the Employment Relations Act 2000 came into force were not validly registered. The Bill was designed to validate the registration of the unions. It completely reversed the effect of the Court's ruling. The Bill also reversed a ruling about cross-examination in the Employment Relations Authority made by the Employment Court which was the subject of a pending appeal to the Court of Appeal. That legislation made no exceptions in respect of the decisions, as opposed to the law the decision stated. The validating legislation did not however affect the liability for costs or the fixing of costs in the Court of Appeal case.

These three situations are a very small sample of the interaction of court decision and legislation. This chapter sets out the choices Parliament has when it considers making changes in the law with some retrospective effect, lists relevant principles and mentions some of the vast array of relevant practice against which the principles can be tested. It draws heavily on a memorandum prepared in May 1995 by the Legislation Advisory Committee for the Finance and Expenditure Committee (*Report of the Legislation Advisory Committee 1 January 1994 to 31 December 1995 Recurring Issues* (Report No 9 June 1996) Appendix I).

The legislative choices

Four main choices are available:

(1) The legislation changes law for the future and leaves unaffected rights, duties and interests existing under the law which has been superseded. This is the rule for criminal liability and penalties and the general principle for other rights, duties and interests in the law, as appears from the provisions of the New Zealand Bill of Rights Act 1990 s26(1), the Crimes Act 1961 s10A, the Criminal Justice Act 1985 s4 and the Interpretation Act 1999 ss7 and 17-22 and the body of common law and international law lying behind them.

(2) The legislation does affect rights, duties and interests existing under the superseded law – that is it has retrospective effect – but it does not affect judgments already given or proceedings already brought.

(3) As well as having the effect in (2), the legislation applies to pending proceedings but not to judgments given.

(4) As well as having the effects in (2) and (3), the legislation also overrides judgments given.

The recent criminal appeal legislation provides an example of a more complex set of provisions.

The legal and policy assessments are not always simple. The divided opinion in the commerce and union cases, both in the courts and Parliament, illustrate that. The legal debates often turn around the meaning and application of "rights", "duties" and "interests" and the relevant adjectives – "vested", "acquired" or "existing". Those words relate among other things to the distinction between procedure and substance which can be helpful and is reflected in the common practice of giving retrospective effect to changes in procedural law and evidence (but not usually to the extent of overriding a judgment). But that anticipates the later parts of this paper.

Relevant principle

The principle against non–retrospectivity is strongest in the case of criminal liability. The Bill of Rights makes that clear. It is unjust, after the event, to make criminal and subject to penalty acts which were lawful when they were done. As well, since the criminal law is intended to be a guide to our actions, retrospective criminal law is also ineffective – people cannot adjust their actions to law which has not yet been written, eg Fuller, *The Morality of Law* (rev ed 1969) Ch 2. That second argument is not as strong in the case of invalid regulations; they were after all in fact in the books. They were there to guide and control. But the principle nevertheless still has force and there are legislative examples supporting it in that situation.

Reasonable expectations

By contrast, in some situations, the general understanding may have been that the law was to the effect that Parliament is now stating. That understanding can be reflected in the declaratory or removal of doubt wording of the measure, as in the 2001 commerce and 1976 fugitive offenders legislation. In such situations the overriding of pending proceedings and judgments and the validation of proceedings decided on an erroneous basis might be justified; although as those two examples show, even then savings might be made to maintain the position of those who successfully challenged the alleged general understanding. Legislation validating irregularities in respect of courts also indicates the scope of the principle prohibiting retrospective criminal law – the actions in question were criminal at the relevant time. The retrospective element related only to the institutions. The common law has the related doctrine of the de facto officer.

The nature of the individual right or interest

In the fugitive offenders case, personal liberty and the associated writ of habeas corpus were in issue. At first the case appears to be analogous to that of criminal liability. But is that really so? Extradition legislation can be and was in that case seen as procedural. New extradition law and treaties commonly apply to earlier offences. Consistent with that, the 1976 fugitive offenders legislation validated actions taken under the 1881 Act; as well, proceedings commenced under it "may be continued and dealt with under the [1881] Act as amended by [the 1976] Act". It was only those

who, before the new Act came into force, had succeeded in habeas corpus proceedings that kept the advantage of the law as declared by the Supreme Court.

Responsibilities for Government

If the argument for retrospectivity has been accepted as a general proposition, that acceptance might be undermined or even negated by a savings provision. That appears to be the position in the 1994 human rights (superannuation) and 1982 economic stabilisation legislation (although in the latter use criminal proceedings could be saved – in the sense that a defendant to a criminal charge could still plead the old law as stated by the Courts, that is that the regulations were invalid). Very rarely the only point of the legislation is to override the particular judgment as in the Clutha case also in 1982. The legislation might also be based on a broadly applicable and accepted agreement which supersedes pending litigation while setting out a new regime for the future; the *Sealords* legislation can be characterised in that way.

In such cases the public interest might be seen as uppermost and as allowing no room for the protection of judgments with continuing effect and proceedings under the old law. Indeed, the Government's course of action might require that such effects and proceedings be prevented. The legislation dissolving the New Zealand Superannuation Scheme enacted on 23 July 1976 provided that no action or other proceedings, civil or criminal, could be brought against various individuals for failing to meet certain obligations under the 1974 Act from 16 December 1975 – the day after the Prime Minister announced that the scheme would be abolished. The Supreme Court in *Fitzgerald v Muldoon* [1976] 2 NZLR 615 on 11 June 1976 had declared that that announcement was unlawful, but it adjourned the balance of the proceedings for six months and granted no coercive remedy – "it would be an altogether unwarranted step to require the machinery of the [1974 Act] now to be set in motion again, when the high probabilities are that all would have to be undone again within a few months" when the proposed legislation was enacted (a matter on which there was "little doubt"). The Attorney-General had also in April 1976 stayed private prosecutions brought against employers for failing to meet their obligations under the 1974 Act; eg *Superannuation: Retrospective Termination* [1976] NZLJ 268. That action too was based on the Government's declared intention to promote legislation repealing the 1974 Act. Like that stay the effect of the 1976 legislation was to prevent legal action being brought in respect of any breach of the 1974 Act from the date of the press announcement through to the date of repeal of that Act. Accordingly the Supreme Court proceedings came to an end, but with a costs order being made against the Government.

The relationship between Court and Parliament

The principles of the separation of powers and independence of the judiciary may be relevant. The independent role of the courts can be put at nought if the legislature superintends the actions of the court and overrides particular decisions. So in the United States statutes setting aside judgments have been held unconstitutional as attempted legislative exercises of judicial power and as violating the constitutional guarantee of due process of law, 46 Am Jur 2d para 9. But legislation overriding judgments requiring acts to be done in the future have been upheld. Two United

States Supreme Court judgments support those propositions. In *McCulloch* v *Virginia* (1898) 172 US 102, 123-124 the Court ruled that:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment the power of the legislature to disturb the rights created thereby ceases.

By contrast, in *State of Pennsylvania* v *Wheeling and Belmont Bridge Company* (1855) 17 How 421, 431, the Court upheld legislation declaring bridges across the Ohio River to be lawful, the Court the year before having declared the contrary under the common law. The Court ruled that that part of the earlier decree which looked to future execution could be overridden by later legislation. To be distinguished from such a decree were, it said, orders for damages for past breach of the free navigation of the river or for costs – Congress could not override such a judgment or order.

Further, if, for instance, the litigants are deprived of the benefit of a judgment it may also be said that their rights to a fair trial have in effect been abrogated after the event in breach of the spirit of chapter 29 of Magna Carta and article 14(1) of the International Covenant on Civil and Political Rights.

If the Crown was party to the litigation, ss27(2) and 27(3) of the Bill of Rights may also be relevant. Those provisions affirm the rights of persons to seek judicial review of public actions affecting their rights and obligations, and to bring civil proceedings against the Crown and to have them heard in the same way as proceedings between individuals. Regular parties to civil litigation do not have the power or ability to initiate legislation terminating litigation or nullifying its result, although they might, of course, try to promote that course.

Relevant practice

The survey by the Legislation Advisory Committee of retrospective legislation enacted over recent decades lists only about 30 provisions expressly and particularly affecting pending proceedings or judgments:

- nine statutory provisions preserve proceedings underway at the time of the new measure, requiring them to be decided in accordance with the old law; five of the provisions add, presumably unnecessarily, that judgments given under the old law are not affected;

- sixteen provisions do not, by contrast, protect pending proceedings – they become subject to the new law – but do protect any judgment given under the old law either expressly or through their silence on the matter;

- only four provisions overrode judgments already given.

Those provisions are:

(1) *Clutha Development (Clyde Dam) Empowering Act 1982* which granted certain water rights, in effect overriding the decision of the Planning Tribunal given in response to the earlier judgment of the High Court on appeal from the Planning Tribunal: *Annan* v *National Water and Soil Conservation Authority and Minister of Energy (No. 2)* (1982) 8 NZTPA 369; and *Gilmore* v *National Water and Soil Conservation Authority and Minister of Energy* (1982) 8 NZTPA 298. Section 4 of the Act provided that the parties to the litigation were entitled to their costs.

(2) *Economic Stabilisation Amendment Act 1982, section 9*: This provision validated and confirmed certain wage freeze regulations and declared them to be and to have always been validly made under the 1948 Act. The Amendment Act also widened the power to make regulations by making it clear that they could prevail over listed statutes, and that legislation assented to on 17 December 1982 reversed the effect of *Combined State Unions* v *State Services Coordinating Committee* [1982] 1 NZLR 742 in which the Court of Appeal gave judgment on 14 December 1982. It is significant, however, that the validation was not to affect any proceedings taken before or after the commencement of the amending Act in respect of an offence committed before that date. That saving recognises that criminal liability should not be created retrospectively and contrasts with the next override.

(3) *Patents Amendment Act 1992:* The Act removed a power (or a near duty) of the Commissioner of Patents to grant compulsory patents in respect of food and medicine. As well, as enacted, it cancelled all pending proceedings and orders and licences made and granted. The Legislation Advisory Committee objected to this as a breach of principle and referred to the parallel United Kingdom legislation which did contain savings provisions (see *Issues of Principle*, LAC Report No 8 paras 92 to 117).

(4) *Human Rights Amendment Act 1994, sections 2(3), 3(3) and 5(2):* These provide that the three sections apply notwithstanding any judgment, decision or order of any Court or Tribunal given or made before or after the commencement of the Act in proceedings commenced before or after that commencement. Section 2 is written with declaratory effect – nothing in certain sections should prevent or be taken ever to have prevented certain provisions in a superannuation scheme. Section 3 takes a clearer declaratory form – *for the avoidance of doubt, it is hereby declared that certain provisions shall not prevent or be taken never to have prevented certain superannuation scheme provisions*. Section 5 is only retrospective – nothing in certain provisions shall be taken ever to have prevented certain benefits; and section 4 also uses "for the avoidance of doubt – declared" wording, but has no provision relating to judgments or pending proceedings. This Amendment Act was a response to the judgment in *Coburn* v *Human Rights Commission* [1994] 3 NZLR 323 that the Human Rights Act made unlawful certain provisions of superannuation schemes, providing for benefits for surviving spouses and children.

To be added to those four statutes are another four enacted since 1994: the *Crown Forest Assets Amendment Act 1995* s4(3) (which was the occasion for the LAC paper); the legislation enacted following *R v Hines* [1997] 3 NZLR 529, *Evidence (Witness Anonymity) Act 1997* s6(1); the exemplary damages legislation as interpreted in *W v W* (2000) 14 PRNZ 157; and the *Employment Relations (Validation of Union Registration and Other Matters) Amendment Act 2001*.

The very limited number of express statutory overrides – which in at least two cases were the subject of controversy comparable to that surrounding the War Damage Act 1965 (UK) overriding *Burmah Oil Company v Lord Advocate* [1965] AC 75 – reflects the strength of the principles outlined above.

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APPENDICES

A. IMPORTANT CIVIL CASES

Contract

Accident compensation – contractual claims for bodily injury

In *Brittain v Telecom Corporation of New Zealand Ltd* CA191/00, 28 November 2001, the appellants sought damages for breaches of their employment contracts with the respondent, which had resulted in injury caused by occupational overuse syndrome. A Court of five held that the claims were barred by both the Accident Rehabilitation and Compensation Insurance Act 1992 and s4(7) of the Limitation Act 1950.

In relation to the alleged bar under the 1992 Act, the issue for the Court was whether s14(3) applied so as to allow the claims for breach of contract to be brought in spite of the fact that the claims arose directly or indirectly out of personal injury. Section 14(3)(b) provides that the bar shall not apply to any proceedings relating to, or arising from, any express term of any contract. However s14(3) goes on "but no compensation for personal injury covered by this Act … shall be awarded in any such proceedings". The appellants sought to argue that this proviso applied only to s14(3)(c), which it immediately followed, and not to s14(3)(b). This argument was said to be supported by obiter comments made by the Court in *McGrory v Ansett New Zealand Ltd* [1999] 2 NZLR 328.

The Court rejected this argument, holding that both grammatically and in the light of the policy and purpose of s14(3) as a whole, the proviso was intended to apply to all three lettered paragraphs and not just to paragraph (c). As such, the Court held that the obiter comments in *McGrory* were incorrect.

The Court then went on to say that s14(3)(b) could be reconciled with the proviso on the basis that proceedings to recover payments due under a contract as a result of the payee suffering personal injury were not barred, but those seeking compensation for breach of contract causing personal injury were. Payments of the first kind involve amounts specified in the contract, or that can be ascertained by reference to a contractual formula or other definitional machinery. Compensation on the other hand relates to a case where the amount involved is at large and depends on assessment not definition. It was compensation in this sense that the appellants sought in their proceedings and accordingly s14(3)(b) did not apply. The Court also noted that if the appellants' argument was correct a serious anomaly would arise as between express and implied terms, with the bar applying to the implied terms but not to express terms by virtue of s14(3)(b).

The second question for the Court was whether s4(7) of the Limitation Act also applied, with the effect that either the claims were barred thereunder or the appellants required leave to bring those claims. The issue was simply whether the appellants' claims were "in respect of bodily injury". The Court held that clearly they were. The

`appellants sought damages because of the bodily injuries they suffered. The damages sought must necessarily be related to that bodily injury. It mattered not whether they framed their cause of action in contract, tort or on any other basis. Both the words and purpose of s4(7) were seen as supporting the Court's conclusion.

Contractual Remedies Act 1979 – effect of cancellation on unconditional rights and obligations

In *Garratt v Ikeda* (2001) 4 NZConvC 193,463 the Court rejected an argument that following cancellation of a contract s8(3)(a) of the Contractual Remedies Act 1979 extinguishes obligations that had unconditionally arisen under that contract.

The respondent vendor of a $1.8m residential property had cancelled the contract after the appellant purchaser had failed to meet the third instalment of the deposit. The Master granted the respondent summary judgment for the $130,000 balance of the deposit. The appellant submitted that the effect of s8(3)(a) was that the obligation to pay the balance of the deposit was extinguished by the cancellation. The Court held that s8(3)(a) did not have this effect. Contractual obligations which have unconditionally fallen due prior to cancellation were not discharged. Here, the purchaser owed $130,000 at the time the contract was cancelled and was obliged to pay it.

The Court also upheld the Master's refusal to grant the purchaser relief under s9 of the Act. The purchaser claimed to be entitled to discretionary relief as the vendor had onsold the property at a profit. The Court held that the claim was precluded by s5, which states that a contractually agreed remedy will predominate over any discretionary power under s9. The deposit in the present case, being a conventional sum comprising no more than 10% of the purchase price, carried within it the express agreement of the parties that on default it was liable to forfeiture by the purchaser. This contractually agreed remedy thus prevailed. The Court went on to say that, even if not precluded by s5, it would not be just to grant relief as s9 does not provide any general or untrammelled power to depart from the ordinary operation of the cancellation rules. The party seeking relief must be able to show that the operation of the rules is unjust due to some special feature of the case, and the forfeiture of deposits is not sufficient for a defaulting purchaser to show that the ordinary rule is unjust.

Contract remedies – reliance damages

In *Ti Leaf Productions Ltd v Baikie* (2001) 7 NZBLC 103,464 the Court discussed the state of English and Australian authorities in respect of wasted expenditure and reliance damages for breach of contract and suggested that some care was needed before adopting these principles in New Zealand.

The appellants entered into a contract to lease part of the respondents' farm to make a film. Shortly into the lease difficulties arose concerning the activities of the appellants shareholders and employees. Rumours emerged of drug manufacturing and cult–based activities on the part of Ti Leaf personnel. In breach of the contract for renewal of the lease the respondents made negative comments about Ti Leaf in a newspaper article. The film was never made and Ti Leaf sued for breach of contract

and defamation, seeking $1.3m damages for wasted expenditure incurred in reliance on the lease agreement.

The Court dismissed Ti Leaf's appeal, upholding the trial Judge's factual findings that the breach was not causative of the loss, as it was probable that the film would never have been completed in any event, and endorsing his approach to the recovery of pre-contractual expenditure on the facts. The Court observed that the state of English and Australian authorities in respect of wasted expenditure and reliance damages for breach of contract, in particular when and in what circumstances the burden of proof should shift to require the party in breach to show why the innocent party would not have recouped its expenditures, suggest that some care is needed before adopting these principles in New Zealand. In any event, the Court continued, the trial Judge's approach was favourable to Ti Leaf as it had required the Baikies to show that Ti Leaf would not have recouped its expenditure because the film would never have been completed.

Employment

Termination

In *W & H Newspapers Ltd v Oram* [2001] 3 NZLR 29 the Court overturned the findings of the Employment Tribunal and the Employment Court that the respondent's dismissal was unjustified on the basis that both the Tribunal and the Employment Court had substituted their own view for that of the employer. The Court addressed the applicable test for termination in such circumstances, namely whether the dismissal was a response open to a fair and reasonable employer.

Mr Oram, a senior and experienced reporter, reported in The New Zealand Herald a story involving a Mr Smith, allegedly the leader of a dangerous organised crime gang. Mr Oram gave a photographer a brief description of Mr Smith and arranged for a photograph to be taken. Unfortunately, the man photographed was not Mr Smith but a social worker attending the hearing in a supportive capacity. Mr Oram's article was a front-page story, and was accompanied by a large reproduction of the photograph with a caption referring to the subject as "Gang Chief" and describing him as a career criminal. Following complaint by the man photographed, Mr Oram was asked by his employer for an explanation. He accepted responsibility, exonerated the photographer and acknowledged that he should have checked the photograph. Disciplinary action followed, and a written summary of the employer's preliminary views was given to Mr Oram. The summary indicated that the employer considered the conduct, both when the photograph was taken and in subsequently failing to check it, of such seriousness as to entitle the newspaper to consider dismissal. Mr Oram replied through his solicitor casting blame on others and the employer's systems. The employer then advised that it intended to dismiss him, which it subsequently did.

Mr Oram brought a personal grievance under s27 of the Employment Contracts Act 1991. The Employment Tribunal found that he had been unjustifiably dismissed. That decision was upheld by the Employment Court. The employer appealed under

s135(1) of the Act contending that the decisions were erroneous in law. The primary ground of appeal was that the Tribunal substituted its own view for that of the employer and that the Employment Court simply adopted the findings and reasoning of the Tribunal.

In allowing the appeal the Court noted that the issue, in terms of the authorities, was whether it was open to the employer, acting fairly and reasonably, to regard Mr Oram's conduct as deeply impairing the confidence and trust between its editors and senior reporter and to have seen dismissal as an appropriate response. Neither the Tribunal nor the Employment Court had made a specific finding in respect of this. The Tribunal appeared to have made its own assessment of the balancing of the factors and had not found that the outcome was such that no fair and reasonable employer could have reached it. The Tribunal had therefore erred in law. The Court further noted that it was open to a fair and reasonable employer to find that a single incident of carelessness, when sufficiently serious, could impair trust and confidence and hence justify dismissal. It was also held that there is no obligation on employers to invite an employee to comment upon the employer's assessment of the employee's explanation of, or attitude to, what had occurred. That would lead to an interminable process. There was therefore an error of law in finding that taking these factors into account had tarnished procedural fairness.

Restraint of trade

In *Fletcher Aluminium Ltd v O'Sullivan* [2001] 2 NZLR 731, in allowing the employer's appeal, the Court laid down the following principles for considering the reasonableness of restraint covenants in composite transactions:

- Restrictive covenants are not confined to the two categories of covenants in contracts of employment and covenants relating to the sale of goodwill in a business.
- The covenant could be enforced whenever the covenantee had a legitimate interest, of whatever kind, to protect and provided that the covenant was no wider than was necessary to protect that interest. The totality of the transaction between the parties had to be taken into account.
- There is no reason in principle why a covenant could not restrain the vendor of intellectual property rights from conduct beyond the scope of the protection accorded those rights by law.
- The purposes of design registration and restrictive covenants are quite different. Registration protects only against infringement, not against competition outside the confines of the registration.
- While it is no answer to a complaint of unreasonableness of a covenant that it was agreed to by the covenantor, in commercial transactions involving a willing vendor and a willing purchaser of equal bargaining power and access to advice, the courts are reluctant to intervene by holding one term of the overall arrangement unreasonable. It is impossible to assess what a purchaser might have been willing to pay if the restraint were not included.

Personal grievance

In *Ark Aviation Ltd v Newton* (2001) 6 NZELC 96,389 an employee had been unjustifiably dismissed because he had not been given the opportunity to address the employer's concerns prior to his dismissal. The question for this Court was whether evidence of employee's misconduct was nevertheless relevant to possible reduction in remedies under ss40 and 41 of the Employment Contracts Act 1991.

The Court was of the view that matters of which an employer was aware at the time which, directly or indirectly, impacted on its decision to dismiss may be shown to be actions contributing to the situation or fault on the part of the employee resulting in the dismissal. They then will form part of the "situation which gave rise to the personal grievance" under ss40(2) and 41(3). There is no threshold under ss40 or 41 of the Act that requires such knowledge or awareness to derive exclusively from a sound process, provided it is of sufficient substance to be the basis for legitimate concern at the time of the dismissal. The Court noted that although the matter was not before it, in some situations misconduct of an employee only discovered after a dismissal may be so egregious as to require the discretion to provide for a remedy under s40(2) not to be exercised at all in favour of the employee whose grievance has been established. For example deliberate and serious misconduct by an employee, which significantly affects the employer, and which amounts to a serious abuse of the trust and confidence that underpins the relationship. The appeal was allowed and the case was remitted to the Employment Court for final determination of the appeal.

Redundancy principles

Coutts Cars Ltd v Baguley CA102/01, 21 December 2001, provided the Court with its first opportunity to consider the applicability of the principles set out in *Aoraki Corporation v McGavin* [1998] 3 NZLR 276 under the Employment Relations Act 2000. In particular the Court considered whether the obligation of good faith under the Act required a different approach to consultation on whether a position was surplus to requirements and on the selection criteria for redundancy.

In three separate judgments the Court of five upheld the Employment Court's finding that the process by which the dismissal was carried out was unjustifiable but reduced the compensation awarded.

Richardson P, Gault and Blanchard JJ held that it was open to the Employment Court to find unfair treatment on the evidence in respect of which there was no contest. However, they criticised the strong factual findings of the Employment Court against Coutts, stating that they considerably overreached the evidence. They further held that in the redundancy context the new statutory obligation on employers and employees to deal with each other in good faith does not introduce any significantly different obligation from that which the courts have placed upon parties to employment contracts over recent years. There is no reason why the decisions in *Aoraki* and *New Zealand Fasteners Stainless Ltd v Thwaites* [2000] 2 NZLR 565 should not continue to provide guidance on the applicable principles.

Tipping J, concurring, noted that the only thing that he considered the employer to have done wrong was to decline to give Mr Baguley a copy of the selection criteria for redundancy. Tipping J further noted that he was inclined to the view that in the

circumstances Coutts was in breach of a duty of consultation – such a duty arising out of the statutory duty of good faith as set out in s4(1) of the Act. The Judge agreed that *Aoraki* principles continue to apply under the new Act.

In a separate judgment, McGrath J disagreed with the view of the majority that the obligation to consult over potential redundancy remains as limited as that outlined in *Aoraki*. He took the view that s4, when read in light of relevant statements in the Act of its objects in ss3 and 101, imposed an obligation to consult. The Judge considered that Coutts failed to meet this duty of consultation. It followed that the dismissal for redundancy was not substantively justified. As to the issue of remedies McGrath J inclined to the view that the loss of opportunity arising from the failure to consult should be brought into account as part of the remedy of reimbursement in settling the grievance.

Health and safety in employment

The appellant in *Linework Ltd v Department of Labour* [2001] 2 NZLR 639 appealed against its conviction under ss6 and 50(a) of the Health and Safety in Employment Act 1992 that, being an employer, it failed to take all practical steps to ensure that its employee, Mr Thomson, was not exposed to a hazard.

A Linework gang under the direction of a foreman was engaged in installing a power cable. The foreman instructed Mr Thomson, a member of the gang, to remove the end of a faulty cable looped over the cross arm of a power pole. Mr Thomson had taken down cables before. He noted two potential dangers : the tail of the faulty cable had not been cut off and the replacement cable did not have covered ends where its three exposed leads were connected above the cross arm. The foreman warned Mr Thomson two or three times to be careful of the live connections above the cross arm.

Mr Thomson climbed the ladder and secured his safety belt. For some reason, however, he did not put on his safety gloves before grasping the faulty cable. The foreman, who was observing the work, at that point looked away to see what his two other employees were doing. He then heard a puff–like noise and looked back to find Mr Thomson slumped in his safety belt. The tail of the faulty cable had made contact with one of the live volt lines at the exposed connections, resulting in Mr Thomson receiving a severe electric shock.

The Court of five held that actions or inactions of the foreman, the person in effective charge of the work site and there in a supervisory capacity, should be attributed to the company, for the purposes of taking all practicable steps to ensure the safety of employees. His actions or inactions were intended to count as the acts of the company. The foreman's failure to take all practicable steps to ensure Mr Thomson's safety meant Linework was in breach of its duties under the Act. It was irrelevant whether the foreman might personally have breached his duty under ss19 and 50(1)(a) of the Act. The appeal was dismissed.

Statutes and treaties

Tariffs – the legislation and the international agreement

The question in *Integrity Cars (Wholesale) Ltd v Chief Executive of New Zealand Customs Service* (2001) 1 NZCC 61,198 , was whether the value for tariff purposes of certain goods imported into New Zealand included the export and inspection charges paid by the New Zealand importer to a Japanese company. The Court held that it did not.

The appellant (Integrity) imported used cars from Japan. A Japanese company, Total Service Yamaguchi Co Ltd (TSY) helped in this business. TSY was an accredited member of the auction houses at which the cars were traded. Only accredited members could participate in the bidding at the auction houses. Accordingly TSY could participate but Integrity could not. In addition to paying TSY the auction prices and fees, Integrity also paid it an export fee for each car and inspection charges for those Integrity requested inspections for.

The second schedule to the Customs and Excise Act 1996 sets out the rules for valuation of goods for the purposes of the tariff. The schedule was designed to give effect in New Zealand law to the Agreement on implementation of article VII of the General Agreement on Tariffs and Trade. Both the schedule and the Agreement require commissions and brokerages to be added to the price paid for Customs valuation purposes. The only exception is fees paid to "buying agents" or as "buying commissions".

The Customs Service ruled that, for import duty purposes, all of the payments by Integrity to TSY must be included in the import entries. The Service did not consider TSY to be merely a buying agent. The Customs Appeal Authority and High Court both upheld this ruling in respect of the export fee. The High Court held however that the inspection fee was not part of the price paid as the inspections occurred after the sales at Integrity's direction. This finding was upheld on appeal.

In considering the export fee the Court rejected the High Court's reliance on the New Zealand common law of agency. Given its international currency, the language of the Agreement and the schedule should be construed on broad principles of general acceptance. Guidance was taken from the commentaries of the Technical Committee on Customs Valuation established under the Agreement with a view to ensuring uniformity in interpretation and application of the Agreement. United States' authorities and publications and the purpose of the exclusion of the buying commission from the transaction price were also taken into account.

Applying this law to the facts the Court held that for the purpose of the schedule TSY was Integrity's buying agent and the export fees paid were buying commissions for representing Integrity in Japan in the purchase of the cars. They were accordingly not part of the price for valuation purposes.

The appeal was therefore allowed. See also *Chief Executive of the New Zealand Customs Service v Rakaia Engineering & Contracting Ltd* CA77/01, 10 December 2001.

Relationship between Extradition Act 1999 and an Extradition Agreement

In *Yuen Kwok–Fung v Hong Kong Special Administrative Region of the People's Republic of China* [2001] 3 NZLR 463 a Court of five upheld the High Court ruling that, in terms of the Extradition Act 1999, only the Minister of Justice had the power to decide on one of the discretionary grounds stated in the Extradition Agreement between New Zealand and Hong Kong whether the appellant should or should not be surrendered.

The Court held that if an extradition treaty provided wider grounds for refusing surrender than the Extradition Act 1999, such as the discretionary grounds in this case, then the person who was the subject of the request was entitled to the benefit of those grounds if they were applicable. Section 7 of the Extradition Act requires a reconstruction of the Act, to the extent it is inconsistent with the treaty, to make it consistent. Thus the discretionary powers in the Act must give way to the Agreement if they cannot be read consistently with it. However s8's narrower scope did not mean in this context it was inconsistent with the Agreement provision; it could be read consistently with that provision and given its full effect.

The Hong Kong agreement leaves the issue of who is to decide whether the person has established the necessary ground to the domestic law of each party. By virtue of s30 of the Extradition Act, the particular discretionary power in this case could be exercised only by the Minister of Justice. This reading is supported by the legislative history. The District Court did not have jurisdiction to exercise a discretionary power restricting surrender, outside s8, based on the provisions of the Agreement.

Tax

Does s29 of the Goods and Services Tax Act 1986 bind the Commissioner?

The primary question considered in *Simunovich Fisheries Ltd v CIR* CA115/01, 10 December 2001, was whether s29 of the Goods and Services Tax Act 1986 (GSTA) prevents the Commissioner, having made a GST assessment on a particular basis for one tax year, from making or proposing to make for a subsequent tax year, an assessment which is inconsistent with the basis on which the first assessment was made without amending the first assessment under s27.

The Court of five held that stamping an asset with a particular GST characterisation on purchase has continuing consequences. Unless removed or changed, the characterisation becomes the basis for calculating GST on sale. It would be inconsistent to have the same asset of the same taxpayer taxed on sale having a different character from its characterisation in respect of its purchase unless and until the characterisation is lawfully changed. For the Commissioner to disregard a basic inconsistency of that kind would undermine the integrity of the tax system which he has the duty under s6 of the Tax Administration Act 1994 (TAA) to use his best endeavours to protect. Furthermore, it is crucial under the scheme of the GST legislation that an asset retain its classification unless and until lawfully reclassified with retrospective effect. If goods are accorded a particular GST character on

purchase, the supply to the purchaser is taxable on that basis through the input tax credit.

Finally, the Court explained that its decision did not involve using judicial review as a collateral process to attack a decision appealable under the TAA's statutory challenge procedures. This was an unusual case. Under the GSTA the question of liability for output tax is linked to the circumstances under which an asset was acquired and to the GST tax characterisation at that time. It was that linkage that gave rise to the procedural difficulty the Commissioner faces. In normal circumstances the issue of a Notice of Proposed Adjustment cannot be challenged by way of judicial review on the ground that the notified proposed adjustment is wrong. The correct course is to follow the statutory procedures laid down in Part IVA of the TAA.

Validity of waiver by taxpayer of statutory time bar

In *Vela Fishing Ltd v CIR* [2002] 1 NZLR 49 the issue was whether, when in 1996 the legislature introduced a provision permitting taxpayers to waive the four year time bar on assessments for up to six months, it intended that power to be available where the original assessment was made in an earlier year, here in the income year ended 31 March 1994. The crucial issue was whether or not by virtue of the transitional provisions of s227(4) of the Tax Administration Act 1994 the reference to "corresponding provision in the repealed enactments", as applying in 1996 on the enactment of a new s108 and the linked provision, s108B, must be construed as a reference to s25 of the Income Tax Act 1976.

On 19 July 1993 Vela Fishing Ltd filed its tax return for the income year ended 31 March 1991. On 28 August 1993 the Commissioner made an assessment under s19 of the Income Tax Act 1976. On 24 March 1998 the company signed a waiver to extend by six months the time bar which would otherwise have applied after 31 March 1998. On 30 September 1998 the Commissioner reassessed the company in respect of the 1991 income year. At the time both the company and the Commissioner believed that the time bar could be waived and was properly waived. The High Court held that any assessment made after 31 March 1998 in respect of the income for the 1991 income year was unlawful and unenforceable.

After a detailed analysis of the relevant statutory provisions this Court held that s25 was a corresponding provision to the new s108. It has the same character and function and pre–supposes the amendment of assessments within the time limit. During the four years the amendment function will be exercised as the statute provides. The appeal was therefore allowed.

Civil liberties

Unnecessary arrests can be irrational

In *Neilsen v Attorney-General* [2001] 3 NZLR 433 a Court of five allowed Mr Neilsen's appeal and awarded *Baigent* damages of $5000 because the justification advanced by the police for his arrest was irrational or unreasonable and the arrest consequently breached s22 of the New Zealand Bill of Rights Act 1990.

Mr Neilsen, a former police officer, was dismissed from his employment with a private investigations business. The Employment Tribunal upheld his personal grievance claim and awarded him damages. The private investigator then complained to the police that Neilsen had carried out work for a client without entering the details in the company job book and had deposited the cheques of $110 into his own bank account. A police investigation concluded there was sufficient evidence to support two charges of failing to account. Two police officers went to Mr Neilsen's home and advised him that if he did not accompany them he would be arrested. He was then taken to the police station.

The High Court found that Mr Neilsen was arrested at his home. The arrest was made without a warrant under s315 of the Crimes Act 1961 on the basis that there was good cause to suspect that Mr Neilsen had committed an offence punishable by imprisonment.

Mr Neilsen commenced civil proceedings, seeking *Baigent* damages on the basis that his arrest was unlawful principally because the officer had been ordered to arrest him and was determined to arrest irrespective of what Mr Neilsen said and because it was not necessary to arrest in the circumstances of the case.

On appeal the Court stated that an arrest is unlawful where a constable exercises his or her discretionary power of arrest in an irrational manner. Section 315 does not warrant the conclusion that Parliament intended that arrest should be the usual response to all offending and provide the usual method of bringing people within the criminal justice system. Section 315 confers a constrained discretion. To fulfil the statutory purposes underlying s315, an officer must give appropriate consideration to the values of individual liberty and public order which are necessarily involved in a decision as to whether to arrest. The Court drew attention to the fact that provisions of the Police General Instructions as well as of the Manual for Detectives — both of which are issued under s30 of the Police Act 1958 and must be obeyed by police officers — require officers to use a summons instead of an arrest for minor offending and where the risk of further offending is low. However, the Court stated that there was no justification for reading into s315 a requirement that an arrest must be objectively necessary before it can be lawful. Furthermore, there is a range of serious crime where an officer can ordinarily be expected to arrest in order to bring the arrested person publicly within the criminal justice system.

The Court concluded that arrest of Mr Neilsen was irrational because the arresting officer's explanation of his reasons for arresting indicated that he had not properly exercised his discretion under s315. The officer accepted that there was no reason to suspect that Mr Neilsen would commit further offences. Secondly, it was clear that

Mr Neilsen's fingerprints were not required for any prosecution, and s57 of the Police Act indicates that the desire to obtain fingerprints cannot be used to justify an arrest. Thirdly, on any view of the facts, failing to account for the small sums involved cannot be stigmatised as serious crime.

Police powers to search and arrest

In *Everitt v Attorney-General* [2002] 1 NZLR 82, a Court of five considered police powers to strip-search those in lawful custody. The appellant, a bicycle courier, had been stopped by two police constables for running a red light. He was required by s66(2) of the Transport Act 1962 to remain with the officers while his particulars were taken and confirmed. While his details were being confirmed one of the constables requested the courier lift up his bike so she could check the serial number. While the courier was doing so the bike struck the officer in the chest. The courier was arrested for assaulting a police officer. He was then subjected to a patdown search before being taken to the Wellington Central Police Station. Bill of Rights advice and standard police cautions were given following arrest and again in the interview room at the Station. The courier was subsequently charged with assaulting a police officer and advised again of his rights. He was then taken down to the cellblock area of the station. There the courier was strip searched, processed and bailed.

In relation to the pre-station period the courier brought actions for false imprisonment, unreasonable search, and unlawful arrest. Elias CJ, Richardson P and Keith J considered there was nothing in the facts to justify holding the conduct of the police at that earlier stage as an arbitrary detaining of the courier. It followed that they were not required to make a finding on how far the duty in s66 of the Transport Act extended. In a separate judgment Blanchard J held that it was implicit in s66(2) that a person who had furnished particulars could be required to remain with his or her vehicle for a short period – no more than a few minutes – whilst the particulars were verified. The request to inspect the bicycle was unanimously held to have been within the officer's powers, although if the courier had refused to cooperate the Court found the officer would have had no power to carry out the inspection. The courier's arrest was held to be lawful as the arresting constable had "good cause to suspect" the courier had committed an "offence punishable by imprisonment".

In respect of the search in the cells the courier brought an action for Bill of Rights compensation and a declaration that the search was invalid. The police claimed to have been acting under s57A of the Police Act 1958 and cited search powers under the Penal Institutions Act 1954. The Court held that the search powers under the Penal Institutions Act had no application in this situation. The issues were therefore whether the courier was "to be locked up" as required by s57A and whether, if so, the decision to strip search was a proper exercise of the discretion under the section. Elias CJ, Richardson P and Keith J held that the officer who conducted the search had taken too narrow a view of s57A when considering whether the courier was to be locked up. A decision needed to be made about the courier's bail before he could be said "to be locked up". Here there was no reason why a bail decision could not have been made promptly.

As to the reasonableness of the search Elias CJ, Richardson P and Keith J considered that the constable had put his mind to whether it was appropriate to exercise the

discretion to strip search in this case. However, since the Constable had not been entitled to conclude the courier was about "to be locked up" the ensuing strip search was an unreasonable search within s21. The trio also rejected the applicability of the common law power to search an arrested person as it had not been relied upon by the Constable. Thomas J concurred that the search was unreasonable but found that the Constable's error was not in the interpretation of the law but in deciding that a strip search, rather than a less invasive and obtrusive form of search, was justified. Blanchard J held that it would have been available in the High Court for the Crown to argue that the common law power to search continued to be available to the police pending the making of a decision on whether the courier was to be locked up. However he noted that legislative clarification would be helpful. In any case Blanchard J held that the search could not have been justified on the basis of the common law power.

The Court, being unanimous as to the result, held the appellant to be entitled to a declaration that his strip-search at the Wellington Central Police Station breached s21 of the New Zealand Bill of Rights 1990 and remitted the assessment of compensation to the High Court.

Meaning of "final release date" under Penal Institutions Act 1954

Superintendent of "A" Prison v S [2001] 3 NZLR 768 was a successful application by the Superintendent for a declaration stating that S has been lawfully detained. S was subject to concurrent sentences of imprisonment; one for a specified and one for a non-specified offence for the purposes of s105 of the Criminal Justice Act 1985. S was assessed as being a high risk for re-offending; and an application was successfully made against his release before his applicable release date. Under s105 an offender may be required to serve the full term of his sentence if the offender is likely to commit any of the specified offences in the section. The issue on appeal was whether the application had to be made before the final release date for the specified offence only and not the final release date for the entire sentence.

The Court held that s105 has to be read with s90 which deals with the final release date; but the final release date for a person with cumulative sentences has to be calculated in accordance with s92(4). This is the conventional interpretative approach. The section does not contemplate the final release date of the specified offence only, it purports to determine the final release date for all offenders subject to a sentence of imprisonment. Terms of imprisonment under cumulative sentences are to be treated as one term. The detention of S was lawful since the application was made before the requisite time.

Availability of Habeas Corpus

The decisions of *Bennett v The Superintendent of Rimutaka Prison, Trentham & Ors* CA113/01, 24 October 2001, and *Karaitiana v The Superintendent of Wellington Prison & Ors* CA214/01, 24 October 2001, heard together, were appeals by serving prisoners against refusal in the High Court to grant them writs of habeas corpus and, in the case of Mr Bennett, judicial review.

Central to the appeal was whether habeas corpus is available, as found in Canada in *Miller v The Queen* (1985) 23 CCC (3d) 97 (SCC), to obtain release from maximum security or non-voluntary segregation in an isolation cell where the applicant is already subject to a prison sentence lawfully imposed and there is therefore no possibility that the Court will order that the applicant be set at liberty. The Court of five held that the writ of habeas corpus should be reserved for setting applicants free from unlawful detention; not merely where inmates are allegedly unlawfully treated while otherwise lawfully detained. A change of conditions under which an inmate is being detained does not create a new detention under either the Habeas Corpus Act 2001 or the New Zealand Bill of Rights Act 1990. The Court held that judicial review was instead the appropriate remedy in such cases. In a truly urgent case, a hearing on interim relief can be arranged as speedily as on a habeas corpus application. The habeas corpus applications of the appellants were dismissed accordingly.

Habeas Corpus Act 1640 s6 and the Mental Health Act 1969

McVeagh v Attorney-General CA149/01, 20 December 2001, was an appeal from a High Court decision to strike out Mr McVeagh's claim that an Auckland High Court refusal to hear and determine a writ of habeas corpus relating to his detention in a mental hospital was a breach of s6 Habeas Corpus Act 1640, entitling him to treble damages against the Attorney-General and the Auckland High Court. The Court upheld the strike out.

In upholding the strike out the Court reviewed the history of the Habeas Corpus Act and its application to the Mental Health Act 1969. The Court held that the provisions of the Mental Health Act relevant to Mr McVeagh's case were far removed from the concerns of the 1640 Act. Thus, while noting the appellant's contention that a constitutional statute should be given a liberal interpretation, the Court held that the 1640 Act was not in the slightest concerned with powers, processes and protection such as those included in the Mental Health Act. In particular s6 could have had no application to the operation of the Mental Health Act in the period s6 was in force.

Tort

The defence of truth and mitigation of damages in defamation

Television New Zealand Ltd & Barnsley v Ah Koy CA64/01, 26 November 2001, concerned the appellants' statement of defence to Mr Ah Koy's claim that he was defamed by them in a Television One news broadcast about the Fijian coup. The appellants submitted that they were entitled to plead the truth of a lesser defamatory meaning than that alleged by the respondent. They also submitted that they were entitled to refer to other publications that had defamed the respondent and to their offer to the respondent of an interview in mitigation of damages. There was also a dispute whether the appellants' particulars of truth were adequate. In relation to pleading the truth of a lesser defamatory meaning, the appellants asked the Court to review its decision in *BCNZ v Crush* [1988] 2 NZLR 234 in light of the changes said

to have been brought about by the Defamation Act 1992 (s8) and by the New Zealand Bill of Rights Act 1990 (ss6 and 14).

The Court held that it was not necessary to embark on any review of *Crush* as the pleadings in the present case did not genuinely raise the point. The so called lesser defamatory meanings asserted by the appellants were in reality meanings not materially different to those asserted by the respondent. It followed that there could be no question of TVNZ seeking to prove the truth of a lesser defamatory meaning. As to the particulars of the defence of truth, the Court held that the particulars provided by the appellants fell well short of being sufficient.

As to mitigation, the appellants sought to plead that the respondent's reputation had been damaged by other allegations of the same kind in order to demonstrate that their contribution to the damage to the respondent's reputation was small. This argument was rejected by the Court. It noted that the evidence did not fall into any of Gatley's categories (*Gatley on Libel and Slander*, 9th ed (1998)), nor any of the statutory categories to be found in ss29, 30 and 31 of the Defamation Act 1992. The Court accepted that it was appropriate, indeed necessary, to isolate the harm caused by the publication in suit in the sense of confining the damages to the words published by the defendant. However, the law has consistently held that it is not permissible to approach the matter from the other end by proving the existence of other like publications and then saying that the plaintiff's reputation has been so tarnished by the combined effect of all the publications that the damage done by the defendant was minimal. If the harm is divisible, able to be isolated, there is no reason to introduce other similar publications in mitigation because, ex hypothesi, they cannot mitigate the isolated harm caused by the defendant's publication. If isolation is not reasonably possible, the tortfeasors are classified as concurrent tortfeasors and are each responsible for the whole of the indivisible harm.

The Court also rejected the appellants' argument that its offer to the respondent of an interview should be allowed to be proved in mitigation of damages. The only basis for such a submission was the doctrine that a plaintiff must act reasonably so as to mitigate their loss. Assuming that such a duty could apply to a plaintiff in a defamation case, the Court held that it was not arguable that by declining TVNZ's offer the respondent had breached any such duty. The appellants themselves acknowledged that the respondent had no obligation to accept the invitations. The appeal was accordingly dismissed.

Negligence – when exemplary damages can be awarded

In *Bottrill v A* [2001] 3 NZLR 622 a Court of five was required to consider whether exemplary damages awards in claims for negligence should be available only where there is evidence that the defendant was subjectively aware of the risk to which he or she was exposing the plaintiff or also where only some form of constructive knowledge can be established.

The Court by a majority (Richardson P, Gault, Blanchard and Tipping JJ) held that exemplary damages can be awarded for negligence only in those cases where the defendant is subjectively aware of the risk to which his or her conduct exposes the plaintiff and acts deliberately or recklessly taking that risk. The inquiry involves an

objective assessment of whether the defendant's conduct amounted to deliberate or reckless risk taking and so whether in that latter situation he or she was subjectively reckless. The test of conscious risk taking will be satisfied where on an objective assessment the defendant had an actual appreciation of the risk or was recklessly indifferent to the consequences and must be taken to have been content for the consequences to happen as they did. Where the particular risk was obvious but there is an absence of evidence as to the defendant's actual state of mind, the circumstances may justify the inference that he or she was aware of the risk and accepted that it could well happen.

The Court identified various reasons for their decision, including the fact that exemplary damages are intended only to punish, the need to avoid undermining the policy of the accident compensation legislation, the fact that other jurisdictions require subjective recklessness for exemplary damages awards, the difficulty of distinguishing between gross negligence and mere negligence and the significant expansion in the scope of liability for exemplary damages in which adoption of an objective test would have resulted.

In his dissenting judgment Thomas J said that he would have dismissed Dr Bottrill's appeal. He would have held that there is no legal rule that subjective recklessness is required for awards of exemplary damages and that in all cases it should be left to the trial judge to decide whether a wrongdoer's negligent conduct is so outrageous and contumelious as to warrant an award of exemplary damages. Thomas J's position was based on his view that extremely negligent conduct falling short of subjective recklessness can merit punishment and that the rationale for exemplary damages extends beyond punishment to deterrence, vindication, condemnation, education, the avoidance of the abuses of power, appeasement of victims and the symbolic expression of society's disapproval of certain conduct.

Damages – compromise and calculation

Newbrook v Marshall CA10/01, 29 October 2001, involved a damages claim for deceit. The vendor of a paint retail business had given an incorrect assurance that he did not know of any competitors who were likely to open business in close proximity to the shop. A key issue on appeal was whether the High Court had erred in refusing to award damages because, although satisfied that loss had been suffered, it had found that it was not possible to quantify the exact loss on the evidence.

The Court stated that where there are variables involved, as usually occurs in assessments of business profits or losses, if precise figures had to be proved, few plaintiffs could succeed. Where, as in this case, it is established that a particular factor was causative but its precise contribution to the loss could not be correctly calculated in precise dollar terms, a more robust approach is required of the courts. It is not a matter of whether an expert could give a reasoned assessment and could defend the number he or she came up with. In *Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory* [1979] AC 91, 106, the Privy Council concluded that "the ends of justice would be best served if [their Lordships] were to fix a new figure of damages, as best they can upon the available evidence, such as it is".

The Court identified several factors which were causative of loss but not individually quantifiable. It identified some as less significant than others, and observed that in deliberately withholding information as to its advent the vendor must be taken to have believed that the competitor's impact on the turnover and profitability of the business would be significant. The Court concluded that on the balance of probabilities the reduction of the profits in issue could not have been less than $30,000. The appeal was allowed and the appellants awarded that additional sum together with interest on it.

Commercial law

Voidable transactions – meaning of "the ordinary course of business"

Waikato Freight and Storage (1988) Ltd v Meltzer [2001] 2 NZLR 541 concerned the concept of "the ordinary course of business" as it affects transactions which may be voidable under s292 of the Companies Act 1993.

Transactions are voidable under s292 if made at a time when the company was unable to pay its due debts, within a specified period and if they enabled another person to receive more towards satisfaction of a debt than the person would otherwise have received or been likely to receive in the liquidation. However, the creditor may, as of right, prevent recovery if able to show that the transaction was made in the ordinary course of business. It was common ground that two payments made by Excel Freight Ltd to Waikato Freight and Storage Ltd were voidable under s292. Waikato Freight sought to establish that the payments were made in the ordinary course of business. This argument had been rejected in the High Court.

The Court held that the proper approach to the phrase was an objective one but against the actual setting in which the payment or other transaction took place. The difficulties that had arisen with the phrase were seen as not being so much with the phrase itself; rather they related to the standpoint from which courts must identify the "actual setting".

The fundamental issue was how much the "objective observer" is to be taken as knowing about the circumstances in which the payment was made. Differences had arisen in the High Court about whether that observer was to be taken as looking at the matter on the basis of the creditor's perception of the transaction, that of the debtor's or some amalgam of the two. The Court stated that none of these exactly captured the correct position and that the judicial approach had become over-complicated and over-refined. The question is simply one of objective fact; whether, at the time it was made, the relevant transaction was made in the ordinary course of business.

The Court held that general business practices are relevant to that question, as are any particular customs or practices within the field of commerce concerned. The previous commercial relationship of the parties was also relevant. The Court disagreed with the Master's three reasons for finding that the payments had not been made in the ordinary course of business, noting that a payment made in the ordinary course of business at the time of its making cannot cease to have that character because of a

change of circumstances in the future. Accordingly, the Court allowed the appeal and made an order that the two payments made to Waikato Freight not be set aside.

Absence of a defence of disclosure under the insider–trading provisions of the Companies Act 1993

The issue in *Thexton v Thexton* CA265/00, 27 November 2001, was whether under s149 of the Companies Act 1993 a director of a company who has material non-public information about the value of the company's shares as a result of his or her capacity as a director or employee and who purchases (or sells) shares in the company is liable to the seller (or purchaser) for the difference between the fair value and the price at which the shares were traded even if he or she disclosed the material non-public information to the seller (or purchaser) at the time of the contract. On appeal, the appellant argued that s149 does not apply where the person trading with a company director is privy to the inside information which the director possesses.

The Court held that s149 implements an "abstain or pay fair value" regime for insider trading rather than an "abstain or disclose" regime. Under s149, information does not cease to be held by a director "in his or her capacity as a director or employee of the company, being information that would not otherwise be available to him or her" merely because the information is disclosed to the person with whom the director trades, unless of course the information is publicly disclosed. Nor can it be said that disclosure to the person with whom the director is trading renders inside information no longer "material to an assessment of the value of shares or other securities issued by the company" under s149. This interpretation is also supported by the policy. It produces a simple rule and avoids arguments about whether all the confidential information had been adequately conveyed by a director to the prospective buyer or seller. Undesirable re-writing under s149 by courts of contracts for the sale of shares and commercial uncertainty can be avoided if a company's board agrees to disclose publicly all material information before a director trades in shares or if at the time of a transaction an independent valuer certifies the price as fair. And if one family member wishes to make another a gift, instead of selling below fair value he or she can adopt the traditional gift and estate planning course of a sale at market value and the reduction of all or part of the resulting debt by annual gifts.

Principles in fixing price when court orders buy-out of shares

Yovich & Sons Ltd v Yovich (2001) 9 NZCLC 262,490, was an appeal against the basis on which the High Court had fixed the price at which it had ordered a company to acquire the minority shareholding of a member under s174 of the Companies Act 1993. The Court had to decide whether there should be a discount in the value of a minority shareholding in that situation.

The Court held that the High Court's decision that it was wrong to discount the value of the shares, in this case, was in accordance with the applicable principles. The appeal was largely an attempt to challenge the manner in which the High Court applied a method of valuation of shares, which method both parties had agreed was appropriate. The making of an order under s174 was essentially a discretionary exercise in respect of which an appellant court would not interfere unless it could be demonstrated the discretion had been plainly wrongly exercised or had been exercised

on some wrong principle of law. The Court is generally reluctant to embark on an initial consideration of valuation processes or the manner in which they were applied. The appeal was dismissed.

Personal liability for misstatement of company's name

The Court in *Clarence Holdings Ltd v Hall & Ors* (2001) 9 NZCLC 262,566 considered whether there was personal liability for misstatement of company's name in a document creating a legal obligation. In this case the respondent formed a new company undertaking the assets of an existing company. There was a transfer of lease of the business premises. The lessor was not informed of the arrangements and for some time was unaware that a new company was occupying its premises. During this period the directors of the new company entered into a fresh lease agreement with the lessor, using the name of the original company. By this time the original company had dissolved. A legal dispute arose when the directors of the new company decided to vacate the premises. The issue was whether the new company was bound by the arrangements made with the appellant in the name of the old company. A claim for personal liability was taken out against the director of the old and new company.

The Court held that when the crucial letter was signed in the name of the old company the respondent was acting as agent for the new company, although the name was misstated. There was no sound basis for treating the directors as acting for the old company when they signed the letter as the company had dissolved and had transferred its relevant business, including the leasehold interest to the new company. In those circumstances the only logical inference was that the respondent was acting as an agent for the new company. The new company became the assignee of the old company's interest as lessee under the deed of lease. Although the assignment was in breach of a covenant first to obtain the consent of the lessor that did not make the assignment void. It was effective to vest forthwith the term of the lease in the assignee, subject to the right of the lessor to forfeit the lease on becoming aware of breach and to the assignee's rights to seek relief against forfeiture.

Under s116(2) of the Companies Act 1955 the respondent was personally liable to the same extent as the new company unless liability was excluded by s116(2)(c) or s116(2)(d). There was no disadvantage caused to the appellant as a result of its lack of awareness. It was the subsequent insolvency of the company, an unconnected event, rather than repudiation of the leasehold contract, which caused the loss. It was just and equitable that the respondent be excused from the liability. The appeal was dismissed.

Trans–Tasman mutual recognition

The appellant in *Registrar-General of Land v New Zealand Law Society* [2001] 2 NZLR 745 appealed against an order in the High Court that the occupation of landbroker confers no authority to convey land in New Zealand.

Mr Dempster and the joined parties are licensed in South Australia to practice as landbrokers in that State. After the passing of the Trans-Tasman Mutual Recognition Act 1997, the Registrar-General of Land in New Zealand granted licences to Mr Dempster and the joined parties to practise as landbrokers in New Zealand.

Traditionally, licensed landbrokers had been permitted to act in conveyancing matters on an equal footing to barristers and solicitors in New Zealand. The New Zealand Law Society submitted, however, that the occupation of landbroker no longer has practical effect in New Zealand and has therefore ceased to exist.

The Court of five scrutinised the relevant legislative history. The Court found that landbrokers and legal practitioners alike continued to partake in conveyancing, especially after the passing of the Land Transfer (Compulsory Registration of Titles) Act 1924, which required all conveyancing to be brought under the Land Transfer Act and therefore within the jurisdiction of landbrokers.

The Court held that the ability of landbrokers to engage in conveyancing continues today. The dwindling in numbers of licensed landbrokers in the mid 1900s was found to be caused through a failure on the part of Parliament to revise the 1870 scale of fees payable to landbrokers. It was not, as submitted by the New Zealand Law Society, due to a conscious decision by Parliament to extinguish the occupation through legislative amendment.

The Court held therefore that the occupation of landbroker, distinct from that of a solicitor or barrister, did exist in New Zealand for the purposes of the Trans-Tasman Act. Further, the Court held that, completely independent of the Trans-Tasman Act, any person who is prepared to abide by the conditions in ss229-234 of the Land Transfer Act 1952 and who is a fit and proper person to be a landbroker is entitled to a licence issued under s229, whether or not that person is a member of the legal profession. This was found to have been the law since 1870.

The Court held that the Registrar-General had been right to register Mr Dempster and the joined parties as licensed landbrokers capable of conveyancing. The appeal was accordingly allowed.

Competition law – the significance of persistently high market share in the absence of evidence of barriers to entry.

The essential issue in *Commerce Commission v Southern Cross Medical Care Society* CA89/01, 21 December 2001, was whether, in the absence of evidence that barriers to entry are high, it could be inferred that Southern Cross is dominant in the market for medical insurance in the light of the economies of scale available to it and the failure of entrants into the market to make dramatic inroads into its market share.

Southern Cross applied to the Commerce Commission for a clearance under s66 of the Commerce Act 1986 in respect of its proposal to acquire Aetna Health (NZ) Ltd. The Commission refused to grant a clearance, stating that it was not satisfied that the proposed acquisition would not result in Southern Cross acquiring a dominant position in the market for medical insurance in New Zealand or strengthening its existing dominance. The Commission in its written decision identified numerous reasons for refusing a clearance but accepted that barriers to entry and expansion in the market appeared to be low. Before this Court the Commission relied on the fact that whereas many providers had entered the health insurance market since 1993, by 2000 none had acquired a market share greater than approximately 15 percent and most had a market share of no more than five percent. Southern Cross' market share

lies between 60 and 65 percent. A further argument for the Commission on appeal was that although barriers to entry were low, barriers to expansion, notwithstanding what the Commission had said about them in its written decision, were in fact high. It was argued that Southern Cross' size allows it to spread its risks more effectively than smaller insurers can. The economies of scale it thus enjoys were said to amount to a barrier to expansion.

A majority of the Court (Richardson P and Tipping J) held that the Commission erred in declining to grant a clearance. They affirmed the test for dominance as formulated by McGechan J in the High Court in *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 and this Court in *Port Nelson Ltd v Commerce Commission* [1996] 3 NZLR 554. The majority stressed the economic maxim that a high market share in the absence of barriers to entry or expansion cannot confer market power or dominance because any attempt to raise prices substantially above market cost will result in entry or expansion of output by competitors. They pointed out that the economic literature indicates that economies of scale do not amount to a barrier to entry unless – and there was no evidence of this here – they are so great as to make a firm a natural monopoly or sunk costs are high. They went on to state that the same applies in respect of barriers to expansion.

On the balance of probabilities the majority considered the comparative lack of any erosion of Southern Cross' market share to have resulted from the health insurance market having been contestable and efficient over the period from 1993 to date. Southern Cross had been deterred by the threat of entry or expansion by competitors from raising its prices significantly above marginal cost, and that created no incentive for competitors aggressively to seek to capture market share. Nevertheless, the evidence indicated that Southern Cross' market share had gradually declined over the years.

In his dissenting judgment Keith J stated that he was reluctant to interfere with the Commission's decision on account of the Commission's expertise and the fact that the Commission had access to more information than the Court did. He endorsed the reasoning in the Commission's written decision, particularly its focus on the failure of Southern Cross' competitors to make major inroads into its market share measured as a proportion of premiums. He also drew on statements made by Southern Cross' competitors to the Commission to the effect that Southern Cross has substantial market power. The updating information did not lead him to the conclusion that the Commission's decision was now to be regarded as wrong.

Joint and several liability under the Securities Act 1978

The appeal in *Robinson v Tait* (2001) 9 NZCLC 262,651 involved the interpretation of s37(6), which provides that, if any such subscriptions are not so repaid within two months after their receipt, the issuer and all the directors thereof "shall be jointly and severally liable to repay the subscriptions". Section 37 of the Securities Act 1978 forbids the making of any allotment of securities to the public for subscription unless, at the time of the subscription, there was a registered prospectus relating to the security. Where subscriptions are received by or on behalf of an issuer but, for any reason, securities cannot be allotted, the issuer must ensure that the subscriptions are

kept in a trust account and repaid to the subscribers, together with any interest earned, as soon as reasonably practicable.

The issuer in this appeal was Fortex Group Ltd. When Fortex collapsed in 1994, it was discovered that s37 applied to subscriptions paid by some of its employees for shares in deferred payment schemes. Their subscriptions were not repaid under s37. In 1996 a group of representative employees sued Fortex and the trustee of the schemes. They did not then sue the Fortex directors. On 18 December 1996 the employees entered into a deed of settlement with Fortex and the trustee. They subsequently sued the directors in reliance on s37(6).

The issue was whether the employees' settlement with Fortex and the trustee also released the directors from liability under the common law rule that release of one joint obligor discharges the entire obligation and so releases any other joint obligor (the "release rule"). The Court of five discussed the scope of the release rule in relation to liability in both tort and contract and the effect of s17 of the Law Reform Act 1936. However, while this background was considered useful, the Court decided the case in the particular statutory context of s37. Keith, Blanchard and McGrath JJ held that the words "jointly and severally" in s37(6) were used to create a joint and a several liability on directors, rather than merely creating a joint liability enforceable both jointly and severally. While the release rule applied in relation to the directors' joint liability with Fortex, the employees' settlement with Fortex and the trustee did nothing to extinguish the additional several liabilities of the directors. The directors' appeal was dismissed accordingly.

Thomas J, concurring, agreed with the High Court of Australia in *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, finding that s17 of the Law Reform Act 1936, which provides that judgment recovered against one joint tortfeasor "shall not be a bar" to an action against any other tortfeasor, must be taken to have abrogated the effect of the release rule also. Despite the employees' settlement with Fortex and the trustee, each of the directors remained liable under both their joint liability with and their several liability to Fortex. Tipping J, also concurring, considered that the decision of this Court in *Brooks v New Zealand Guardian Trust Co Ltd* [1994] 2 NZLR 134 should still be regarded as stating the law, contrary to *Thompson*.

Family law

Departure orders under the Child Support Act 1991

In *D v C* [2002] NZFLR 97 the appellant father appealed from a High Court decision granting the respondent mother a departure order from a formula assessment of child support under the Child Support Act 1991 on the basis that the High Court had erred in applying a "principle of proportionality" to the assessment of his contribution. This so-called principle involved adding together the taxable incomes of the mother and father and assessing what proportion the father's income bore to that total. The Judge

then applied this percentage in a mathematical way to the issues which he had to consider.

A Court of five held that it was inescapable that the High Court had construed the Act as involving, indeed as driven by, what it termed "the principle of proportionality". The Court held that neither the policy of the Act nor its objects supported such a rigid and mathematical approach. The differing capacities of the parents to provide for the children's proper needs were of course relevant when deciding whether to make an order and on what terms, but the High Court's approach was seen as unduly prescriptive.

However, the Court agreed with the High Court's assessment that a departure order was justified. The reasonable needs of the three children amounted to $27,500 per year, significantly higher than provided for by the formula assessment. This, coupled with the father's capacity to meet the children's needs, was held to represent special circumstances justifying a departure order. The mere level of the father's income was also sufficient to constitute special circumstances providing alternative grounds for a departure order. As to the level of departure, the Court held as a matter of discretion that the father should meet 80% of the reasonable needs of the children.

Inter–country relocation cases under the Guardianship Act 1968

In *D v S* [2002] NZFLR 116 a Court of five set out eight key points which should be borne in mind in custody, guardianship and access cases and allowed the father's appeal. Blanchard J dissented on the outcome.

First, s23 of the Guardianship Act 1968 makes the welfare of the child the first and paramount consideration. Secondly, s23 does not mean simply that the child's welfare is the first item in a list of items to be considered, but that once all relevant factors have been taken into account, the course to be followed will be that which is most in the interests of the child's welfare. Thirdly, the approach mandated by s23 and the emphasis on the parents' responsibilities for the wellbeing of the child are wholly consistent with the relevant provisions of the United Nations Convention on the Rights of the Child. Fourthly, all aspects of welfare must be taken into account, including the child's physical, mental and emotional wellbeing and the development in the child of our society's standards and expectations of behaviour. Undue emphasis must not be given to material, moral or religious considerations, or for that matter any other factor. Fifthly, it should be noted that s23(1A) of the 1968 Act was introduced to dispel any gender based assumptions as to the parent whose care will best serve the welfare of the child. Sixthly, choice of residence and relocation may be affected by the nature and duration of the existing custodial arrangements. Seventhly, decisions of courts outside New Zealand are likely to be of limited assistance. Even if an overseas statute focuses on the welfare of the child as the paramount consideration in a similar legislative context, the social landscape in which it is applied will not replicate our local circumstances. Finally, it is evident from modern family law cases and academic commentary that relocation disputes are particularly difficult and that differing assessments are often available, especially as judges, while seeking total objectivity, are all influenced to some extent by their own perspectives and experience.

The Court concluded that *Payne v Payne* [2001] 2 WLR 1826 does not provide an appropriate model for New Zealand courts. Our law, as stated in *Stadniczenko v Stadniczenko* [1995] NZFLR 493, requires the reasonableness of a parent's desire to relocate with the children to be assessed in relation to the disadvantages to the children of reduced contact with the other parent, along with all other factors. There will be no error of law if the decision as to residence is based on the welfare of the children looking at all relevant factors, including the need of the particular children for a continuing relationship with their father and with their mother.

Blanchard J, dissenting, expressed his complete agreement with the eight points set out by the majority (Richardson P, Keith, Blanchard and Tipping JJ) and with its rejection of *Payne*. He disagreed only with the majority's conclusion that the High Court had been influenced by *Payne* to depart from this Court's decision in *Stadniczenko*.

Testamentary promises

The appellants in *Byrne v Bishop* [2001] 3 NZLR 780 were the next of kin of Daniel Bernard Byrne, who died on 5 October 1996 without having made a will. They contended, unsuccessfully, that the High Court had erred in upholding a testamentary promises claim by Mr Byrne's neighbours, the Bishops, under s3 of the Law Reform (Testamentary Promises) Act 1949.

The Bishop family owned a dairy farm directly across the road from Mr Byrne. Mr and Mrs Bishop have three adopted children. Due to his drinking heavily, Mr Byrne suffered a stomach hemorrhage in January 1977. While he was away from his farm for around five weeks, the Bishops looked after the property and stock. On his return, the Bishop family effectively adopted him as one of the family. The High Court Judge found that, from 1977, Mr Byrne hardly ever left the Bishop's place except to go home to sleep and to work in his workshop or garden. The three Bishop children and their parents combined to give Mr Byrne the love, companionship and domestic benefits of close family membership. They took him away from what the Judge described as his "lonely and squalid life as a hermit", drinking himself to death. In return, Mr Byrne would help out around the Bishop household by, for example, giving presents and taking the children on holidays and to and from school. This relationship can be contrasted with that of Mr Byrne and his next of kin, the appellants, with whom he had very little contact over the 20 years preceding his death.

On the death of Mr Byrne, the Bishops brought a claim under s3 of the Law Reform (Testamentary Promises) Act 1949, which was upheld in the High Court. The Judge ordered that one of Mr Byrne's two dairy farms be vested in the Bishop children, together with payments already made from the estate to and estate chattels already received by the Bishop family.

On the Byrnes' appeal the Court accepted the Judge's findings as to the Bishops' generosity to the deceased. The Court rejected submissions that the award in the High Court was "beyond the scope of the services" rendered by the Bishops when reciprocal benefits from Mr Byrne were taken into account. It also rejected the

contention that the award should have been lower because the greater part of the services were rendered by Mr and Mrs Bishop, not the children. The Court held it is sufficient for the purpose of s3 for a promisor to reward one family member for the services rendered by another, even if the claimant did not know of the promise during the promisor's lifetime. It is the purpose behind the promisor's provision that is relevant, not the motivation of the person rendering the services rewarded. The Court held also that the Bishops' acceptance of their neighbour was "quite extraordinary", going beyond the natural love and affection expected in a normal family situation. A very substantial award would have been reasonable, even if the moral claims of Mr Byrne's next of kin had been stronger. The High Court Judge was held to have properly weighed all competing considerations in exercising his discretion. The appeal was dismissed accordingly.

Administrative law

Unlawful fettering of discretion

In *Westhaven Shellfish Ltd v Chief Executive of Ministry of Fisheries and Ors* CA238/00, 11 October 2001, the development and application of a Ministry of Fisheries' policy was declared to unlawfully fetter a statutory and regulatory discretion. Westhaven harvests cockles in Golden Bay in accordance with permits issued under s63 of the Fisheries Act 1983. Cockles have not been brought within the quota management system (QMS). Westhaven sought permits for cockles in other New Zealand fisheries areas (including area 3). Those requests failed as did its applications, made to the Ministry, for review of the refusals.

Westhaven sought judicial review of (1) the policy directions given by the chief executive of the Ministry of Fisheries and his predecessor, (2) Ministry decisions declining permits and (3) Ministry decisions refusing applications for review; it also challenged (4) allocations made to another company which harvests cockles in area 3. The grounds were that the chief executive and other officials failed to exercise their statutory discretions, unlawfully fettered the discretions, had regard to improper purposes and irrelevant considerations, failed to take into account relevant considerations, breached natural justice and illegitimately discriminated in breach of the Act. These complaints were rejected in the High Court. Westhaven appealed.

The grant of s63 permits for fish outside the QMS is discretionary and may be subject to conditions (s63(4)). In 1992 this section was amended to prohibit the issuing of permits in respect of any non-QMS species, except tuna, except to a person who (1) had a fishing permit that was in force on 30 September 1992 and (2) lawfully took fish, aquatic life, or seaweed under a fishing permit held by that person at any time between 1 October 1990 and 30 September 1992 (s63(13)(a)). Further, a permit issued to such a person authorises the taking of only those species authorised by the permit held by that person during that period. The Fisheries (South East Area Commercial Fishery) Regulations 1986 reg11AA prohibits the taking of cockles in area 3 unless the Director–General of Fisheries authorises the taking. The 1992 amendment did not restrict permits being granted in other areas, whereas the

guidelines issued by the Director–General limited the granting of such permits to those species and areas already held.

In refusing Westhaven permits in new areas the Ministry proceeded on the erroneous basis that s63(13) confined permits not only to the original species but also to the original areas. Westhaven fulfilled the necessary s63(13)(a) criteria in relation to cockles. On review of these refusals the Ministry acknowledged that to the extent that the decision to decline was based on s63(13) it was incorrect but concluded the original decision was made in accordance with good fisheries practices.

The Court held that the chief executive and Ministry had not lawfully exercised the powers conferred by the Act and regulations. A policy may well state a presumption, or even a strong presumption, against new permits. But the policy cannot deny the power which the law has conferred. Here the statements of policy and the decisions themselves did not recognise in any way that there might be a departure from the policy nor did they indicate what facts might support such a departure.

On the issue of discrimination the Court held that s63(6) was not relevant to this case as there was no "fishery management area or quota management area" as required by the section. The appeal accordingly failed on the discrimination ground but succeeded on the grounds that the policy both in its statement and application had unlawfully fettered the discretion conferred.

Judicial review – membership of Stock Exchange

White v New Zealand Stock Exchange CA61/01, 29 October 2001, arose from the Board of the New Zealand Stock Exchange's decision to decline Mr White's application for individual associate membership of the Stock Exchange. The Membership Appeal Committee of the Stock Exchange dismissed Mr White's appeal against the decision and the High Court dismissed Mr White's application for review of these decisions.

The Court held that the Board breached the obligations of natural justice in reaching its decision declining Mr White's application without drawing their concerns about his fitness for membership to his attention and giving him the opportunity to comment.

The Court further held that the Appeal Committee had not looked at the matter afresh. The Court was not satisfied that the Committee had made its own evaluation of Mr White's current fitness for membership, and satisfied itself whether or not requirements of the Rules as to membership of the Stock Exchange were met. In reaching this conclusion the Court noted that the Committee never stated they were looking at the matter afresh, nor did they evaluate or express any conclusions as to submissions made by way of explanation, justification and excuse for a certain incident. Further, the decision was found to have employed language pointing against the inference that the Committee was itself looking at the matter afresh and reaching its own independent conclusion.

The appeal was accordingly allowed and the decisions of the Board and the Committee were declared invalid.

Mental Health (Compulsory Assessment and Treatment) Act 1992

In *Waitemata Health v Attorney-General* [2001] NZFLR 1122 a Court of five considered the interpretation of the definition of "fit to be released from compulsory status" in s2 of the Mental Health (Compulsory Assessment and Treatment) Act 1992.

Elias CJ, Richardson P, Gault and Thomas JJ considered the test for release in s2 which defines the expression "fit to be released from compulsory status" as "no longer mentally disordered and fit to be released from the requirement of assessment or treatment under this Act". They then reviewed a number of authorities in which the word "and" had been used in the consequential sense. They concluded that the consequential meaning of "and" is a natural and ordinary meaning which accords with the scheme of the Act. The effect of the definition is that a patient is fit to be released from compulsory status if, and only if, that patient is no longer mentally disordered. There is no additional requirement of fit to be released once it is decided that the patient is not mentally disordered. The only purpose of compulsory status is to achieve assessment or treatment. That purpose cannot attach to someone who is not mentally disordered. On the natural justice point they upheld the High Court finding that natural justice required that the Director-General be notified of the hearing and given an opportunity to make submissions. Noting that the common law will supplement the statute to achieve fair procedure unless the statutory procedure is clearly intended to be exhaustive they concluded that there is nothing in the scheme or provisions of the Act which is inconsistent with the Director's right to be heard in the particular circumstances.

Tipping J, concurring, noted that the natural justice point turned on conventional principles of fairness as reinforced by s27(1) of the New Zealand Bill of Rights Act 1990. Natural justice is not a concept confined to the immediate parties to an issue. The fact that a legislative scheme does not expressly provide for service on, or the participation of, the third party does not mean that third party's interests can be ignored. On the interpretation point Tipping J preferred the "and therefore" meaning as a pure question of statutory construction in light of the scheme and purpose of the Act.

Waitangi Tribunal – procedure and jurisdiction

Hemi v Te Runanga O Ngai Tahu CA82/01, 1 November 2001, was a sequel to the decision of the Court in *Ngati Apa Ki Te Waipounamu Trust v R* [2000] 2 NZLR 659. The appellant appealed successfully and Ngai Tahu cross-appealed unsuccessfully from a High Court decision that, respectively, the Waitangi Tribunal's direction that cross–examination by Ngai Tahu should be postponed to the end of the claimants' evidence was a breach of natural justice and that the Tribunal had jurisdiction to entertain the appellant's claim.

A Court of five unanimously held that the Tribunal had jurisdiction as a result of the decision in *Ngati Apa*. The Court stated that it mattered not whether the relevant passages in that decision were ratio decidendi or simply dicta, as they were fully considered statements made after full argument.

As to the cross–examination direction, the Court was again unanimous in the view that the Tribunal's direction did not necessarily raise any real risk of a breach of

natural justice. The Court noted that there would be a variety of types of evidence adduced, for only some of which there might be prejudice arising from delayed cross-examination. The direction was not an absolute one and the Tribunal would need to be alert to the fact that in some circumstances immediate cross-examination would be desirable, perhaps even necessary. The Court also noted that the test to be applied was not whether the High Court considered the direction reasonable, but whether the Tribunal's view was one that it could reasonably have reached. The High Court Judge, having found no irrationality, should have upheld the Tribunal's direction.

The Court stated that it was influenced in its conclusion by the fact that to determine that there would necessarily be a breach of natural justice had an element of prematurity about it. The direction was a procedural direction of a specialist tribunal. Unless there was some fundamental flaw in the direction in question, the Court held that it was preferable to await the outcome of the substantive proceedings and then examine whether any prejudice had actually resulted. The High Court should not readily intervene in matters of this kind on an anticipatory basis.

Permitted baseline test and ss104 and 105 of the Resource Management Act 1991

The Court established that the "permitted baseline" test applied to the substantive consideration of consent applications as well as to process issues relating to notification under the Resource Management Act 1991 in *Smith Chilcott Ltd v Auckland City Council* [2001] 3 NZLR 473.

The matter came before the Court on three questions of law. The first was whether a consent authority considering an application for a non-complying activity under ss104 and 105 of the Act was obliged to apply the "permitted baseline test", which had been formulated in relation to the notification provisions of s94(2) in *Bayley v Manukau City Council* [1999] 1 NZLR 568. If it did, the second question was whether the Environment Court applied that test correctly by its finding that a "likely" test was also a "credible" test. The third question was whether the High Court erred in finding the density rule contained in the Auckland district plan was a relevant provision in terms of s104(1)(d) of the Act.

The Court held that the "permitted baseline" test did apply to substantive consideration of consent applications as well as to process issues relating to notification. A consent authority considering an application for consent to a non-complying activity was obliged to consider the test.

Any permissible use qualifies as a "credible" development under the test for what is permitted unless it is a fanciful use. The Environment Court did not apply the "permitted baseline test" in conformity with the law by asking itself whether a permitted development was "likely" or "more likely" or "more credible".

The Court found the density rule was relevant in respect of the effects on amenities, although the purpose of the rule might not have been to protect amenities such as a view or outlook. The Environment Court was able to make a broad assessment that the density rule may have had an effect on the environment beyond its immediate purpose.

Civil procedure

Appeal against orders striking out proceedings

In *Midland Metals Overseas PTE Ltd v The Christchurch Press Co Ltd & Ors* CA67/01, 24 October 2001, a Court of five upheld a Master's decision to strike out certain pleadings as untenable. In the course of doing so the Court commented on the interrelationship of the laws of negligence and defamation in New Zealand in light of the House of Lords' decision in *Spring v Guardian Assurance Plc* [1995] 2 AC 296.

Midland Metals had commenced proceedings in defamation, malicious falsehood, negligence and breach of the Fair Trading Act 1986 in relation to remarks made about the quality of certain Chinese imported underground electric cables. The Master struck out the negligence claim and, in relation to the defamation claims, an allegation of exacerbation and another of breach of the Human Rights Act 1993. On review, the High Court held that the exacerbation pleading could stand but otherwise affirmed the Master's decision. Midland Metals appealed and the respondents cross-appealed the order granting leave to reformulate the damages claim.

Gault, Keith and McGrath JJ upheld each of the Master's strike out rulings and held that s6 of the Defamation Act 1992 limited compensatory relief for a corporate plaintiff to pecuniary loss. Therefore, the cross-appeal was allowed and the High Court's order granting leave to reformulate the pleading was quashed. In holding that the negligence actions were rightly struck out they reviewed the New Zealand authorities in light of the decision of the House of Lords in *Spring* before reaffirming the New Zealand position against recognising a duty of care based on injury to reputation. The allegation of breach of the Human Rights Act through use of the description "Chinese cables" was also rightly struck out as untenable.

Blanchard and Tipping JJ delivered concurring judgments. Both emphasised the careful balance which has been worked out in the law of defamation and allied torts over a long period of time, representing an endeavour to accommodate the often irreconcilable values of freedom of speech and individual reputation. In relation to the exacerbation of harm pleading Tipping J added that economic loss is not logically susceptible to any concept of aggravated damages. The amount of harm caused by the wrong to the plaintiff's economic interests is simply a matter of proof on ordinary causation principles.

Summary judgment principles

Bernard v Space 2000 Ltd & Knobs & Knockers Ltd 15 PRNZ 338 was an appeal against the entry of summary judgment for the defendant under R136(2) of the High Court Rules. In allowing the appeal, the Court applied and dismissed the principles in *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298.

The Court followed *Westpac* in holding that when the defendant applies for summary judgment under subrule (2), the procedure is not directly equivalent to the plaintiff's summary judgment procedure in subrule (1). Case law relating to subrule (1) therefore does not apply, or must be applied with considerable caution to applications for summary judgment by a defendant under subrule (2). Rule 136(2) is appropriate

where the defendant has a clear answer to the plaintiff which cannot be contradicted and where the defendant can offer evidence which is a complete defence to the plaintiff's claim.

The Court stated that the difference in approach to be adopted in relation to subrules (1) and (2) is founded on the fundamental principle of a citizen's right of access to the courts. Where a plaintiff has a proper issue to be tried it is inappropriate to apply a test or adopt an approach which would bar him or her from the judicial process. The Court's insistence on a clear answer and a complete defence under R136(2) recognises that a plaintiff's fundamental right to his or her "day in court" is not to be lightly denied.

The Court also commented that R136(2) is not a suitable vehicle for the determination of questions of fact, including questions of causation. Summary judgment may be suitable for cases where an abbreviated procedure and evidence by way of affidavits will sufficiently expose the facts and legal issues, but not otherwise. Consequently, the plaintiff will not ordinarily have to adduce evidence to resist a defendant's application under R136(2).

The Court held that the Master's dismissal of the point in this case was premature and the reasons for the decision were inconsistent with the principles enunciated. Accordingly, the summary judgment entered for the defendant was set aside.

Summary judgment – costs revision

In *Erwood v Glasgow Harley* [2002] 1 NZLR 251 the issue for the Court was whether summary judgment could be entered for liability but not for quantum. Counsel for the respondent had conceded at the hearing before the High Court on the R143 application that there had been no appearance by the appellant on the application for summary judgment. The case was dealt with on the basis that the appellant did not appear before the Master and was able to apply to set aside summary judgment. Although the matter might have been handled differently the appellant had not shown that the decision of the High Court to uphold the entry of summary judgment as to liability, but to set aside as to quantum, resulted or may have resulted in a miscarriage of justice. There was accordingly no basis in terms of R143 for setting the entire summary judgment aside. The appeal was dismissed.

Summary judgment – leases

In *Fulton v Woods* CA232/01, 22 November 2001, the Court considered the test for rebutting the statutory presumption contained in s105 of the Property Law Act 1952 in the context of an appeal against summary judgment. The presumption is that a tenancy is determinable at the will of either of the parties by one month's notice in writing. The lease in question was an oral agreement.

After noting that no argument was directed to the appropriate approach to summary judgment the Court held that the High Court Judge took too narrow an approach to the case by examining whether and to what extent the express terms of the lease were supplemented by implied terms when the lease itself was concluded orally. The real enquiry was to determine the terms of the arrangement settled between the parties.

That was a matter for evidence of what was said in the context of the matrix of facts against which the arrangement was made. It could not be determined on the basis of the affidavits. The Court accordingly allowed the appeal and quashed the order for summary judgment.

Vexatious litigant

In *Collier v Attorney-General* CA84/00 and 218/00, 13 November 2001, the Court considered an appeal against an order of the High Court made under s88A of the Judicature Act 1908 that no civil proceedings be instituted or continued by Mr Collier without the leave of the High Court. The Court also considered Mr Collier's application for a retrial.

On 31 March 2000 the High Court declared Mr Collier a vexatious litigant. The order was based on twenty proceedings filed in the Christchurch registry of the High Court in which Mr Collier was a party. The applicant had also relied on numerous appeals and applications made by Mr Collier during the course of the proceedings. Mr Collier appealed.

At the outset of the hearing in this Court Mr Collier submitted a memorandum to the Court requesting the Court answer questions relating to possible bias on ethnic or religious grounds. The memorandum specified that should the Court refuse to answer the questions it should recuse itself. Two members of the Court separately answered that they had no conflict of interest which should be disclosed to Mr Collier and expressly declined to answer the other questions other than to add that they had no reason for recusal and intended to sit. The third member said that there were no grounds for recusal, otherwise he would not be sitting. Mr Collier then asked the Court to provide reasons in writing for declining to answer the questions and applied for conditional leave to appeal to the Privy Council. After hearing submissions on the application and taking a short time for consideration the Court declined the application on its merits; and there was in any event arguably no decision from which to appeal. Mr Collier asked leave to withdraw and, having been advised that the Court intended to complete the hearing, withdrew into the public area of the Court.

The Court went on to consider the application for retrial and the appeal which included allegations by Mr Collier of judicial bias and the denial of right to appeal the refusal of particulars sought before trial. After reiterating that there is no appeal from the refusal of leave to appeal under R61C(6) of the High Court Rules the Court held that there was no injustice arising out of procedural matters. Neither was bias made out. Both the application for retrial and the appeal were dismissed.

Disclosure of Committee minutes

ENZA Ltd v Apple & Pear Export Permits Committee [2001] 3 NZLR 456 was an appeal against a High Court refusal of orders under s10 of the Judicature Amendment Act 1972 and R307 and R312 High Court Rules requiring the Permits Committee to produce for inspection notes and minutes during which the Committee deliberated on or discussed applications made to it for export permits. The Committee had made an affidavit informing the Court of reasons for decisions and procedure relevant to issues raised on judicial review. The Court held that minutes will inherently be fragmented,

incomplete and may give a misleading impression of reasons for decisions. The Committee's function has more of a judicial than an administrative character in application of legal rules and principles to individual applications. There is a danger in allowing use of minutes in cross-examination of deponents. The party concerned may wish to cross-examine on matters having only peripheral relevance to the issue but highly invasive of the legitimate privacy of the deliberations of the Committee. The appeal was dismissed.

Test for approving intervention

Drew v Attorney-General [2001] 2 NZLR 428 involved a successful application by the New Zealand Council for Civil Liberties to intervene in the hearing of an appeal against a judgment dismissing an application by the defendant for judicial review of orders made against him in prison disciplinary proceedings. The defendant neither supported nor opposed the application under R19(2)(a) of the Court of Appeal (Civil) Rules 1997. The Court held where the likely assistance to be offered outweighs any potential detriments to the various interests the Court should continue its practice of allowing intervention in such cases. The Court was prepared to accept that the area of prison inmates' rights under prison disciplinary processes did raise issues of special concern to the defendant. The application was granted.

Leave to appeal from the Employment Court

In *New Zealand Employers Federation Inc v National Union of Public Employees* [2001] ERNZ 213 the first application under s214 of the Employment Relations Act 2000 (ERA) for leave to appeal against an Employment Court decision, the Court considered when leave to appeal against decisions of the Employment Court should be granted.

The Court stated that the test to be applied in considering leave applications under s214 uses exactly the same language as s144(3) of the Summary Proceedings Act 1957, which governs appeals to this Court from decisions of the High Court on criminal appeals from the District Court. At least until there is a body of decisions under s214(3), decisions of this Court under s144 may provide some guidance as to the criteria under s214(3) and their application. Clearly there must be a question of law and the question must be one which by reason of its general or public importance or for any other reason ought to be submitted to the Court of Appeal for decision. The Court has a residual discretion to refuse leave even though there is a question of law involved and that question is of general or public importance. But, as the Court has emphasised in its decisions under s144, the stringent requirements of that section must be satisfied and neither the determination of what comprises a question of law nor the question whether that point of law raises a question of general or public importance is to be diluted (*R v Slater* [1997] 1 NZLR 211). In considering whether a question of law which is not of general or public importance ought nevertheless "for any other reason" to be submitted to the Court for decision, and in exercising the residual discretion, the Court can be expected to have regard to the special jurisdiction of the Employment Court under the ERA (cf s216). As a matter of practice, an applicant seeking leave to appeal under s214 should at the outset file a memorandum identifying the question or questions of law involved in the appeal and stating shortly

the grounds on which leave is sought and the considerations to be advanced in support of the proposition that the particular question of law identified ought to be submitted to the Court for decision. In this case leave was granted because the case raised the issue of how wide s11 of the Interpretation Act 1999 is, a question of interpretation affecting many if not all newly enacted statutes. There was also a dearth of authorities on this point and substantial public interest considerations were involved.

Review of costs awards

In *Victoria University of Wellington v Alton-Lee* CA294/00, 30 July 2001, the Court dismissed the University's appeal against the Employment Court's award of costs and disbursements totalling $181,400 in favour of the plaintiff who had achieved only qualified success in the Employment Court. The Court held that the unorthodox methods of calculation of costs, a perhaps simplistic analysis of who won and who lost the case and a criticism of the University which was not really reflective of the findings made in the primary judgment were not, in themselves, errors of law in terms of s135 of the Employment Contracts Act 1991. They would have been relevant if they were associated with an award of costs which was outside a range which could fairly be regarded as being acceptable. However, the result being within (although right at the top of) the range which was acceptable, the appeal was dismissed.

B. Important Criminal Cases

Elements of offences

CYPFS restraining orders – meaning of "contact in any way"

R v Reihana CA225/01 and 329/01, 14 November 2001, was a test case on the correct construction of s87 of the Children, Young Persons and Their Families Act 1989, in particular the effect of the restraint envisaged by s87(1)(c) from contacting the child or young person in any way. The issue was whether this meant that the person the subject of an order is restrained from contacting the child in any way at all, or is only restrained from making contact in a "molesting" way. There were two conflicting High Court decisions on the issue: *Coghill v Police* (1994) 12 FRNZ 347, which had adopted the former broader approach; and that in the present case, which had adopted the latter narrower one.

The Court held that the contact need not be molesting in nature. Provided the contact is deliberate, it is deemed to be a type of molesting which the section prohibits. It was noted that restraining orders under s87 can be made only if the child or young person has already been found to be in need of care and protection. The consistent theme in the statutory circumstances defining when a child is in need of care and protection (s14(1)) was that there was something which seriously threatens the child or young person's safety or well being. In light of this relatively high threshold, the essential purpose of s87 is to prohibit, in the interests of the child or young person, all forms of contact so that there could be no argument about the motive of the person making contact or its effect on the child or young person.

Uncertainty about class of drugs under the Misuse of Drugs Act 1975

The issue in *R v Karpavicius* [2001] 3 NZLR 41 was which, if any, drugs offence under the Misuse of Drugs Act 1975 applies if it is known that the drugs which the defendant conspired to import were either of class A or class B but not which of the two.

The Court of five held that where it is clear that an offence relates to either a class A or a class B drug but not clear to which, a defendant cannot be convicted and sentenced under paras (a) or (b) of s6(2A) – which relate to class A and B drugs respectively – but can be convicted and sentenced under s6(2A)(c). Paragraph (c) refers not to class C drugs but to "any other case", and those words cover class C drugs as well as the situation which arose in this case.

Failure to stop after an accident

R v Puru CA150/01, 27 August 2001, concerned an appeal against convictions for careless driving causing death and failure to stop and ascertain whether any person had been injured after an accident. In dismissing the appeal, the Court addressed the question of the guilty knowledge necessary to establish the offence of failure to stop

under s36(1)(b) of the Land Transport Act 1998. It was argued for the appellant that the test for knowledge is that the person has ascertained a state of facts or circumstances which creates in his or her mind a certainty that the point of his or her inquiry is free from doubt. It was further argued that this test was more difficult and severe than that applied by the trial Judge. The Court held that the tests were the same. The Crown is required to prove beyond reasonable doubt that the defendant knew that there had been an untoward event which might possibly have caused injury. This was the test applied by the trial Judge.

The Court also addressed the appellant's argument that s36(1)(b) creates three obligations : to stop, to ascertain if any person is injured and to render assistance, as held in *Lunn v Coates* (1954) 8 MCD 304. It was held that that decision was in error. To suggest that it is an offence in itself to fail to stop would be contrary to the object of the provision which is to ascertain whether anyone has been injured and to secure assistance for those in need of it. The obligations under the section are to stop and ascertain whether any person has been injured, and secondly, if someone has been injured, to render assistance to that person. No election between stopping, on the one hand, and ascertaining whether any person has been injured, on the other, is contemplated by the section.

Jury unanimity as to acts alleged as particulars

The appellants in *R v Mead and Molloy* CA146/01 and 147/01, 1 October 2001, had been convicted of ill-treatment of a child under s195 of the Crimes Act 1961. The issue on appeal was whether the trial Judge had misdirected the jury in his summing up. The Judge instructed the jury that they did not have to be unanimous in respect of the acts alleged as particulars, and that individual jurors could disagree on the proof of any specific acts but could nevertheless convict the accused as long as they were satisfied that the "essential elements of the offence" were proven.

Thomas and Anderson JJ held that no misdirection had occurred. Thomas J stated that s195 requires probative evidence on which the jury can be satisfied to the requisite standard of proof that the child was wilfully ill-treated in a manner likely to cause unnecessary suffering. The core of the offence lies in the cruelty, the particular form it may have taken is not an ingredient of the offence and neither are the particulars which have been furnished. For the most part, ill-treatment for the purposes of the section will comprise a course of conduct, an accumulation of incidents extending over a period of time. It is this course of conduct which the jury must examine to ascertain whether it constitutes wilful ill-treatment and individual jurors may adopt different routes to the overall conclusion that the requisite ill-treatment has occurred. The particular evidence which may have been accepted by individual jurors does not destroy their unanimity on the core elements of the charge and the guilt of the accused.

Anderson J stated that the issue could be resolved in accordance with the elementary principles that the essential elements of a crime are defined by law, not evidence; that particulars in an indictment are of an evidential, not a legal nature and that juries have traditionally been entitled to reach a collective conclusion without individual members of the jury being unanimously satisfied as to the occurrence, weight or significance of the evidence. Further, the purpose of s195 is to proscribe cruelty to

children and recognises that such ill-treatment may involve a course of conduct, the specific incidents of which may not be capable of proof.

Elias CJ, dissenting, argued that the requirement that a jury be unanimous as to the essential ingredients of an offence includes the statutory elements of the offence and the factual basis to which those elements are anchored. Where a number of specific incidents are included in the same count, there is a risk that all jurors will be satisfied of the proof of one, but not necessarily the same one. When directed, as in this case, that they do not have to agree on the conduct relied upon, the jury may then convict without a consistent foundation, that is, without unanimity as to the basis of criminal liability.

In accordance with the views of the majority, the appeals against conviction were dismissed.

Computer programme, whether document

R v Misic [2001] 3 NZLR 1 established that computer programmes and the computer disks are documents for the purposes of s229A of the Crimes Act 1961. Essentially, a document is a thing which provides evidence or information or serves as a record. The Court held that the program and disk in question constituted material things which record and provide information and as such they are readily comprehended by the term "document".

Defences

Defence of honest belief, collateral issues, transcripts of evidence

In *Haines v R* CA132/01, 5 December 2001, the appellant appealed against his conviction for conspiracy to defraud on three grounds : was the defence of honest belief available in cases where the defendant knows his or her conduct is dishonest but believes it is morally justified; should two television documentary videos be admitted as evidence to show how they impacted on the appellant's state of mind; and had the trial Judge given adequate direction that the trial transcript of evidence was to remain in the jury room and should the jury have received a subject index to the transcript. All grounds failed.

The Court found that the defence of honest belief was not available if the defendant knew his or her conduct was dishonest. It was not accepted that the Court in *R v Firth* [1998] 1 NZLR 513 had in mind that a defence of honest belief might be made out on the basis of a moral belief that conduct which the defendant knew involved invoicing on a basis for which there was no entitlement was nevertheless justified. The observations in *Firth* apply where the defendant has a belief that the conduct is honest and not dishonest.

The documentary video evidence related to collateral issues and the actions reflected in the documentaries were not the subject of the trial. The trial Judge had the

responsibility of ensuring that the videos did not distract the jury from its essential task of determining whether the defendant's conduct might be regarded as honest.

In relation to the trial transcript the Court found that the Judge had provided sufficient instruction to the jury at the beginning of the trial. The jury was provided with a table of contents setting out the page numbers in the transcript at which the evidence of witnesses could be found and listing exhibits produced by each witness. The Court referred to *R v McLean* [2001] 3 NZLR 794 where it was indicated it would be proper to provide the jury with a transcript in appropriate cases. The decision fell within the Judge's discretion. The Court held that the Judge had made it clear that the transcript was to remain in the jury room.

Self–defence unavailable for possession of offensive weapon offences

In *R v Busby* CA211/01, 26 September 2001, the Court considered the availability of the defence of self–defence in a prosecution under s202A(4)(b) of the Crimes Act 1961. The Court noted that the offence for which the appellant was charged was an offence of possession of a weapon in specified circumstances. It was not an offence having as an element the use of force. Where the offence is complete upon proof of possession together with circumstances that prima facie show an intention to use it to commit an offence (subject only to the accused proving that he did not intend to use the weapon to commit an offence of the stated kind in terms of s202A(5)), there is no room for self-defence.

Transitions

Homosexual Law Reform Act 1986 – transitional provisions

In *R v Patterson* [2002] 1 NZLR 245 the appellant challenged his convictions for sexual offending against young boys on the basis that he should have been prosecuted under new Crimes Act provisions substituted by the Homosexual Law Reform Act 1986, and not the old Crimes Act provisions. All the conduct in issue took place before the Homosexual Law Reform Act 1986 came into force. The charges were laid under the old provisions, which were in force at the time of the appellant's offending. The appellant's purpose in seeking to persuade the Court that he had been wrongly charged under the old sections was that, under the relevant new provisions, no prosecution could be brought unless commenced within 12 months from the time the offence was committed. The prosecutions which led to the appellant's convictions would have been invalid as they had been commenced well after the expiry of the permitted time limit.

Section 7(1) of the 1986 Act expressly excludes prosecutions involving conduct no longer an offence after the Act came into force, but does not require offences committed before the Act came into force to be prosecuted under the new sections. Accordingly the Court held that, provided the conduct involved remains an offence, it may be prosecuted under the old sections.

Section 7(2) contains a rider to the effect that in the case of proceedings already in train when the Act came into force, the accused is entitled to rely on the specified defences introduced by the new sections. No proceedings were in train against the appellant when the Act came into force, and accordingly he was not entitled to rely on the new defences. The appellant argued that it was anomalous that those against whom proceedings were pending were allowed the benefit of the new defences, whereas a person like the appellant whose conduct also took place prior to the coming into force of the Act, but who was prosecuted after it came into force did not receive a similar benefit.

The Court of five held that, even if that was an anomaly, s7 could not be read in such a way as to remedy it. It stated that this would involve a substantial recasting of the way s7 was expressed, which was not a function of the Court. The Court went on to hold that this conclusion did not conflict with human rights norms, either domestic or international. There was no question of the appellant being unable to take advantage of a lighter penalty, but rather whether a time bar applied that did not apply at the time of the offending. Nor did such a construction constitute any breach of the appellant's rights, as citizens who commit offences can expect no more than to be dealt with according to the substantive law which was in force at the time of their conduct. Thus, the appellant could not complain that he was somehow entitled to a greater degree of retrospective benefit than that provided for by Parliament. Indeed, the Court held that the true meaning of s7 is so clear that the meaning for which the appellant contended could not be regarded as a tenable meaning, so as to be available in terms of s6 of the New Zealand Bill of Rights Act 1990. Thus, even if a breach of the appellant's human rights had been involved, the clear terms of s7 would have prevailed by dint of s4 of the Bill of Rights.

Limitation periods in sexual offences

The appellant in *R v Hibberd* [2001] 2 NZLR 211 was convicted of 32 offences of sexual misconduct with boys between the ages of 12 and 16. He appealed against his conviction, raising two separate questions relating to time-bars under the Crimes Act 1961.

The first ground of appeal against conviction related to the appellant's sodomy convictions for offending in 1975 and 1979. Both charges were laid under the old s142(1)(b) of the Crimes Act. However, counsel for the appellant argued that s7(2) of the Homosexual Law Reform Act 1986 prevented any prosecution for that offending because it was not commenced within one year after the commission of each act of sodomy and was therefore statute barred under the present s142. It was argued that, on human rights grounds, Parliament must have intended s7 to have retrospective effect. The Court held that there was no evidence that Parliament in fact intended s7(2) to have retrospective effect. Further, the Court held that a failure to give retrospective effect to the reforms does not offend against any human rights norms, including anything in the New Zealand Bill of Rights Act 1990. When committed before the commencement date of the reforms, the act of sodomy was a crime, which could be prosecuted at any future time. Provided a fair trial was still possible, there could be no unfairness in proceeding to prosecute more than 12 months after the event.

The Court held also that the term "defence" in s7(2) does not include time–bars. The time–bar provisions prohibit the commencement of a prosecution. Any such purported prosecution is a complete nullity. The Court held that the s7(2) term "defence" refers instead to the other defences introduced by the 1986 reform, such as those in ss140A and 142 where the person charged is under 21 or is younger than the boy involved.

The second ground of appeal against conviction related to two counts of indecent touching in 1993 charged under s140A(1)(a), as introduced in 1986. The Court accepted the appellant's argument that Parliament can never have intended, in placing a 12 month time-bar on prosecutions for anal intercourse under s142, to permit a prosecution after that time for an indecent assault immediately and proximately connected to the very same act. To that extent the appeal succeeded.

Police powers

Search and seizure – evidence

In *R v Thomas* CA301/01, 10 December 2001, the Court had to decide whether a police search was unlawful and whether evidence obtained as a result of the search should be excluded. The police had stopped a vehicle believing the driver was under the influence of alcohol even though the police allowed the vehicle to travel 3.8km before pulling it over. Having stopped the vehicle the police smelt cannabis and invoked their powers to search under s18(2) and (3) of the Misuse of Drugs Act 1975. Cannabis was found as a result of the search. The Court held the initial police stopping of the vehicle was unlawful. The police had stopped the vehicle for an unauthorised purpose. The Court was of the view that the initial stopping was unlawful and was inextricably linked with the questioning that followed. This was not a situation in which there had been an act independent of the unlawful stopping such as could properly give rise to a legitimate basis for the search under the Act. The smelling of cannabis was directly linked to and tainted by the earlier illegal stopping of the vehicle. The search was unreasonable under s21 of the New Zealand Bill of Rights Act 1990. The evidence as a result of the search was therefore inadmissible and the pretrial appeal succeeded.

Validity of search warrant

The appellant in *R v Harrison* CA20/01, 23 May 2001, appealed against a pretrial ruling that evidence resulting from a search warrant executed at his address was admissible at trial.

The appellant was suspected of being involved in the manufacturing of cannabis oil. A detective received instructions from the officer in charge of the inquiry to obtain a search warrant in relation to the appellant on the basis of information received from an informant. The warrant was issued, a search was made of the appellant's address

and items were found which the police contended were consistent with the production of cannabis oil.

The appellant challenged the validity of the warrant and the reasonableness of the search. The supporting affidavit, sworn by the detective, contained no information about the source of the detective's information, nor the reliability of the informant. Further, the police remained unable to give any convincing evidence as to the informant's reliability by the time of the pretrial hearing.

While accepting that the conduct of the police had been neither deliberate nor undertaken in bad faith, the Court held that the affidavit was "seriously deficient". There was no evidence that urgency had been required in seeking the warrant and the Court saw no reason why the officer in charge could not have sworn the affidavit himself. The Court disagreed also with the Judge's conclusion that the police had had sufficient evidence to justify the warrant even though the available material had not all been included in the affidavit. It was simply not sufficient, the Court said, for a police officer to assert a belief that an informant is reliable when necessary inquiries had not been carried out.

The Court held that, not only was the warrant invalid, but the subsequent search was both unlawful and unreasonable. The evidence obtained as a result of the search was held inadmissible at trial. Leave to appeal was granted and the appeal allowed accordingly.

Bail

"Bailable as of right"

R v Bryant [2001] 2 NZLR 319 concerns the relationship between s51 of the Summary Proceedings Act 1957 and the "bailable as of right" provision in s319 of the Crimes Act 1961 before their repeal and replacement by the Bail Act 2000. The appellant challenged the admission of the statements made while he was held at the police station pending bail. It was argued that because the appellant was bailable as of right, the police should have released him on bail once he had been processed. Their failure to do so meant that he had been arbitrarily detained in breach of the New Zealand Bill of Rights Act 1990, making the two statements inadmissible.

The Court rejected this argument. Sections 318-320C of the Crimes Act indicated that s319(2) in effect meant that a person was bailable as of right by a court once brought before a court. By contrast, s51 was directed at police bail. It permitted police to grant bail where prudent, whereas the police lacked such a power at common law and simply had a duty to bring detainees before a court as soon as possible. Sections 319 and 51 set up separate bail regimes, and it could not be said that s51 was subject to s319. The Court further observed that the suggestion that s51 was subject to s319 raised public policy difficulties because continued police detention would be precluded where there were legitimate concerns for the safety of an arrested person as well as of the public.

Defence facilities

Accused's entitlement to require access to victim for psychological assessment

In *R v Griffin* [2001] 3 NZLR 577 a Court of five set aside the appellant's conviction for unlawful sexual intercourse with a severely subnormal woman. The appeal was brought on the basis that the complainant had been interviewed by a prosecution psychologist but not the defence psychologist. It was argued that this had breached the appellant's right to adequate facilities to prepare his defence and therefore, his right to a fair trial. The Court examined the criteria for cases involving fair trial and preparation issues, particularly examination of or interview with the complainant on behalf of the defence.

The majority, Richardson P, Blanchard and Tipping JJ, held that the right to adequate facilities to prepare a defence to criminal charges under s24(d) of the New Zealand Bill of Rights Act 1990 is designed to put the defence on an equal footing with the prosecution, and necessitates access to evidence required to present the accused person's case. The concept of the accused having access to evidence involves, in cases such as that under consideration, striking an appropriate balance between the interests of the accused and those of the complainant. Conscious of the potential for tactical or intimidatory requests for examination of complainants, the majority prescribed as the relevant test for the grant of an exclusion or a stay that a fair trial would be impossible without the examination sought. The onus is on the accused to demonstrate that the issue in respect of which the examination is sought is capable of bona fide argument. The majority held that the evidence in this case should have been excluded unless the complainant also consented to examination by the defence psychologist, who in the absence of such examination, was likely to seem less persuasive to the jury.

Gault J, dissenting, stated that the right to adequate time and facilities to prepare a defence does not extend to a right or entitlement to have a complainant psychologically examined. While the prosecution is required to prove guilt beyond reasonable doubt, an accused is not required to prove anything. This distinction lies beneath the long-standing recognition that a trial is not necessarily flawed because evidence is given by the prosecution which could not be checked by the defence. In this particular case, the defence expert did give extensive evidence at trial and there was no evidence before the Court identifying how, in particular, she was disadvantaged. Gault J therefore felt it inappropriate, on appeal, to infer unfairness.

Thomas J, dissenting, stated that before declaring a trial unfair and ordering a new trial, the Court must undertake a close analysis and evaluation of the evidence to determine whether substantive unfairness exists. In the context of this analysis, while the paramountcy of the accused's right to a fair trial is recognised, the rights and interests of the victim must also be taken into consideration. Thomas J was also concerned about the wider implications of the majority judgment, making reference to the pressures, consequent on that approach, which may be faced by complainants.

The appeal was allowed, a new trial was ordered and evidentiary directions given.

Non–party pretrial discovery in criminal cases

The two issues for the Court of five in *Attorney-General v Otahuhu District Court* [2001] 3 NZLR 740 were whether the District Court has the power in summary proceedings to make pretrial rulings and whether a Crown Research Institute can be ordered to disclose confidential documents to the defence in criminal proceedings before trial.

Mr Brown was apprehended by a police officer after driving erratically. He failed the initial breath-screening test and the subsequent evidential breath test. Before the hearing of his charge in District Court he sought discovery from the prosecution of the instruction manual for the Intoxyliser 5000 testing device. The manual is not held by the police but by the Institute of Environmental Science and Research (ESR), a Crown Research Institute established under the Crown Research Institutes Act 1992. In judicial review proceedings before the High Court the Attorney-General on behalf of the New Zealand Police argued against the making of an order for the production of the manual, which was supplied to ESR by the foreign manufacturer on condition of strict confidence.

This Court made a number of points. First, the manual was not held by the prosecution and there was therefore no power to order the prosecution to disclose it. The prosecution's pretrial disclosure obligation applies only to material in the possession of the prosecution or which the prosecutor has an enforceable legal right to obtain. The prosecutor has no such right in respect of documents held by a Crown Research Institute.

Second, there is nothing in the Summary Proceedings Act 1957 which either expressly or by implication empowers the District Court to make pretrial rulings on discoverability of documents not in the possession or power of the prosecution. The decision of Hammond J in *Haskett v Thames District Court* (1999) 16 CRNZ 376 upholding the three-stage process adopted in the District Court in summary proceedings, where following a plea of not guilty the information is adjourned for a status hearing and subsequently, if proceeded with, is adjourned for the substantive hearing and determination, may be best understood as treating that process as involving steps in the hearing of the charge which commenced with the taking of the plea, and not as stand-alone pretrial hearings.

Third, in the case of documents, s20 of the Summary Proceedings Act, which authorises the informant or the defendant to obtain a summons requiring any person to appear as a witness at the hearing and to bring and produce at the hearing any documents mentioned in the summons, is consistent with the absence of any power under the Summary Proceedings Act to require pretrial discovery from the prosecutor. The person summonsed may apply on or ahead of the date specified in the summons to have the subpoena set aside. At the hearing of that challenge, which is a step in the hearing of the charge, the trial judge will be required to rule on any question of privilege or confidence that may then arise and may, of course, adjourn the hearing if the interests of justice require. This s20 procedure accommodates all relevant factors and meets the interests of justice, including Bill of Rights values. There is no justification for creating a different and additional remedy based entirely on the New Zealand Bill of Rights Act 1990.

Fourth, it is not sufficient to carry the day for the applicant that the material is likely to be relevant to the issues at the trial or that it may assist the defence. The importance of the material to a fair trial has to be such as to override all other public interest considerations, including privacy and property rights of the non-party in possession of the material and any confidentiality obligations and confidentiality rights of third parties.

Fifth, s35 of the Evidence Amendment Act (No 2) 1980, which empowers a court on the basis of obligations of confidence to excuse any witness from answering any question or producing any document that he or she would otherwise be compellable to answer or produce, does not provide a mechanism for pretrial discovery orders. While an order under s35 can be sought before the trial commences, the order can be directed only at what a witness can be required to answer or produce as a witness at the trial. Furthermore, where access to documentary material is challenged under s20 by a non-party the court is required to weigh and balance the various factors raised to determine whether in the interests of justice access to the material should be provided and, if so, on what terms.

Sixth, merely to suggest or even prove deficiencies in maintenance of a particular breath-testing device will not suffice. Those deficiencies must be shown to be capable of affecting the reliability of the particular result in order for the presumptions of reliability in the Land Transport Act 1998 to be displaced. As the Court in *R v Livingston* [2001] 1 NZLR 167 said, the issue is whether the machine produced a reliable result on the particular occasion when it is claimed there was some particular malfunction, and the defence must be able to point to a sufficient evidential foundation for the proposition that the device was not functioning reliably on that occasion. Unreliability will not be readily inferred.

R v Moore [2001] 2 NZLR 761 also raised the question whether the courts can make orders for pretrial discovery in criminal cases against non–parties.

Mr Moore and the complainant had been in a de facto relationship for some years. Mr Moore was committed for trial on several counts of assault and threatening to kill. His counsel applied to the District Court for an order for pretrial disclosure of a psychiatric report prepared by a Dr Clarkson in relation to a custody dispute between Mr Moore and the complainant. The District Court purported to hear the application under s344A of the Crimes Act 1961. Dr Clarkson opposed production of the report because he had obtained the consent of Mr Moore and the complainant on the footing that the report would not be used for subsequent criminal proceedings. The Family Court had also directed that the report could not be produced without the complainant's consent, which the complainant withheld.

The Court of five held that s344A did not authorise the District Court hearing because the admissibility of the report was not in issue. The section permits pretrial rulings only as to the admissibility of evidence at trial, not the making of orders for pretrial disclosure of documents where it is not clear whether the Crown or the defence intends to use the documents as evidence at the trial. In this case, defence counsel sought the report so as to be able to determine whether at trial Dr Clarkson should be called or the complainant cross-examined on matters which might arise from the

report. Accordingly, the Court concluded that there was no foundation for the guidelines as they applied to pretrial disclosure by non-parties. Documents such as the report in this case should be obtained under the procedure described in *R v Dobson* CA25/95, 8 June 1995.

The Court further observed that in the event that Dr Clarkson relied on s35 of the Evidence Amendment Act (No 2) 1980, which empowers a court on the basis of obligations of confidence to excuse any witness from answering any question or producing any document that he or she would otherwise be compellable to answer or produce, there can be no presumption in favour of disclosure. The competing interests must be carefully weighed and a judicial judgment exercised.

Evidence

Admissibility of evidence – co–conspirators rule

The appellant in *R v Morris* [2001] 3 NZLR 759 was charged with conspiring with Messrs Clark and Fletcher to supply or offer to supply cocaine to a person or persons unknown. The appellant appealed against a pretrial ruling that two recorded discussions between his alleged co-conspirators were admissible against him notwithstanding that he was not present when the discussions occurred.

The Crown case was that Mr Fletcher imported cocaine from Indonesia in August 2000 and that, from their base in Dunedin, he and Mr Clark proceeded to sell it uncut to a limited number of customers in "wholesale" transactions with the intention that the buyers would on-sell to customers. The Crown alleged that the appellant was one such buyer.

Conversations between Messrs Fletcher and Clark were intercepted and recorded on 1 September 2000 and 6 September 2000 under a warrant issued by the High Court. On 19 September the appellant's home was searched. When interviewed on 19 September, the appellant denied receiving cocaine from Mr Fletcher, saying he had had little contact with Mr Fletcher since the latter returned from Indonesia. There had in fact been 20 telephone calls between their cellphones in the relevant period. On a pretrial application, the High Court Judge ruled the intercepted conversations between Messrs Fletcher and Clark admissible against the appellant at trial.

The issue on appeal was whether the Crown could invoke the "co-conspirators rule" so as to render admissible the otherwise hearsay conversations made in the absence of the appellant. The Court held the test to be whether, first, on a balance of probabilities, there was "reasonable evidence", independent of the remarks in question, of the existence of a common design between the accused and the co-conspirator of the kind or type referred to in the indictment; and then, secondly, whether the co-conspirator's remarks were made in furtherance of that common design and while it was still on foot.

The Court held that the Crown needed to do no more than show the conspirators, including the appellant, had agreed to join in a chain of distribution of the drug in question with the "common intention or common understanding" that on-sales would take place. This was held satisfied on the facts. The Court held also that the appellant's involvement in the conspiracy was made out to the requisite standard and that the co-conspirators' comments had been made for the purpose of furthering the common purpose at a time when a jury could reasonably infer the conspiracy was still on foot. The two-step test required for the admissibility of the intercepted conversations was met. The appeal was dismissed accordingly.

Admissibility of random drug testing of prison inmate in bail application

In *R v Allison* CA387/01, 21 November 2001, the Court had to decide whether results from a random drug test taken while in prison under s36B of the Penal Institutions Act 1954 could be used in an application by the Crown to the High Court to revoke bail, on the grounds that s20(1) of the Bail Act 2000 overrides s36BD of the Penal Institutions Act. The Court held the regime expressed in ss32A and 36B-BD of the Penal Institutions Act is part of the mechanism for achieving good order and safety within the prison. It has nothing to do with the bail of those at liberty outside the prison. Section 36BD limits the use of the results of the prescribed procedure to purposes of internal discipline and proscribes their use in any other proceedings except for an offence under s32A – refusal to submit to medical examination. That conclusion was supported by ss21 and 6 of the New Zealand Bill of Rights Act 1990 and common law principles. The bail application was to be heard without reference to the ESR certificates.

Admissibility of hearsay evidence

In *R v Manase* [2001] 2 NZLR 197 a Court of five confirmed the existence of a general residual exception to the hearsay rule based on relevance, inability to give primary evidence and sufficient apparent reliability.

The Court noted that it is possible to approach exceptions to the hearsay rule in two ways. The first, seen as the only sound method, involves identifying and confining the law to categories or types of circumstances in which there is sufficient circumstantial reliability in the hearsay statement to justify admission. The second is to allow one-off exceptions, additional to categorised exceptions, when in the particular circumstances the dangers inherent in the hearsay rule are seen as displaced. The Court held that to achieve consistency and discipline, it was necessary to develop criteria for identifying cases which qualify. Thus a general residual category, defined by those criteria, is established.

The Canadian concept of "reasonable necessity" as a criterion for admitting hearsay evidence was rejected on the basis that it was imprecise and problematic and had lead to dilution of the rule to little more than relevance coupled with a sufficient degree of reliability. The Court held that the common law of New Zealand should not be developed in this way.

It was held that whether to admit evidence under the general residual exception turns on three distinct requirements. The first and threshold test is one of relevance. If

evidence is not relevant it should not be admitted. The second requirement is that of inability and is satisfied if the primary witness is unable to be called to give primary evidence. Third, the hearsay evidence must have sufficient apparent reliability, either inherent or circumstantial, to justify its admission in spite of the dangers against which the hearsay rule is designed to guard. As a final check, as with all evidence admitted before a jury, the Court must consider whether hearsay evidence which otherwise might qualify for admission should nevertheless be excluded because its probative value is outweighed by its illegitimate prejudicial effect.

Admissibility of similar fact evidence where identity is in issue

The issue in *R v Gee* [2001] 3 NZLR 729 was whether identity cases should be regarded as an exception to the general principle in *R v Degnan* [2001] 1 NZLR 280 that evidence otherwise qualifying for admission on similar fact principles is admissible at law even though it relates to a previous charge on which the accused was acquitted.

The appellant had been acquitted on the first of two burglary counts and found guilty on the second. The Court allowed his appeal against his conviction and went on to consider the use that could be made of evidence as to the first burglary at the retrial that was ordered in relation to the second burglary. The sole issue at the retrial was to be the identity of the offender.

The Court considered two approaches that have been adopted in identity cases; the sequential and the pooling. The sequential approach requires the jury to be satisfied of guilt on the similar fact allegations before they can be taken into account. By contrast, in the pooling approach the jury examines all the evidence in order to decide whether the evidence as a whole suggests that the offender was the same person on each occasion. If the jury is so satisfied, all the evidence can be pooled when the jury considers whether the accused was that person. However, if the jury is not satisfied the counts must be considered separately. The Court also noted a third approach, the global approach, which would require consideration when a determination of the correct approach was necessary.

On the facts of the case, the Court was not required to come to any firm decision on which of the various possible approaches should be adopted in New Zealand. Issues as to the standard of proof to be applied under the particular approach adopted were also left for later determination, although the Court did indicate that until that determination the safest course was for trial judges to follow the English approach and apply the criminal standard of proof under both the sequential and pooling approaches.

The proposed evidence was ruled inadmissible. Neither the sequential nor pooling approach was appropriate on the facts. Both the burglaries involved two offenders. While the jury could come to the view that the similar features were such that the burglaries necessarily had one person in common, they could not conclude that the person in common necessarily had the same companion. Thus the Court did not have to decide whether identity cases such as the present were exceptions to *Degnan* or simply justified the exercise of the *Degnan* discretion – the result was the same.

Similar fact evidence – discrete conduct

The Solicitor-General in *R v Yum* CA54/01, 16 May 2001, appealed against the pretrial exclusion of evidence characterised as similar fact evidence. The Crown wanted to adduce evidence of two subsequent cases of offending to which the respondent had pleaded guilty. The Court closely scrutinised the factual circumstances surrounding the three incidents. The Court agreed with the District Court that the second incident was not sufficiently similar to the first incident to make the probative value of the similar fact evidence outweigh its prejudicial effect. With respect to the third incident, however, the Court held that the facts were so similar in behavioural and sequential aspects that the evidence should be admissible. The Court rejected submissions that subsequent events will always be inadmissible as similar fact evidence. Leave to appeal was given and the appeal allowed to the extent that the evidence relating to the third incident was declared admissible.

Admissibility of statements which are partly exculpatory and partly inculpatory

In *R v Tozer* [2002] 1 NZLR 193 a defendant accused of sexual violation by rape declined to make a statement when confronted by the police with the complainant's allegations. A few days later the defendant's solicitor presented to the police a typed statement in which the defendant admitted penetration but maintained that the complainant had consented. The issue on appeal was whether his statement, being partly exculpatory and partly inculpatory, was admissible.

A statement must be considered objectively as at the time it is made. Whether it contains an admission or a statement against interest must be assessed at that time. It is the effect of what is said, not what the maker's motive in making it might or might not have been, which is important. It is the statement actually made which is to be assessed, and if admitted is considered by the jury as evidence, but it is not to be assessed out of context. A statement is not made in a vacuum. It is made in answer to a charge or a call for explanation. What the maker was told about the charge or matter at the time must be material in assessing the character of the statement made in response. It must also be relevant to ask what effect the existence of the statement was likely to have on the defence of a charge. It followed that defendant's statement was admissible because without his statement it would have been open to the defence to challenge in cross-examination of the complainant and in the defendant's evidence-in-chief at trial the inference that sexual intercourse had actually occurred. The complainant's evidence was inconclusive and her recollection fragmentary as to whether intercourse had occurred, and the defendant's statement therefore blocked off what was or might well have been a contestable issue as to proof of penetration.

Admissibility of intercepted communications

The appellant in *R v Bouwer* [2002] 1 NZLR 105 was charged with the murder of his wife. He appealed against a pretrial ruling in the High Court that certain conversations intercepted under warrants issued under s312CB of the Crimes Act 1961 were admissible at trial.

On a pretrial application the High Court ruled that certain conversations of the appellant, intercepted under two s312CB warrants were admissible at trial. The

appellant appealed on the ground that, at the times the warrants were issued, it could not be said, in terms of s312CB(1)(c), that it was "unlikely that the Police investigation of the case could be brought to a successful conclusion…without the granting of such a warrant". It was submitted that the police already had sufficient evidence to charge the appellant at the time the warrants were issued, and therefore the investigation had already been brought to a "successful conclusion".

The Court held that a broad interpretation of s312CB(1)(c) was required; that an investigation will come to a "successful conclusion" when "the maximum available evidence in support of a Crown case against [the suspect] has been obtained" (*R v Aitken* (1987) 2 CRNZ 482, 485). While the police might feel they have sufficient evidence to establish a prima facie case, it may not be especially strong or there may be aspects which can be strengthened if certain lines of investigation, such as obtaining an interception warrant, are pursued further. Likewise, while the High Court should be cautious about granting an interception warrant after a suspect is already charged, the Court said that this course is not precluded merely by the existence of the charge. Further investigation should still be possible. The interception warrants were validly issued. The appeal was dismissed accordingly.

Sentencing

Burglary sentencing principles

In *R v Nguyen* CA110/01, 2 July 2001, the Court reviewed sentencing principles for major burglary rings.

The Court noted that the range of circumstances in which the offence of burglary can be committed is such that no tariff can be fixed. It is necessary in every case to assess the criminality of the particular offending. In burglary cases relevant considerations include the degree of planning and sophistication in the offending, the nature of the premises entered, the kind and value of property stolen, the damage done, the impact and potential impact upon occupants or owners of property, and the extent of the offending where multiple burglaries are involved. The organisation of groups or rings for the purpose of a business in the theft and sale of goods is a factor which will increase criminality. Burglary is a different offence from receiving, involving as it does the entry of premises and theft of property. Those engaged in burglaries can be regarded as more culpable than those who receive stolen property – although much may depend on the scale of the operation.

The Court reviewed sentencing decisions in New Zealand, Australia and England, noting that those cases generally related to domestic burglaries and reflected sentences of up to ten years in bad cases of multiple offending. The Court held that the offending in the present case did not put the appellant in the highly professional range. Although this meant the starting point taken by the sentencing Judge appeared high, the sentence of six and a half years actually imposed reflected significant elements of personal and general deterrence and was within a properly exercised sentencing discretion.

Review of sentences in manslaughter cases

In *R v Leuta and Rauf* [2002] 1 NZLR 215 the Solicitor-General sought leave to appeal against the sentences imposed upon the respondents for manslaughter. At the invitation of the Solicitor-General a Court of five took the opportunity to consider the desirability of establishing guideline sentencing levels for a class of manslaughter said to involve the directed use of deadly force against another.

In rejecting the proposed approach the Court noted that the range of circumstances impacting on the culpability of the offending is wide. It is the particular consideration of these variable features which requires assessment. Setting a starting point as sought would have little value and would risk creating the very inflexibility encountered with the guideline judgment for aggravated robbery sentences in *R v Moananui* [1983] NZLR 537, eventually departed from in *R v Mako* [2000] 2 NZLR 170. The best guidance for sentences in manslaughter cases is to be found in earlier sentencing decisions in similar cases rather than in a guideline starting point for offences involving one or a limited number of identified features.

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