CASE NOTES

South Pacific Manufacturing Ltd v New Zealand Security Consultants & Investigations Ltd; Mortensen v Laing [1992] 2 NZLR 282. Court of Appeal. Cooke P, Richardson, Casey, Hardie Boys JJ, and Sir Gordon Bisson.

The question for the Court was whether a duty to take reasonable care was owed to an insured or to an insured's creditors by an investigator under contract to an insurer during the investigation of the insured's claim. The Court held that there was no duty of care owed by the insurance investigator to the insured. The cases provided an opportunity for the Court to consider the volte-face of the House of Lords in *Murphy v Brentwood District Council.*[1] In that case, their Lordships overturned their decision in *Anns v Merton London Borough Council.*[2] The essence of the judgments in *Murphy* is that *Anns* confused physical and purely economic damage, and that this confusion obscured the principle that in a case of pure economic loss, more is required to establish the scope and nature of any duty than in a case where physical damage has occurred.

The Court of Appeal unanimously decided that *Murphy* "should not lead to any changed approach to negligence in New Zealand".[3] Instead of opting for *Anns* over *Murphy*, the Court continued its pragmatic policy of accommodating the pronouncements of the House of Lords within the framework of *Anns*, notwithstanding the intention of their Lordships to qualify, criticise, and finally reject *Anns*. The accommodation provided is not always hospitable.

Cooke P begins his discussion of duty of care principles by affirming the approach of the Court of Appeal in *First City Corporation Ltd v Downsview Nominees Ltd*[4] and *Brown v Heathcote County Council.*[5] To that approach Cooke P adds fifteen points as "generalities".

Although he later refers to "what is now the economic tort of negligence",[6] the President acknowledges that pure economic loss may tell against a duty of care, while stressing that such loss is not decisive. In support, he notes that Lord Oliver of Aylmerton expressed doubt that categorisation of damage is useful. However, this is misleading for Cooke P fails to observe that the doubt expressed relates to the utility of limiting foreseeability by reference to the kind of damage claimed. Lord Oliver goes on to say that the categorisation is useful in identifying cases where something more than reasonable foreseeability of damage is required before

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1 [1991] 1 AC 398.
2 [1978] AC 728.
3 [1992] 2 NZLR 282, 305 per Cooke P.
4 [1990] 3 NZLR 265.
5 [1986] 1 NZLR 76.
6 Supra at note 3, at 297.

sufficient proximity is established.[7] For instance, in cases of economic loss resulting from negligent misstatement, proximity is predicated on reliance and an assumption of responsibility in a relationship which is akin to contract.[8] The House of Lords has not, so far, restricted the duty to take care to avoid or prevent economic loss to the reliance cases. However, their rejection of *Anns* invited scrutiny of non-reliance cases where recovery for economic loss caused by negligence is allowed.

The comment which comes closest to a direct reply to the House of Lords is the eighth point of the President, where he contends that compensation for damage to other property of the plaintiff is essentially recovery for economic loss. To this thesis, he appends the argument that there is no vital feature distinguishing types of property interests which are damaged through negligence. He appears to be saying that the fact that in some cases the economic loss arises from physical damage is only thought relevant due to the drawing of an invalid inference from injury to the person, which is *sui generis*.

Cooke P seems to be suggesting that the type of damage to the property interest which led to the economic loss should not affect the requirement of sufficient proximity. I would argue that it is unclear how this could be established on an incremental approach. While recovery could be allowed for physical damage to other property of the plaintiff by analogy with cases of physical damage to the plaintiff, if the recovery for physical damage to property is essentially compensation for economic loss, then it is difficult to understand how this is analogous to personal injury cases. And since the President is not rejecting incrementalism per se, there ought to be some analogue available.

The President downplays the importance of the method used in resolving the duty question and characterises "the dividing line between tort and contract [as] somewhat arbitrary".[9] His Honour is also sceptical that an appeal to incrementalism will produce uniformity on the issue of recovery for economic loss. This analysis appears designed to bolster the contention that, when all is said and done, a finding of liability is predicated on the court's belief that such a finding is just and reasonable. It is suggested that the difficulty which the Privy Council may have with this approach at some future date is that the criterion of justice and reasonableness may be sufficient for legislative action, but that a Court ought to have regard to principle and precedent as well.

The Court of Appeal (Casey J dissenting) held that a prima facie duty of care, partly predicated on reliance, was established in *Mortensen v Laing*. In the *South Pacific* case there was insufficient proximity because the plaintiffs were a shareholder and creditor who had financial interest in the insured, and it was held that

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7 Supra at note 1, at 486.

8 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).

9 Supra at note 3, at 297.

this relationship was not close or direct enough to the investigator.[10]

Although the first part of the *Anns* two-stage test was satisfied in *Mortensen v Laing*, the Court unanimously held that there were good policy reasons negativing the prima facie duty of care.

First, it was feared that "the claimed duty of care would undermine or confuse tracts of settled and reasonably satisfactory law".[11] The real cause of action was not negligence, but defamation:[12]

> To allege that the investigator carelessly and incorrectly reported that an insured was responsible for the fire is to say that the investigator carelessly made a defamatory statement about that insured.

The Court's concern was that freedom of speech would suffer if an investigator could not rely on the defence of qualified privilege, arising from the contractual relationship with the insurer, in submitting an investigation report. Qualified privilege is not a defence to a negligence suit, and it was held to be contrary to public policy to allow a cause of action which would have the effect of reducing that privilege. "By a sidewind the law of defamation would be overthrown."[13]

This argument seems incommensurate with the criterion of "just and reasonable" favoured by the Court. The Court cites two of its own decisions as authority. However, in the first case the damages claimed were admitted to consist of injury to reputation,[14] and in the second case Hardie Boys J held that "an inability in a particular case to bring it within the criteria of a defamation suit is not to be made good by the formulation of a duty of care not to defame".[15] Yet in *Mortensen v Laing* the Court assumed for the sake of argument that the plaintiffs were able to prove the allegations of negligence. In finding sufficient proximity in these circumstances, the Court is conceding that but for the careless investigation, the plaintiffs would not have suffered the economic loss ensuing from the insurer's refusal to indemnify. That the careless investigation, aside from the resulting economic loss, may have further ramifications such as the defaming of the plaintiffs, does not entail that the real claim is for defamation and not for the negligently caused economic loss. The economic loss is conceptually distinct from the damage to reputation.

A second policy reason for denying the duty was the remedy which the insured had against the insurer. The President's argument was that an action in negligence against the investigator may be used to avoid the question of the insured's responsibility for lighting the fire which led to the insurance claim. The other members of the Court thought it inappropriate to superimpose tort liability when a contractual remedy was available. On policy grounds Richardson J considered

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[10] See *Takaro Properties Ltd v Rowling* [1986] 1 NZLR 22, 70 per Cooke J.

[11] Supra at note 3, at 286 per Cooke P.

[12] Ibid, 309 per Richardson J.

[13] Ibid, 302 per Cooke P.

[14] *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148.

[15] *Balfour v Attorney-General* [1991] 1 NZLR 519, 529.

that:[16]

> where, as here, contracts cover the two relationships, those contracts should ordinarily control the allocation of risk unless special reasons are established to warrant a direct suit in tort.

By virtue of the insurance contract, the insured was likely to have a remedy against the insurer. The insured should exercise that remedy and sue on the contract. Richardson J contended that there is no justification for allowing parties greater recovery through tort than they bargained for in contract. This contention seems to rest on the belief that "the plaintiffs seek relief in tort for what are essentially contract based losses".[17] Given the President's views on the arbitrariness of the divide between tort and contract, it is not surprising that he does not support this argument.

It is possible to restrict Richardson J's remarks to the situation where the claimed duty of care is a term of a contract. Whether or not the other judgments can be so restrained is less certain.

Nevertheless, the judgments of Richardson, Casey, Hardie Boys JJ and Sir Gordon Bisson provide a new twist in the concurrent liability saga. One view of *McLaren Maycroft & Co v Fletcher Development Co Ltd*[18] is that it denies *co-extensive* liability in tort and contract where the implied contractual duty to exercise reasonable care is equivalent to the tortious duty.[19] The denial of an action in tort due to the possibility of a contractual remedy suggests that the rejection of co-extensive liability still has adherents in the Court of Appeal.[20] The twist is that in this case the plaintiff was prevented from pursuing a claim in tort against one party because of a possible claim in contract against another party. Thus it is co-extensive *remedies* rather than co-extensive *liabilities* which were refused!

The Court of Appeal has resisted the call to reject *Anns* on the basis that, ultimately, it is the criterion of "just and reasonable" which should determine the existence of a duty of care. While this criterion may conflict with an incremental approach, the outcome of the appeal in *Mortensen v Laing* casts doubt over whether *Anns*, with all the extensions built on by the Court of Appeal, is the natural home of this criterion.

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16 Supra at note 3, at 308.

17 Ibid, 309.

18 [1973] 2 NZLR 100 (CA).

19 This interpretation was accepted by Hardie Boys J in *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548, 588.

20 Unsurprisingly, Cooke P is not one of them. See his remarks on *McLaren Maycroft* in *Mouat v Clark Boyce* [1992] 2 NZLR 559, 565.

R v Butcher [1992] 2 NZLR 257. Court of Appeal. Cooke P, Gault and Holland JJ.

R v Butcher is the fullest consideration of the rights of an accused contained in the New Zealand Bill of Rights Act 1990[1] and highlights some of the difficulties that the Act imposes on the investigative process. The case came before the Court by way of case stated under s 380 of the Crimes Act 1961, and focused on s 23(1)(b) of the Bill of Rights, which provides that:

> Everyone who is arrested or who is detained under any enactment ... shall have the right to consult and instruct a lawyer without delay and to be informed of that right ...

The two accused were suspected of aggravated robbery. During police interrogation, incriminating statements were obtained which led to the discovery of weapons and clothing allegedly used in the offence. In both cases, the police failed to advise the accused of the right to counsel under s 23(1)(b). Counsel sought a ruling that confessional statements and real evidence obtained in violation of s 23(1)(b) were inadmissible.

The first question was whether the degree of detention gave rise to the right to counsel under s 23(1)(b). At the point of obtaining the evidence there had been no formal arrest. To come within the section either the concept of arrest for the purposes of the Bill of Rights would have to be expanded, or the circumstances had to be within the scope of "detained under any enactment".

In considering the second option, "under any enactment", Gault J concluded:[2]

> [T]he section is limited to detention pursuant to least [sic] to claimed statutory authority ... "detained under any enactment" clearly seems intended to mean something different from arbitrary detention and must be taken to relate to the exercise or purported exercise by officials of statutory powers of detention and perhaps nothing more.

To determine the meaning of "arrest" as the alternative trigger for the right to counsel, Gault J turned to the common law. However, this can only be relevant to the definition of a lawful arrest. If s 23 were to be restricted to lawful arrests and detention under specific enactments, detention effected simply for the purposes of questioning a suspect would not be covered. It is at this point that the right to counsel is arguably most important to a suspect.

Cooke P recognised that detention short of a formal arrest would have to be covered by a definition of arrest which went beyond that of the common law. This was achieved through the concept of "de facto detention". This reasoning was necessary for the Act to be a meaningful protection of the rights of suspects.

However, it is to be regretted that the addition at a late stage of the expression "under any enactment" into the Bill of Rights, has necessitated the expansion of the well-settled definition of arrest for the purposes of the Act. The expression does not hold any obvious advantages, and the adoption of the simple term

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1 Hereafter referred to as the "Bill of Rights", or "the Act".

2 [1992] 2 NZLR 257, 272.

"detention" as under the Canadian Charter would have enabled the common law definition of arrest to be retained.

The learned President went on to explain the meaning of de facto detention:[3]

> By de facto detention I mean ... a situation in which the subject is not free to go or in which what is said or done by the police causes the subject reasonably to believe that he or she is not free to go.

Although the evidence showed that the accused would not have been free to go if they had attempted to, Cooke P opined, obiter, that a subjective belief that the suspect was not free to go would constitute detention.[4] Gault J concluded that:[5]

> A mere unexpressed belief of being unable to leave or unexpressed intention to arrest if there is an attempt to leave would not be sufficient.

However he himself subsequently appeared to adopt a subjective assessment when he observed:[6]

> Few in Burgess's position would not have thought he was arrested.

Once it had been concluded that there had been a breach of the right to counsel, the question of the appropriate remedy had to be determined. In contrast to the Canadian Charter of Rights and Freedoms, the Bill of Rights Act does not contain a section governing the approach to the exclusion of evidence obtained in violation of the Act. It was therefore left to the Court to determine the appropriate approach to exclusion. This is where the members of the Court show a divergence of opinion, from both the lower court and between themselves.

Earlier cases such as *R v Edwards*,[7] and *R v Nikau*,[8] had concluded that a breach of the Bill of Rights was simply another factor to be taken into account when exercising the discretion to exclude evidence. In discussing this approach Cooke P observed:[9]

> In effect that would be to treat the statutory rights as elements, albeit at least nominally important ones, in the exercise of the jurisdiction of the Court to ensure fairness in criminal trials: a jurisdiction to which the Judges' Rules of 1912 and 1930, now in their literal form largely obsolescent in New Zealand for practical purposes, also belong.
> In my opinion that approach cannot be right ... *it seems to me that the New Zealand Bill of Rights Act cannot be relegated to the category of a relevant factor in exercising of that jurisdiction.* [Emphasis added.]

Cooke P concluded that a breach of the Bill of Rights should prima facie result in exclusion.[10] However he stopped short of mandating an exclusionary rule and

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3 Ibid, 264.

4 Holland J appears to concur with this view: see ibid, 274.

5 Ibid, 271.

6 Ibid, 273.

7 [1991] 3 NZLR 463 (HC).

8 (1991) 7 CRNZ 214 (HC).

9 Supra at note 2, at 266-267.

10 "Once the facts are collected, these cases virtually decide themselves. In short the rights of the accused under s 23(1)(b) were plainly violated and there is no ground for excusing the violations or admitting the confessions in evidence nevertheless." Ibid, 264 per Cooke P.

incorporating the problems experienced by American courts. In *R v Kirifi*[11] the learned President appeared to adopt an approach to exclusion under which the rights of the accused are the paramount consideration. Therefore evidence obtained in violation of the Bill of Rights should prima facie be excluded.[12] However, Sir Robin appears to retreat from such a rights-based approach by retaining a discretion to admit such evidence:[13]

> As indicated in *Kirifi*, there may be circumstances in a particular case where, despite some degree of transgression of the rights, it is fair and right to admit a confession in evidence.

It was the view of the President that the Court should move away from the balancing approach which the courts had traditionally adopted under the Judges' Rules, towards a rights-based exclusion approach. It is unfortunate that the concepts of fairness and rightness were retained as a method to allow admission of evidence in certain cases. These expressions and their application are inherently vague,[14] especially when they determine whether incriminating evidence should be admitted. Sir Robin gave no indication of when evidence obtained in breach of the Act could still be adduced in evidence.

Gault J was more circumspect in dictating the approach to exclusion and expressed some reluctance at departing from the principles of exclusion under the Judges' Rules without a clear legislative direction to that effect. His Honour expressed concern that exclusion should not become automatic:[15]

> In my view some care is needed to ensure that adoption of principles dictating exclusion, even prima facie, does not lead to effective automatic exclusion.

He appeared to consider that exclusion of illegally obtained evidence is not focused on the rights of the accused but rather on the control of the police force:[16]

> An arrested person may be prepared to make statements after being told of the right not to do so yet may wish to consult a lawyer to secure early freedom, as on bail. Delay in permitting that consultation arguably should not affect the admissibility of statements. On the other hand denial of access to a lawyer with the purpose of extracting a confession should be met with exclusion.

Holland J showed a similar concern over the wholesale adoption of a rights-based exclusion approach, and observes that exclusion of evidence could result in the loss of convictions. In this respect his Honour seemed to focus on the public perception of the judicial system (systemic integrity), rather than the rights of the accused, or the control of the police.[17]

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11 [1992] 2 NZLR 8 (CA).

12 "The loss of some convictions because of exclusion of evidence should not be surprising, for any bill of rights represents a fundamental social decision to forgo certain efficient police practices for the sake of greater values." Roach, "Constitutionalising Disrepute: Exclusion of Evidence after *Therens*" (1986) 44 U T Fac L Rev 209, 255.

13 Supra at note 2, at 266.

14 See Mathias, "Discretionary Exclusion of Evidence" [1990] NZLJ 25.

15 Supra at note 2, at 273.

16 Ibid, 272.

17 Ibid, 274.

> Where as here, the two appellants have voluntarily admitted their guilt of a serious crime a Court must give very anxious consideration to the issues involved before ruling such admissions to be inadmissible at their trial with the consequence of their possible acquittal of charges for which they are clearly guilty.

The judges used a variety of rationales throughout the case: rights-based, police control, and systemic integrity. However, no one approach was consistently applied. This can be illustrated by the issue of admissibility of the derivative real evidence (the weapons and clothing).

Only the learned President expressly considered the issue of admissibility of this evidence. He held that the clothing was inadmissible because it was only discovered as a result of the statements obtained in breach of the accused's rights.[18]

This result is consistent with a rights-based approach as the requirement of causation on the obtaining of real evidence is generally viewed loosely. However, under an approach based on the integrity of the judicial system the result may well be different, because the community will often not be outraged at the admission of derivative evidence which is demonstrably reliable. However, if the focus is on the control of the police, derivative evidence should generally be excluded because admission would not deter violation of the accused's rights. While any statement would be excluded, highly probative real evidence obtained as a result of a statement would be admitted.

R v Butcher is the Court of Appeal's first substantial examination of the basic requirements of s 23, and has gone a long way towards defining the scope of its application. In doing so, the Court of Appeal has adopted an interpretive approach to the Bill of Rights which is consistent with the fundamental nature of the Act. Nevertheless, it is important even at this early stage that the courts develop and maintain a principled approach to the exclusion of evidence. In future cases the courts will have to build on the foundations laid in *Butcher* in order to clarify and attempt to solve the problems that still remain.

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[18] Ibid, 267. Cooke P concluded that the weapons and the balaclava were admissible since a diligent police search would have uncovered this evidence, irrespective of the breach of the Bill of Rights.

Ministry of Transport v Noort; Police v Curran (1992) 8 CRNZ 114. Court of Appeal. Cooke P, Richardson, Hardie Boys, Gault, and McKay JJ.

The Transport Act 1962[1] gives enforcement officers the power to require a driver who is suspected of driving after having consumed alcohol to undergo a breath screening test (which is generally performed at the roadside). If the driver refuses to undergo the test, or the test indicates that the driver's breath alcohol exceeds the permitted limit, the officer may require the driver to accompany him or her to a testing station for an evidential breath or blood test. The issue for the Court of Appeal was what application, if any, the right to counsel contained in s 23(1)(b) of the New Zealand Bill of Rights Act 1990 has to the breath and blood alcohol regime in the Transport Act.

Noort was convicted of driving with excess blood alcohol,[2] Curran of refusing to permit a blood specimen to be taken.[3] In the High Court, Gallen J in *Noort's* case, and Doogue J in *Curran's* case, both held that the relevant provisions of the Transport Act excluded the right to a lawyer in the Bill of Rights. The Crown conceded that if s 23(1)(b) did apply, there had been a breach.

The Crown's main argument was that the scheme and operating requirements of the Transport Act impliedly exclude the right to legal advice altogether and s 4 of the Bill of Rights applies:

> No Court shall, in relation to any enactment .... (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) Decline to apply any provision of the enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights.

The appellants argued that the two enactments were not inconsistent, and could operate together. It was not contended that there was any right to a lawyer at the breath screening stage. Upon being required to accompany the officer to a testing station, only the right to consult a lawyer by telephone and the right to be informed of that right were asserted.

The Court of Appeal was unanimous in holding that, although there is no room for the right to operate at the breath screening stage, when a person is detained for further testing, the right does apply.[4] However the right is a limited one. Telephone access only is sufficient, although there is no one-call rule. In exercising the right, there can be no unduly long delay by, for example, trying to contact unobtainable lawyers, or waiting for distant lawyers to arrive.

All of the judges saw the right to a lawyer as an important one, and the right to

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1 Sections 58A, 58B and 58C.

2 *Noort v Ministry of Transport* [1992] 1 NZLR 743.

3 *Curran v Police* (1991) 7 CRNZ 323.

4 Gault J dissented on the facts, holding that s 23(1)(b) had not been breached in either case. He did however, express his views on the relationship between section 5 and the Transport Act and reached the same conclusion as the other judges.

be informed of the right to a lawyer as a vital corollary of this basic right. Richardson J stated:[5]

> The right is pivotal in assuring so far as possible that both those detained and those detaining them act in accordance with the law. It recognises the reality that an individual who is arrested or detained is ordinarily at a significant disadvantage in relation to the informed and coercive powers available to the State.

Although all the members of the Court reached the same conclusion, they employed different reasoning. In interpreting and applying the Bill of Rights, it was unanimously agreed that a generous, purposive approach was appropriate, one which was "suitable to give to individuals the full measure of the fundamental rights and freedoms referred to".[6] However, differences of opinion over the roles of ss 4, 5 and 6 of the Bill (which govern the application of the Bill of Rights to other enactments) and the order in which they are to be applied, are apparent.[7]

Richardson (McKay J concurring), and Hardie Boys JJ considered s 5 was a necessary step in the interpretive process and that ss 5 and 6 should be applied before s 4.

Sections 5 and 6 provide as follows:

> **5. Justified limitations** – Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
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> **6. Interpretation consistent with Bill of Rights to be preferred** – Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Richardson J thought it more consistent with the purposes of the Bill of Rights to resort to s 4 only if an action cannot be justified by sections 5 and 6. Section 4 would only be relevant where there is a necessary inconsistency between an enactment and the particular right, after the right has been modified as permitted by s 5. This approach led his Honour to conclude that the right to a lawyer was limited by the operating requirements of the Transport Act, which embody the public interest in limiting the time citizens are detained and enforcement officers are off the road.

However, total exclusion of the right to a lawyer was unnecessary to make the legislation workable as s 58B of the Transport Act envisages a significant lapse in time between detention and testing. Unlike the other provisions, s 58B does not require that a person accompanying an officer to a testing station do so "forth-

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5 (1992) 8 CRNZ 114, 136; see also 130 per Hardie Boys J.

6 Ibid, 122 per Cooke P, citing *Minister of Home Affairs v Fisher* [1980] AC 319, 328 per Lord Wilberforce. The same approach had been used previously by the Court of Appeal in *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439; see Pigeon, Case Note (1991) 6 AULR 624.

7 The methodology to be used in applying the Bill of Rights and ss 4, 5 and 6 in the context of these drink-driving cases has been the subject of a detailed article by Paul Rishworth, "Applying the New Zealand Bill of Rights Act 1990 to Statutes: The Right to a Lawyer in Breath and Blood Alcohol Cases" [1991] NZRLR 337.

with". There is no time limit; thus it is possible to allow some delay for the person to consult a lawyer. In addition, expert evidence showed that the time required to consult a lawyer would not make a significant difference to the amount of alcohol in a person's breath or blood.[8]

Hardie Boys J agreed that the proper approach was to consider s 5 first. He considered that s 5 was designed to allow limits to be placed on rights in cases where s 4 would otherwise operate so as to exclude the right altogether. The conflicting enactment would only then prevail if there is no room for the right to operate in even a restricted form. He concluded that the Transport Act provisions could be given a meaning consistent with the right to a lawyer once it was recognised that the right to a lawyer is a limited one.

Cooke P took a very different approach and held that s 5 was irrelevant. The President saw the issue purely as one of inconsistency. Giving drivers a limited opportunity to telephone a lawyer would not impair the administration of the Transport Act or substantially increase the road toll. Therefore, the two Acts could stand together and were not inconsistent. His Honour saw s 5 as being relevant only to the Attorney-General's duties under s 7,[9] and areas covered by the common law. His reason was that where any enactment is inconsistent with a provision of the Bill of Rights, the enactment prevails because of s 4 and the courts do not consider s 5. The basis on which Cooke P found that the right to counsel was limited is unclear – it seems to rest only on giving the Bill of Rights "practical effect" which is reasonable:[10]

> The New Zealand Courts must now, in my opinion, give it [the right to a lawyer] practical effect irrespective of the state of our law before the Bill of Rights. What is practical effect can only be a question of fact dependent on the particular circumstances. As in innumerable situations with which the law has to deal, a test of reasonableness naturally falls to be applied.

Gault J took the same view of s 5 as Cooke P but decided the right to counsel was limited on a different basis.

That the judges used different methods to apply the Bill of Rights but reached the same conclusion may indicate that the precise methodology to be used in applying the Bill is not, after all, very important. However, I respectfully prefer the reasoning of Richardson J, who took a more principled approach to limiting rights than was evident in the "reasonableness" approach of Cooke P. Examining limitations on rights against the criteria in s 5 must surely provide the strongest protection to citizens from attempts to limit their rights, as Richardson J recognised:[11]

> [Section 5] guards those rights by insisting that they may be regarded as modified *only where the stringent tests laid down are met.* [Emphasis added.]

Leaving the scope of fundamental rights for individual judges to determine as

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8 Supra at note 5, at 138-139 per Richardson J; 121 per Cooke P.

9 That being to inform the House of Representatives of any provision of a bill which appears to be inconsistent with the Bill of Rights.

10 Supra at note 5, at 125.

11 Ibid, 140.

they see reasonable gives uncertain protection to those rights. While it can be argued that using s 5 to determine the scope of rights has much the same effect (as according to s 5, limits must be reasonable limits), there are other criteria to be considered under s 5. Furthermore, there is an existing body of Canadian case law which sets out a principled approach to the section.[12] The matter ought not merely to be decided according to what a particular judge views as reasonable.

Notwithstanding this stricture, the decision in *Noort* is a major victory for supporters of the Bill of Rights. The practical effect has been to force a change in the procedure to be followed in the many thousands of instances each year, where drivers are detained for breath or blood alcohol testing. It is possible that the judiciary could have been reluctant to overturn the convictions because of the sheer volume of similar cases currently before the courts in which, it seems, prosecutions will have to be abandoned.

That the Court of Appeal was willing to risk the inevitable outcry from the Ministry of Transport and campaigners against drunk drivers shows that the Court is willing to give priority to civil liberties and will approach the Bill as if it were an entrenched constitutional document.

Cecily Brick

Paul v NZ Society for the Intellectually Handicapped Inc (1992) 4 NZELC 95,528. Employment Court. Castle J.

One of New Zealand's first recorded industrial disputes occurred in April 1848, when 350 Maori, employed on road building, went on strike when government officials told them a deduction was to be made from their pay for the cost of rations. Sir George Grey rode out and told the men, "If you don't consent there is the road"; to which one Maori worker replied, "And there's the road for you. I suppose it is open for both of us."[1]

Of course, 144 years later, it is still the case that negotiations between employers and employees can be difficult and become stalled. Throughout New Zealand's history, workers have used strike action as a means to force employers to the negotiation table to consider their demands. However, with the Employment Contracts Act 1991, and the Employment Court's decision in *Paul v NZ Society for the Intellectually Handicapped Inc*,[2] employers are finding lockouts effective tools in forcing employees to accept their demands.

In the decision of *Paul v IHC*, an employer's unilateral action in reducing its

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12 See *R v Oakes* [1986] 1 SCR 103.

1 *The Southern Cross*, 15 April 1848.

2 (1992) 4 NZELC 95, 528.

staff members' terms of employment to compel them to accept new contracts has been held to constitute a lawful lockout. A lawful lockout occurs in a situation where there is no collective employment contract in force, and negotiations for a new collective contract are occurring. A lockout does not necessarily involve literally locking employees out of the workplace; in the IHC situation it meant breaking some or all of the employer's employment contracts with a view to compelling employees to accept new terms of employment.

Paul v IHC involved the breakdown in negotiations for a new collective employment contract between the Community Services Union and the IHC, and the IHC's subsequent letter to employees advising that, due to financial difficulties and the negotiations deadlock, the IHC would reduce allowances presently paid to them. The IHC stated that its failure to observe certain provisions of the employment contracts was with a view to compelling employees to accept its terms. The union sought a permanent injunction to prevent such a unilateral action by the IHC.

The issue for the Court to decide was whether such an action by an employer would amount to a lockout as defined in s 62 of the Employment Contracts Act 1991, and whether that lockout would be lawful in terms of s 64(1)(b) of the Act. In determining this issue, Castle J faced three questions.

Firstly, the Court considered whether the actions of the IHC amounted to a fundamental breach of the employment contract. This involved deciding whether the IHC's actions amounted to a breach of the employment contract; for its employees were still required to work, though different remuneration and conditions had been imposed on them. The Court held that the IHC had deliberately breached fundamental terms of its employees' contracts. Castle J found the breaking of the employment contracts to be a partial lockout under s 62(1)(c) of the Employment Contracts Act 1991.

The second issue addressed was whether the IHC's action was taken with a view to compelling employees to negotiate new terms of employment. The union argued that the IHC's primary motivation was to achieve cost savings, and considerations such as compelling negotiation were secondary. However, the Court looked at the IHC's clear statement to its employees that its actions were with a view to compelling them to accept reduced terms of employment. As a result, the Court rejected the union's argument.

Thirdly, Castle J examined whether the lockout was lawful. That is, did the lockout relate to the negotiation of a collective employment contract as required by s 64(1)(b)? The union argued that the IHC's concern for cost savings had meant no true effort for successful negotiations had been made. The Court answered that its role was not to review or give judgment upon the negotiations and whether they were fair, but only to determine whether in fact negotiations were conducted: "the only relevant issue is whether negotiations are in fact being conducted, not quality or bargaining strength of them or the parties".[3] Thus it is of no avail for a union or

[3] Ibid, 95,546.

employee to argue an employer has been unreasonable or inflexible during negotiations.

Having determined these three issues, the Court found that a lawful lockout had occurred.

Unfortunately, *Paul* gives a hollow sound to the assurances of the Minister of Labour, Bill Birch. In pamphlets distributed to every household in New Zealand before the enactment of the Employment Contracts Act 1991, Mr Birch promised:[4]

> Your pay and conditions will continue unchanged even if the award you are covered by has already expired. They could change only with your agreement .... Rates of pay could only be altered with your agreement ...

The Act was sold with grand statements about how employers and employees could now reach an agreement that suited and pleased both parties. The underlying premise of the Employment Contracts Act is that employment negotiations are now on a "level playing field". While s 57 was the drafters' attempt to make such a field, the *Paul* decision shows just how uneven that field can be.

This case creates a tension between an employer unilaterally reducing contractual terms to compel an employee to negotiate, and s 57 of the Employment Contracts Act 1991, which allows the court to make an order against any contract procured by harsh or oppressive behaviour or by undue influence or by duress. This tension is clearly seen between s 57, where the court may examine parties' negotiating behaviour, and the lockout action, in which Castle J decided that a court cannot review parties' behaviour. Therefore it is of no relevance to argue the lockout action was used in an unreasonable, or even threatening, manner.

Recently, Chief Judge of the Employment Court, Tom Goddard, spoke about this conflict. He pointed out how strikes and lockouts were "coercive by nature, the very stuff out of which duress and undue influence are made". The learned judge indicated that resolution of the tension may involve the Court asking whether the conduct of either party was "overbearing or fraudulent" or took "unfair advantage of the other's lack of bargaining strength". He went on to say: "[I]t may well be that the mere fact of a strike or lockout being lawful does not prevent the resulting contract from being set aside".[5]

The lockout strategy and the *Paul* case also sit uneasily with the early Employment Contracts Act decisions of *Grant v Superstrike Bowling Centres Ltd*[6] and *NZ Resident Doctors Assoc v Otago Area Health Board,*[7] where the Court held that an employer may not unilaterally change the terms of an employee's contract. It has been said that the difference between a lockout and the earlier decisions is that a lockout only involves unilaterally breaching terms and conditions to encourage negotiation, at which stage the employees have the opportunity to agree to these

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4 Quoted in Chapple, "Unions Slipping Out of Picture", *Sunday Star,* 29 March 1992, section A, 11.

5 Ibid.

6 (1991) 4 NZELC 95,374.

7 (1991) 4 NZELC 95,334.

changes. According to this view, the employers' actions in *Grant*[8] and *NZ Resident Doctors*[9] amounted to the imposition of changes which were not subject to any negotiation or consultation. Unilateral changes involve final terms while lockouts are said to involve what the employer wants to be the final terms. In a lockout situation, the employer is said not to have actually changed the terms of the contract per se.

In contrast, it may be argued that this is a fine distinction when there is no requirement on the employer to end the lockout and to negotiate a settlement. *Paul* means that an employer need only show a willingness to negotiate a new contract before breaching the provisions of the previous contract that he or she wants changed. The lockout is an indication that he or she will settle only on the imposed terms. It seems the distinction between an employer's unilateral variation of terms and the lockout action may be a fine one.

As with any new legislation, we must now look to the future to see if the tensions between a lockout and s 57 of the Act, and a lockout and earlier decisions under the Act, can be resolved. It is to be hoped that the courts will seek to ensure some balance in employment negotiations so that workers in the 1990s may reply, as they did in 1848, that the negotiation road is an open one.

Shan Wilson

Liggett v Kensington; *Re Goldcorp Exchange Ltd* (1992) 4 NZBLC 102,574. Court of Appeal. Cooke P, Gault and McKay JJ.

The collapse of the Goldcorp group produced a plethora of legal claims. Investors sought to gain priority over both secured and unsecured creditors by asserting proprietary interests in the bullion still retained by the group. Most claimants were successful in the High Court. However, the "non-allocated purchasers" were denied the remedy of a constructive trust.

The "non-allocated purchasers" had paid money to a Goldcorp subsidiary ("Exchange") in the belief they were purchasing actual gold. Exchange had falsely represented that bullion would be held for the customer, as part of an unallocated mass, with sufficient bullion to meet the obligations of all customers. Purchasers received a certificate of ownership and, on giving seven days notice, could uplift their bullion.

In the High Court, Thorp J acknowledged that a constructive trust may arise from either an antecedent fiduciary relationship or, in light of *Elders Pastoral Ltd v Bank of New Zealand*,[1] from unconscionable conduct on the part of the defendant.

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8 Supra at note 6.

9 Supra at note 7.

1 [1989] 2 NZLR 180 (CA). See Dixon, "The Remedial Constructive Trust Based on Unconscionability in the New Zealand Commercial Environment", supra at p147.

His Honour found no fiduciary relationship because the plaintiffs were not in a "position of vulnerability". On an analysis of the facts, the judge refused to award a remedial constructive trust.

The majority in the Court of Appeal adopted a vastly different approach. In a somewhat puzzling judgment, Cooke P held that a fiduciary relationship did exist. However, the President did not wish to found his judgment on the existence of this prior fiduciary relationship. Rather, his Honour imposed a constructive trust because there had been a misrepresentation by Exchange, which meant the claimants had paid money as a result of a mistake. Therefore, as in *Chase Manhattan Bank NA v British-Israel Bank (London) Ltd,*[2] the recipient held the money on trust for the mistaken payer.

Cooke P also held that the claimants had priority over the secured debenture holder, the Bank of New Zealand (hereafter "the Bank"). This was justified on the ground that the unallocated purchasers had not accepted a risk of insolvency, whereas the Bank had accepted some risk regarding assets over which it had no fixed charge. Furthermore, prior to the receivership, the Bank had notice of Goldcorp's predicament, and was thus in a better position to assess the potential risk than the unallocated purchasers.

His Honour appeared unconcerned that no causal nexus existed between the money paid and the asset claimed. Indeed, had it been pleaded, he was prepared to extend the claimants' charge to encompass all of Exchange's unencumbered assets (not merely the bullion in the vaults).

Similarly, Gault J focused on the claimants' ability to assert an equitable lien over the bullion. However, his Honour had some difficulty with the position of the Bank as a secured creditor. Nevertheless, he considered that the Bank had sufficient notice for its claim to be relegated, despite the fact that there was a conflict of evidence on appeal as to the exact state of the Bank's knowledge.

In his dissent, McKay J echoed much of Thorp J's judgment. His Honour found that no fiduciary relationship existed, emphasising that the case was an example of a contract for sale and purchase under which Exchange had failed to perform. McKay J stressed that there was no correlation between Exchange's bullion and the money paid by non-allocated purchasers. Moreover, he recognised the flaw in the majority's reasoning; there was no misappropriation of trust moneys because Exchange was not a trustee of the purchase moneys. It is submitted that McKay J correctly distinguished between "pure proprietary" claims (for example, an express trust) and "restitutionary proprietary" claims. In the latter, a trust does not arise as of right, but as a remedy granted in the exercise of the court's discretion. Imposing such a remedial trust over assets which have no causal link to the claim radically alters the present laws of tracing.

Indeed, the most alarming feature of the majority's decision is the fact they allowed the claimants to assert an equitable lien over property which was not

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2 [1981] Ch 105.

connected to the money paid. Furthermore, it was also disturbing that the majority gave the claimants' charge priority in preference to the secured debenture holder although, admittedly, there was conjecture as to the true state of the Bank's knowledge.

It is submitted that *Goldcorp* illustrates the danger of allowing equitable doctrines to rampage unchecked through commercial transactions. A more principled approach is necessary. Where the defendant retains the benefit, it is submitted that the court should apply the principles of unjust enrichment. In *Powell v Thompson,*[3] Thomas J used the principle of unjust enrichment in imposing a constructive trust for "knowing receipt".[4]

However, where the defendant is insolvent, it is impossible for it to wrongfully retain a benefit. Further principles must be taken into account if there is to be a fair distribution of assets among creditors. In the High Court, Thorp J attempted to provide some guidance by distinguishing between spousal and commercial cases. In the former instance, a court may adopt a more flexible approach to the "linkage" between the benefit and the asset claimed. However, in commercial cases the plaintiff must establish a causal connection between the money paid, and the asset over which it asserts a trust.

The majority in the Court of Appeal paid little attention to the spousal/ commercial distinction. Instead, Cooke P focused on the "acceptance of risk" theory as a justification for promoting the claimants' interest ahead of the Bank. While this theory provides a sound justification for preferring one set of creditors to another,[5] the President's application of it is questionable. The claimants sought a remedial constructive trust, rather than a pure proprietary right. They were not "beneficiaries", but stood in a contractual relationship with Exchange, and so it is difficult to see how the appellants accepted no risk of insolvency. Yet Cooke P was prepared to hold that the Bank had accepted a greater risk – although the Bank had taken security over Exchange's assets.

Moreover, his Honour also held that a trust would lie on the grounds of mistake. It is submitted that he failed to distinguish between a mistake in the formation of a contract (as in this case), and a mistake in the performance of a contract (as in *Chase Manhattan*). In the former instance, if a constructive trust is to be imposed, the plaintiff must show that he is able to rescind the contract.[6] In New Zealand, the concept of rescission has been complicated by statute. It is arguable that in *Goldcorp* any number of statutes could have provided a constructive trust

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3 [1991] 1 NZLR 597(HC).

4 Although the author does not agree with the learned judge's obiter statements regarding "knowing assistance". See *Equiticorp Industries Group Ltd v Hawkins* [1991] 3 NZLR 700, 718-728 per Wylie J.

5 See Paciocco, "The Remedial Constructive Trust : A Principled Basis for Priorities over Creditors" (1989) 68 Can Bar Rev 315, 324-325.

6 Although in *Daly v Sydney Stock Exchange* (1986) 160 CLR 371, a constructive trust was not awarded despite the plaintiff being able to rescind in equity.

remedy – for example, the Contractual Mistakes Act 1977, Contractual Remedies Act 1979, Sale of Goods Act 1908, Fair Trading Act 1986, or even the Securities Act 1978. However, Cooke P neatly avoided this difficulty by recourse to s 5(2)(c) of the Contractual Mistakes Act (nothing in that Act shall affect the law relating to fiduciary duty). This sleight of hand served only to confuse the issue because breach of fiduciary duty (which has always permitted equitable rescission) is quite independent of mistake. By mixing the fiduciary rationale with the mistake ground of vitiation, his Honour failed to provide a coherent, juridical explanation of the constructive trust in New Zealand law.

The effect of *Goldcorp* is only to confuse the already vexed issue of the constructive trust; restitutionary grounds are hinted at, but needlessly confused with fiduciary principles. Most radically, however, the Court of Appeal has used a remedial constructive trust to grant a charge over all the assets of a defendant, although the money paid was in no way related to those assets. This was achieved without a discussion of either the need to distinguish between commercial and spousal cases, or the degree of causal connection required between a claim and an asset. Of most concern to the commercial community are the ramifications of the decision for the position of secured creditors. If claimants whose action is seemingly contractual in nature assert not a proprietary right but a restitutionary claim only, and yet are allowed to take priority over a secured creditor, then creditors may ask whether there is any point in taking security at all.

Michael Butler

Auckland Area Health Board v Television New Zealand Ltd, Court of Appeal. 9 April 1992, CA 81/92. Cooke P, Richardson and Gault JJ. High Court. Auckland. 2 April 1992, CP438/92. Fisher J.

In a democracy such as New Zealand, the relationship between the media and the government is fundamental. Restraints should only be imposed on the Fourth Estate for the most compelling reasons.[1] This philosophy was upheld in *Auckland Area Health Board v Television New Zealand Ltd,* where the plaintiffs sought an interim injunction restraining the defendant from broadcasting a "Frontline" programme alleged to be defamatory of the plaintiffs. The plaintiffs identified seven allegedly defamatory statements which were likely to be contained in the programme. Fisher J declined to renew or continue the interim injunction[2] previously granted as a holding measure until the matter could be properly argued. Cooke P,

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1 See for example Palmer et al, *Media Law* (1988).

2 *Auckland Area Health Board v Television New Zealand Ltd,* High Court, Auckland. 2 April 1992 CP 438/92 at p4.

delivering the judgment of the Court of Appeal, upheld Fisher J's conclusion without expressly approving the judgment.

It would be fair to say that in the area of defamation, the prophesies with regard to the unentrenched Bill of Rights seem to have come to pass. No one reading this case could think that the Bill is other than a "mere canon of interpretation".[3] The New Zealand Bill of Rights Act 1990 rated only one passing reference in the Court of Appeal and none in the High Court. Section 14 of the Bill of Rights states that:

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

This case fell squarely within that definition. However, the Court simply used the Bill of Rights as a backup to support its previous statements about freedom of the media. Furthermore, there was no mention of s 5 which deals with the limitations that may be justifiably placed on the rights and freedoms enunciated in the Bill.

Two important media law issues were at stake: the production of the proposed script for the programme, and prior restraint. The decision of Smellie J in *Ron West Motors Ltd v Broadcasting Corporation of New Zealand*[4] is an instance of the High Court requiring the production of a programme script to help determine whether an interim injunction should be imposed.[5] In the *Auckland Area Health Board* case the Court of Appeal did not doubt it had the jurisdiction to do this. However, Cooke P distinguished *Ron West* and stated that:[6]

> [This] is a *wholly exceptional jurisdiction* to be exercised only in cases where there is a *well-grounded fear* that the publication will be clearly unlawful. [Emphasis added.]

The reason for this limitation is that it is no part of the Court's function to act as a censor. Consequently, a transcript was not required to be produced.

It is heartening to see the Court moving away from the incursions into journalistic integrity that were made in *Ron West*. In *Ron West* Smellie J simply wanted the transcript to be produced in order to make an informed decision on whether a plea of justification would be likely to succeed at a full trial. Cooke P has significantly improved the position of journalists in these circumstances by imposing a much more stringent test. With respect to Smellie J, this new test of "well-grounded fear", combined with the emphasis on the extraordinary nature of the jurisdiction, is much more satisfactory. This is especially so, given that the court is usually acting on an ex parte application and therefore should be circumspect about interfering with the freedom of the press.

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3 Rishworth, "A Canadian Bill of Rights for New Zealand? The Justice and Law Reform Committee's Final Report" [1989] NZRLR 83, 95

4 [1989] 3 NZLR 433. It must be noted that in *Ron West* the defendants were willing to produce a transcript subject to conditions, but in this case the defendants refused to do so.

5 See r 310 of the High Court Rules.

6 *Auckland Area Health Board v Television New Zealand Ltd,* Court of Appeal, 9 April 1992. CA 81/92 at p3 per Cooke P.

The other interesting issue is that of prior restraint. Cooke P suggested that an injunction should only be issued in a defamation case, prior to broadcast of a programme, where there are clear and compelling reasons.[7] It must be shown that the defamation which is likely to be published is such that there is no reasonable possibility of a legal defence. This is a more stringent test than that in *American Cyanimid Co v Ethicon Ltd,*[8] the case usually used to determine whether an injunction will be granted, and which was mistakenly applied by Fisher J in the High Court.[9] It has been accepted that the *American Cyanamid* test is not appropriate in defamation actions where the court is dealing with the fundamental right of freedom of speech, which should only be interfered with in the most serious cases.[10] The Court of Appeal, however, missed the opportunity to use the Bill of Rights as a basis for the test.

There remains the question of whether it should be possible to issue an interim injunction prior to the broadcast of a programme. It is difficult to see what purpose such an injunction would serve. Publicity surrounding an injunction can itself damage the plaintiff's reputation. If the material does prove to be defamatory, the plaintiff is not denied a remedy simply because he or she can only bring an action after the event. Fisher J opines that in most cases damages will not be an adequate remedy for an injured reputation. With respect this is a puzzling statement, given that the usual method of compensation in a defamation action is damages.

It is encouraging to see the Court of Appeal shifting the balance between personal reputation (as protected by the law of defamation) and freedom of speech in favour of the latter. However, it is unfortunate, though not surprising, that their Honours have chosen to do this almost entirely without reference to the New Zealand Bill of Rights Act 1990.

Rachel Moses

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7 Ibid, p2 per Cooke P. This is a restatement of the traditional test found in *Bonnard v Perryman* [1891] 2 Ch 269 (CA).

8 [1975] AC 396 (HL).

9 Supra at note 2, at p5.

10 See *Bestobell Paints Ltd v Bigg* [1975] FSR 421; *New Zealand Mortgage Guarantee Co Ltd v Wellington Newspapers Ltd* [1989] 1 NZLR 4 (CA).