

# Alternative Dispute Resolution

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## I: INTRODUCTION

There is a growing acceptance and use of alternative methods of dispute resolution both within the formal legal system and in private disputes.<sup>1</sup> The advantage of these less formal processes is hailed by supporters as being the provision of more accessible, practical, and flexible solutions than can be achieved in a system offering solely litigation.<sup>2</sup> Opponents of these processes question such claims of success and make several points: a failure to meet their objectives, a fostering of increased state presence and intrusion, and a loss of many of the safeguards built into the formal legal system.<sup>3</sup>

Court-based alternatives to litigation are set up in specialist institutions and in the general courts. When such alternatives are put in place, the philosophies giving rise to them and the methods by which they are applied have a profound effect on the outcomes of disputes processed under them. Measurements of success may vary, depending on these philosophies and the methodology employed to produce or extrapolate data.<sup>4</sup>

The dispute resolution process of mediation is the state-sponsored and preferred settlement option in both family and labour disputes. The process as it is applied in the Family Court differs in many respects from the way it is applied in

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1 NZ Law Commission, *The Structure of the Courts*, NZLC R7 (1989) para 142.

2 Banks, "Alternative Dispute Resolution: A Return to Basics" (1987) 61 ALJ 569.

3 O'Donovan, *Sexual Divisions In Law* (1985).

4 Macduff, "The training role of mediation" (1986) 1 FLB 137.

the Employment Tribunal. The theoretical basis of mediation, once channelled into the format of family dispute resolution, undergoes metamorphosis into a hybrid creature bearing some resemblance to adjudication, arbitration, and mediation.<sup>5</sup> In contrast, there is a legislative prohibition of such intermingling in labour disputes.<sup>6</sup> A comparison of the process of mediation as undertaken in these two specialist bodies provides a fascinating insight into the complexities of alternative dispute resolution in present day New Zealand.

The application of free market principles is evident both in the changes to the rules surrounding the dissolution of marriage in the family context, and in the dismantling of the compulsory union and award systems in the context of labour relations. These changes, combined with a groundswell of public demand, have led to a reformulation of the old institutions and methodology utilised to settle disputes arising within the family or workplace.

## II: THE FAMILY COURT

The New Zealand Family Court offers a rare opportunity to observe several processes operating in the same dispute. The Family Court came into being in 1981 as a response to the criticism levelled at the handling of family disputes within the legal system.<sup>7</sup> Much of the reform introduced alternatives to litigation. In the course of a dispute, a family may be subjected to intervention by both legally trained and lay personnel. This stems from the dual roles the Court has to perform. On the one hand it has a typical judicial function, while on the other it has a therapeutic function.

The process of dispute handling in the Family Court context has become a three-tiered system which distances disputants from the option of litigation. The first tier, in most cases, consists of counselling either under the auspices of the Court or through a private agency. This has been described as the community's way of assisting a couple to settle their dispute without formal recourse to the Court.<sup>8</sup> If unresolved, the dispute can then move to the second tier, a mediation conference. The aim of this conference is to demonstrate to a couple that settlement of the dispute is their responsibility, and to provide a further opportunity for them to resolve it outside the formal court system. The final tier is adjudication. This is denied to all but the most determined and uncompromising disputants who have said, "we cannot or will not, with all the assistance available to us, resolve this dispute."<sup>9</sup>

The basic philosophy behind the Family Court is conciliation, and so the emphasis is firmly on consensus in the solution of any dispute. In its efforts to fulfil

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5 Cartwright, "New And Future Trends In Family Law" [1984] NZ Recent Law 357, 362.

6 Employment Contracts Act 1991 ("ECA"), s 81(5).

7 *Report of the Royal Commission On The Courts* (1978) (Beattie Report).

8 *Supra* at note 5, at 357.

9 *Ibid*, 358.

the dual functions of therapy and adjudication, there has been a genuine desire to create a better system for resolving family disputes. This can be seen in the provision of low-level, private, and informal resolution techniques in the form of mediation and counselling. The Court has the power to force parties into these aspects of its therapeutic operations and to mould the processes to optimise its own objectives of conciliation and out-of-court settlements. Yet parties processed through these alternative options are sometimes left with the same feelings of frustration as those who hold out for litigation. From the Court's perspective these litigants have had opportunities to compromise and agree on a settlement. They are equated with failure in a system which aims to keep parties out of court.

However, the litigation stage remains largely unaltered, and the main thrust remains adversarial. The emphases in the earlier stages of counselling and mediation, on conciliation and party involvement in the resolution of their dispute, are not carried over into this stage. Reductions in the level of formality, changes to the physical appearances of rooms used for family hearings, and the appointment of specialist Judges are the only alterations. Moreover, the continuation of advocacy by legal professionals in a setting foreign to most litigants, combined with the institutionalisation of the settlement process, leaves many families with a feeling of frustration and a sense that their real concerns have not been heard.<sup>10</sup>

### 1. Counselling in the Family Court

Counselling is the lowest level of intervention in the three-tiered Family Court process. It is seen as a necessary step in the dispute resolution sequence for many couples and is available without any preconditions. Counselling is thus available, if requested, prior to any decision to seek orders through the Court. The three categories of referral for counselling are:

- (i) "on request" by one of the spouses ( Family Proceedings Act 1980 ("FPA"), s 9);
- (ii) "mandatory referral" after an application for a separation order (FPA, s 10); and
- (iii) "discretionary counselling" when the Court considers, at any stage in proceedings, that such counselling may promote conciliation (FPA, s 19).

Counselling may, therefore, be undertaken at any point in the course of a family dispute. Counselling takes place off court premises either through Marriage Guidance or private counsellors. Research has shown some variables affecting the likelihood of a successful outcome through counselling.<sup>11</sup> Positive outcomes are most likely when there have been joint sessions, when the referral is made under s 9 following a request by one of the parties, and when there are six or more

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<sup>10</sup> Barry & Henaghan, "Mediation in the Family Court" (1986) 1 FLB 84, 88.

<sup>11</sup> Maxwell, *Family Court Counselling Services and the Changing New Zealand Family*, Family Court Counselling Research Report 1 (1989) 85.

sessions of counselling.

Counselling is viewed as beneficial in its own right, as it facilitates rational decision-making by the parties. It also functions as a preparatory step necessary for some disputants prior to mediation. Counselling provides an opportunity to release emotional tension before moving through the dispute resolution process. Many disputes are settled at this counselling stage, which can incorporate mediatory efforts, as well as pure counselling.<sup>12</sup> Family Court counsellors play a mediation role in attempting to help parties reach an agreement; they also play a counselling role in establishing whether reconciliation is possible and, if not, the decisions each party wishes to come to concerning matters in dispute.

## 2. Mediation in the Family Court

New Zealand Family Court mediation conferences are a unique modification of the third party intervention and participatory settlement process of mediation:<sup>13</sup>

[It] is a mixture of mediation and arbitration – some would even suggest with a dash of litigation thrown in .... The dynamics of a mediation conference are critically altered by the presence of a Judge as Chairperson ....

Many of the modifications have far-reaching implications for the process of mediation itself and the degree of agreement present in any settlements reached in mediation conferences under these conditions.

Mediation in the Family Court takes place in “mediation conferences” and unlike counselling, its availability is restricted. The number of counselling referrals has risen from 37.5 per cent of originating applications in 1982, to 78.6 per cent in 1988, while mediation conferences in the same period dropped from 26 per cent to 14.8 per cent.<sup>14</sup> One might argue that this is indicative of growing dissatisfaction with Family Court mediation, based on many of the criticisms outlined in this article. Only those spouses who have made an application for a separation or maintenance order,<sup>15</sup> or an application for custody of or access to a child<sup>16</sup> are able to request mediation or to have it requested on their behalf by a Family Court Judge. Upon receipt of such a request the Registrar sets a time and place for the conference and notifies the parties, requesting their attendance. The setting for conferences is within the Court building, either in a courtroom, Judge’s chambers, or in a special conference room. While attendance is compulsory,<sup>17</sup> the parties cannot be compelled to actively participate. Notice of the conference is also given to the parties’ lawyers, who can attend at the request of their client.

<sup>12</sup> Davidson, “Family Court counselling and mediation: The vexed question of standards and personnel in New Zealand” (1986) 1 FLB 73, 75.

<sup>13</sup> Cartwright, *supra* at note 5, at 362.

<sup>14</sup> Maxwell, *supra* at note 11, at 52.

<sup>15</sup> Family Proceedings Act 1980 (“FPA”), s 13(1)(a).

<sup>16</sup> FPA, s 13(1)(b).

<sup>17</sup> FPA, s 13(2)(b).

The mediation conference is chaired by a Family Court Judge.<sup>18</sup> Its statutory objectives are the identification of the matters at issue between the parties and the resolution of these issues by agreement.<sup>19</sup> The Chairman<sup>20</sup> keeps a record of the matters at issue, separating those on which agreement is reached from those on which it is not. There is no other record of the proceedings and all information, apart from this report, remains confidential.<sup>21</sup> Where agreement is reached, the Chairman can, with the consent of the parties, make binding orders. These can cover separation, custody or access arrangements, maintenance for either spouse or any children of the marriage, and the possession or disposition of property under the Matrimonial Property Act 1976. While a mediation conference cannot be convened where the only issue is a property dispute or a question of domestic protection, these, and any other “non-qualifying” issues, can be raised once a conference has been convened. Qualifying matters include applications for separation, maintenance orders and custody or access matters.

Section 16 of the Family Proceedings Act allows for the same Judge who chairs the conference to adjudicate in subsequent litigation between the parties, unless he or she withdraws, or the parties request him or her to do so.<sup>22</sup> In the larger centres, the policy is that the same Judge should not perform both functions, but in smaller areas this is a real possibility.<sup>23</sup>

Mediation has been described by Fuller as being a resolution process ideally suited to the dyadic marriage relationship.<sup>24</sup>

Mediation by its very nature presupposes relationships normally affected by some strong internal pull towards cohesion; this is true whether the mediative efforts in question be directed towards the formation, modification or dissolution of such relationships.

Fuller postulates that mediation as a dispute resolution process is subject to intrinsic limitations, so that generally it cannot be employed where more than two parties are involved. Further, it presupposes a meshing of interests of an intensity sufficient to make the parties willing to collaborate in the mediatory effort.<sup>25</sup> When the state requires the parties to mediate, as is the case in Family Court procedures, it must be asked what effect this has on the necessary collaborative effort.

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18 FPA, s 14(1).

19 FPA, s 14(2).

20 As the position is described in the Act.

21 FPA, s 18(1)(b).

22 *Krammer v Krammer*, noted [1984] NZ Recent Law 171.

23 1 Ludbrook's Family Law Service 2C.08.

24 Fuller, “Mediation – Its Forms and Functions” (1971) 44 S Cal L Rev 305, 314.

25 *Ibid*, 330.

*Influences on Mediation in the Family Court**(a) The interests of the child*

In a Family Court mediation conference there are generally only two disputants but the mediator has very real interests which influence the process and outcome. The paramount concern in any dispute involving children before the Court is the child's best interest.<sup>26</sup> It is the Judge's task to promote this above all other considerations, and prior to granting a dissolution the Court has a duty to satisfy itself that any arrangements made regarding a child are the best that circumstances will permit.<sup>27</sup>

The Family Court in its handling of custody and access issues has very few guidelines for determining what constitutes the best interests of a given child. Trends favouring joint, shared or sole custody are discernible at various times in the past decade.<sup>28</sup> In 1984, Judge Cartwright pointed to the growing use of joint or shared custody orders, which was the option preferred by the Court at that time:<sup>29</sup>

The three step process ... has put a greater responsibility on litigants to find their own solutions. I believe that this has contributed to the rise in popularity of joint or shared custody orders. It is not uncommon for couples to agree on some such arrangement at mediation stage.

These orders have been described as requiring a similar level of co-operation between parents as that required to maintain a successful relationship.<sup>30</sup>

However, much of the research supporting the Court's preference for certain trends is derived from social sciences, and suffers from poor, or totally inappropriate, control of the variables influencing outcomes and data.<sup>31</sup> Custody and access options cannot be studied in isolation from the economic and social changes resulting from the break-up of a family, yet these are often ignored or dealt with only marginally. The reality is that from this research the Family Court creates a preferred custody or access option which provides a benchmark against which all decisions are to be measured.

A recognition of the impact of various competing interests in this sphere of family disputes reveals the very real possibility that "expert" opinion, as it develops through the Court's dual functions of therapy and judicial determination may, consciously or unconsciously, be shaping the content of agreed outcomes under alternative dispute resolution processes. Davis says that a vital characteristic

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<sup>26</sup> Guardianship Act 1968, s 33.

<sup>27</sup> FPA, s 45(1).

<sup>28</sup> Hall, *The Welfare of the Child: A Literature Review*, Family Court Custody and Access Research Report 1 (1989) 17.

<sup>29</sup> Supra at note 5, at 358. There is presently a move away from such arrangements in America, where much of the data promoting them as the best option originated.

<sup>30</sup> Supra at note 28, at 62.

<sup>31</sup> This is to be expected in behavioural or social sciences, as the subjects under study cannot be placed in an environment which isolates the variable postulated as causing the effect under examination: *ibid*, 48.

of mediation is that any settlements reached be voluntary.<sup>32</sup> The indicators for a preferred settlement put forward by the mediator can remove some of the voluntariness of the process and this is especially true if the mediator is a figure of authority such as a Family Court Judge.

*(b) The use of Judges as mediators*

The use of judicial personnel for such a pivotal role has both advantages and disadvantages. An argument in its favour is the ability for agreed settlements to be converted, with the parties' consent, to binding orders during the conference. This removes any need for vetting or further investigation into the settlement and puts the responsibility for implementation onto the parties. The presence of a person with authority and knowledge of family law as a "neutral" resource to advise participants on the likely outcome of a court hearing provides the necessary impetus for some disputants to relinquish an untenable position.<sup>33</sup>

However, in one of the few pieces of research on mediation in the New Zealand Family Court, Barry and Henaghan found support for Judges as mediators amongst the mediated, their lawyers and the Judges themselves, but identified their role as a cause of both concern and confusion in the conference.<sup>34</sup> The survey found that Judges made recommendations which formed the basis for settlements over which participants felt they had very little control. Participants reported being relieved when the decision was made for them, and frustrated when the issues remained unresolved. As Holt and Leibrich point out, Judges may not be the most appropriate mediators.<sup>35</sup> The perceived authority of a Judge may mean that judicial mediation is quietly directive:<sup>36</sup>

[T]he parties more often than not equate authority with semi-omnipotence and quite literally can be seen to be hanging on every word uttered by the Judge ....

This can be an advantage if settlement is the prime concern in such disputes and is equated with successful mediation. However, such "success" may be achieved at the expense of the educative role which mediation is capable of playing. Skills learnt from mediation can be utilised in the resolution of future disputes. Many of the participants in these conferences will continue to have contact and possibly disputes, and any resolution skills can help in resolving their differences.

*(c) The roles of the mediator*

Macduff<sup>37</sup> identifies two roles for the mediator aiming to educate the parties in order to bring about changes in behaviour. The first of these roles is "as translator

32 "Conciliation and the Professions" (1983) 13 Family Law 6.

33 Barry & Henaghan, *supra* at note 10, at 85.

34 *Ibid*, 86.

35 Leibrich & Holm, *The Family Court: A Discussion Paper* (1984) 8.

36 Ryan, "Judges or Mediators or Both?" NZ Law Conference Paper, (unpublished 1984).

37 *Supra* at note 4, at 139.

or conduit” for the parties, to enable them to hear each other. This requires an ability in the mediator to hear each party. There are demonstrable differences in perception across class, cultural, and gender lines.<sup>38</sup> The mediator therefore requires an empathy with the class, culture, and gender of those for whom he or she attempts to mediate.

The Family Court has been criticised as a middle class, pakeha, male-dominated institution which poorly serves the needs of Maori and Pacific Island women.<sup>39</sup> Judges are predominantly male and Pakeha, legally trained, bastions of middle class values who relate to a different “family” experience which bears little relevance, if any, to the “family” experience of the majority of their clients. This diversity of experience between the mediator and the mediated has a vast impact on the level of understanding between the participants, impacting on the mediator’s ability to fulfil this translating role.

The second role, which develops this communication theme, involves training each party in the ways that the issues and information might be perceived by the other party. This procedure is not aimed at settlement as an end in itself. The awareness of a different perception of issues and information is, for many disputants, a real breakthrough. Even though settlement has not been achieved, this constitutes a measurable level of success.

There is, however, a conflict between educating disputants in problem resolution techniques on the one hand, and quick settlement on the other:<sup>40</sup>

[O]ne of the major problems with mediation ... was the way in which three diverse interests had become joined in a movement for reform. Their priorities were quite different and to some extent, even contradictory. One was concerned with cost saving, another with the extension of welfare paternalism, and a third with the encouragement of self reliant dispute resolution .... [T]he existence of these divergent interests raises serious problems for any sort of programme evaluation study ....

It is possible that much of the “success” defined in terms of one interest would be at the expense of the others. Even without a specific legislative requirement to put the interests of the child first, few mediators would accept that their responsibility was limited to the two disputants.

In some ways the obvious authority of a Judge can be more directly countered than the less visible influence exerted over the mediation process by any mediator. If left entirely in the control of the parties, grossly unequal and insensitive settlements could be imposed by the stronger disputants. In terms of matrimonial disputes this will usually translate to the male partner who, in a family setting, usually holds the indicators of power and economic control. Because mediation is conducted in private, the requisite level of protection cannot be ensured. The

38 Ibid.

39 Busch, Robertson & Lapsley, *Domestic Violence and the Justice System: A Study of Breaches of Protection Orders* (1992) (Busch Report).

40 Dingwall & Eeklaar, “A Wider Vision” in Dingwall & Eeklaar (eds) *Divorce Mediation And The Legal Process* (1988) 169.



manner and extent to which protection is provided may vary considerably, depending on the mediator's perception of the power imbalance, and the degree to which this affects the mediation process.

*(d) Legal representation of the parties*

The ability of the parties to request that their counsel be present at the mediation conference offers a degree of control over these aspects of the proceedings. Barry and Henaghan's survey revealed that some lawyers sought to control the conferences or used them as a means of discovering the opposition's case prior to a court hearing.<sup>41</sup> The lawyers' attitudes reflected the confusion that arises when the interface between the therapeutic and judicial functions performed by the Court is examined too closely. The survey revealed a high level of confusion about the aims, objectives and methodology of mediation. Judge Trapski identified a very real difference between those parties who had been instructed in the format, process and procedure of the mediation conference and those who came along without the benefit of such preparation.<sup>42</sup>

Given the diverse responses in the survey, it could be beneficial to the disputants and the Family Court if a group of lawyers who endorsed and practised mediation were chosen to represent parties in mediation conferences. They could be chosen on similar lines to the selection of Counsel for the Child. The Family Court is well used to the fragmentation of cases by specialists in a given area and has demonstrated a willingness to tap into specialist legal and personal skills when choosing Counsel for the Child.

If mediation is to be truly practised in the mediation conference, as much of the litigation philosophy as possible must be removed while still retaining any safeguards to prevent coercion or domination by one of the parties or the mediator. The notion of advocacy seems to confuse and frustrate the objectives of a settlement process for which the parties supposedly take responsibility.<sup>43</sup> The role of advocate in conciliatory proceedings is an amalgam of conflicting duties not normally associated with the practice of law as it has developed in our present legal system. The advocate must balance his or her adversarial role against efforts to reach a settlement in conciliation or mediation.

The removal of advocacy could help to crystallise the different methodology and philosophy which mediation introduces into the dispute resolution process. It could also assist in dispelling some of the confusion brought about when the very different processes of mediation and litigation are seen to operate in the same forum. Education of lawyers in mediation techniques or a prohibition of adversarial tactics during mediation conferences may help to bring about this separation of processes.

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<sup>41</sup> Supra at note 10, at 88.

<sup>42</sup> "Family Courts Now – An Interview with Judge Trapski" [1985] NZLJ 41.

<sup>43</sup> Supra at note 10, at 89.

Simply removing lawyers from the process of mediation altogether brings the conference into line with the type of mediation which takes place in the counselling phase of dispute resolution. However, the Judge is perceived to have far more authority than any counsellor, and the mediation which takes place in conferences can never be freed from this contaminating factor. Without partisan legal representatives, weaker parties could be left vulnerable to forces exerted by an authoritarian mediator and dominant parties, and agree to disadvantageous settlements.

*(e) Other influences*

There is also strong evidence that, despite strong reservations, women acquiesce and take part in mediation and counselling for fear of otherwise appearing hostile to the Court's attempts to seek settlement of their dispute by non-adversarial methods.<sup>44</sup> A common theme to emerge from case studies of battered women was that they felt they had no option but to co-operate.<sup>45</sup> The Busch Report concluded that applicants for protection orders often felt obliged to attend counselling and mediation because failing to attend was perceived to count against them in subsequent court hearings.<sup>46</sup> With issues such as the custody of children and matrimonial property settlements at stake, it was felt that these women were unlikely to run the risk of appearing unco-operative. The court system itself can, in effect, control such women.

The problem of intra-family violence is not always well recognised or handled by a Family Court system based on a philosophy of reconciliation and conciliation. Where violence is present in a relationship, counselling or mediation is not advised, as they work best when both parties want a workable and mutually agreeable outcome.<sup>47</sup> The inequality of bargaining positions inherent in violent relationships must be recognised and redressed, if mediation is to be a viable option in such circumstances. The class, culture and gender differences between most Family Court Judges and victims of domestic violence, combined with the fear of misinterpretation if they fail to co-operate, adds yet another complication to mediation conferences dealing with such families.

### 3. Summary

The reality of mediation in the Family Court system is both confused and distorted by the institutionalisation of the process. The viability of mediation is threatened by distension to include not only the couple involved, but also an omnipotent, patriarchal figure representing the interests that society deems paramount. Society, the Family Court, and the individual Judge representing these two

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<sup>44</sup> *Supra* at note 39, at 249.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*

<sup>47</sup> Parry & Pritchard, "Counselling towards mediation: Another kind of team approach" (1986) 1 *FLB* 90.

powerful forces have an interest in the issues involved in mediating a family dispute, and agreements will need to comply with the preferred outcomes favoured by these brokers of power before receiving legal and moral sanction.

The presence and attitude of legal representatives for the parties compounds the confusion by further blurring the distinction between the processes of mediation and adjudication. The lawyers' knowledge that unsettled disputes can move from mediation to adjudication influences the strategies and the advice given to clients. The inherent demand that settlements be speedy and cost efficient detracts from the educative potential of mediation in teaching resolution skills to disputants.

Many of these distortions have been removed from the practice of mediation in the Employment Tribunal, as highlighted by the following discussion.

### III: EMPLOYMENT TRIBUNAL

The Employment Contracts Act 1991 has placed industrial relations in New Zealand in a new context. It introduced as many fundamental changes to the framework of industrial relations in New Zealand as the Industrial Conciliation and Arbitration Act did in 1894. The organisation of labour relations can be characterised by a continuum from collective to individual and the Act marks a move towards the individual end of the scale. The growth of a free market ethic, coupled with a growing reluctance on the part of successive governments to intervene in the market, has culminated in the Employment Contracts Act. A series of key indicators from both Labour and National governments have highlighted a gradual change in emphasis from state control to individual responsibility.<sup>48</sup> Shale argues that:<sup>49</sup>

[T]he ECA is not the sudden and unique reform that it was touted to be .... Rather, it is the product of a gradual transformation of New Zealand labour relations towards a decentralised regime ....

The Employment Contracts Act completes the legal evolution from compulsory arbitration to direct bargaining. The former dispute resolution process of arbitration through the Arbitration Court, which was designed to act on behalf of the government to regulate conditions and wages, was no longer appropriate in a deregulated labour market. The arbitration method of dispute resolution has been replaced in the Act by an adjudication model.

Mediation has risen to increased prominence under the Act to become the preferred process of dispute resolution. The result of a mediated dispute, whether settled or not, is the responsibility of the parties. This is consistent with the philosophical basis of the Act and its objective of promoting the efficient operation of the labour market.

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48 Shale, *The Employment Contracts Act 1991: Reform in Context*, LLB(Hons) Dissertation, University of Auckland (1992) 56.

49 Ibid, 104.

The government has provided mediation through a new institution, the Employment Tribunal. It has also established the Employment Court, which oversees the Tribunal and hears appeals from it. The establishment of these two bodies reflects a general acceptance by Parliament and the Courts that disputes in the industrial relations area should be initially determined by specialised “industrial” institutions.<sup>50</sup>

The Tribunal was formulated specifically to deal with a fundamentally different set of rules and participants from those who operated under previous labour legislation in New Zealand. The removal of compulsory unionism, blanket award coverage and the union monopoly in representing workers in industrial disputes marks an almost total reformulation of the process of industrial relations from a corporate to an individual model.

The original Bill did not contain any provisions for a Tribunal. When the Bill was introduced for its first reading, the Minister of Labour, the Honourable Mr Birch, outlined a compulsory system of personal grievance dispute resolution.<sup>51</sup> Under the system, a grievance committee chaired by a mediator was to resolve personal grievances arising from collective agreements for groups of workers, and those individual contracts which included a personal grievance resolution requirement. Access was to be available for all parties to take cases themselves without the need to go through a union. Appeals to the courts were to be on points of law. Likewise for the settlement of disputes under collective contracts there was to be a disputes committee chaired by a mediator. Individual contracts would only come within the system if there was specific agreement between the parties for its application. The Minister went on to state that the Mediation Service and the Labour Court would continue. He then said:<sup>52</sup>

It is envisaged, however, that changes may be needed to the institutional framework and to the personal grievance procedures in light of the new bargaining arrangements in the legislation. The select committee will be asked to consider whether these institutions and the personal grievance procedures are appropriate to the functions provided in the Bill, and what an appropriate structure might be. In calling for submissions, therefore, the committee will encourage interested parties to address those specific issues that remain to be resolved ....

As a result of this specific request and the submissions received, ten major changes were introduced in the Bill’s second reading.<sup>53</sup> All employment contracts, whether individual or collective, would be covered by a single jurisdiction rather than being split between the civil courts and the Labour Court. Thus all employment contracts would come under the same legislation. An Employment Tribunal and a new Employment Court would be set up. These would be accessible to all employees and employers regardless of the type of employment contract or

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50 *NZ Baking Trades Employees’ Industrial Union v General Foods Corp (NZ) Ltd* [1985] 2 NZLR 110, 117 (CA).

51 511 NZPD 480 (19 December 1990).

52 *Ibid.*

53 514 NZPD 1426 (23 April 1991).

representation they had. The Minister described the rationale behind setting up the Tribunal:<sup>54</sup>

The intention is to provide a specialist lower-level institution that will be able to resolve many issues closer to the workplace ....

Under the Act, many more individual employees and their employers will be involved in the processes of negotiating and enforcing employment contracts, rather than national unions and employer groups negotiating on behalf of all parties within a given industry. The Tribunal fits into this individual model as the first level of dispute resolution beyond the parties themselves. It is state controlled and financed. Its members are appointed by the Governor-General on the recommendation of the Minister of Labour.<sup>55</sup> It must be indicated whether a particular member is appointed as either a mediator, an adjudicator, or as both a mediator and an adjudicator.<sup>56</sup> This is necessary because of the distinction between the Tribunal's mediatory and adjudicative functions. There are no criteria in the Act for qualification as a Tribunal member, but in practice they are chosen on proven ability to function successfully in dispute resolution, labour relations and associated fields.<sup>57</sup> The initial appointments to the four Tribunals throughout the country were lawyers with industrial experience, union and employer group personnel, and specialist Industrial Court staff.<sup>58</sup> The personal characteristics of a mediator are important, but it could be argued that the question of acceptability rests not so much on the qualities of the mediator but on the mediator's agency affiliation.<sup>59</sup> Mediators in the Tribunal are employed by the state and are, in a sense, political appointees. It is possible in this situation that government directives filter through the agencies and that mediation becomes a channel for directing government pressure.<sup>60</sup>

It is difficult to remove completely the nagging suspicion that state agencies are political and that political appointees cannot be trusted ....

The basic objective of the Employment Contracts Act – the promotion of the efficient operation of the labour market – cannot be achieved without the efficient resolution of issues that take place between employers and employees within the workplace.<sup>61</sup> It is therefore very much in the government's interest to control, both legislatively and by selection of personnel, the Employment Tribunal.

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54 Ibid, 1439.

55 ECA, s 82(1).

56 ECA, s 82(2).

57 Personal communication with the Secretary of the Auckland Employment Tribunal.

58 Brooker & Friend, *Employment Contracts Act 1991* EC81.05.

59 Howells & Cathro, *Mediation in New Zealand: The Attitudes of the Mediated* (1986) 35.

60 Ibid.

61 Churchman & Grills, *The Employment Contracts Act Revisited* (NZ Law Society Seminar, 1992) para 2.1.5.

## 1. Dispute Resolution Procedures

Mediation through official agencies has been used in industrial dispute resolution since the Industrial Mediation Service, established in 1970 by an amendment to the Industrial Conciliation and Arbitration Act, began operating in 1972.<sup>62</sup> The service was restricted to mediating in disputes over rights. These were issues relating to the interpretation of existing awards. Arbitration or adjudication, rather than mediation, were better suited to disputes of this nature. This meant that “the New Zealand neutral commonly enters a dispute as a mediator and may leave as an arbitrator.”<sup>63</sup> It was because of this historical plurality of roles that the prohibition in the present Act came into being.

The restriction on the type of disputes that can be handled under a mediation process has also gone. Mediation is available for a wider range of disputes than adjudication. There is an overlapping jurisdiction, founded on s 78(3)(a) and (b), which requires that the Tribunal provide mediation and adjudication in performing its general function. The jurisdiction to mediate extends beyond the types of disputes shared with the adjudicative jurisdiction. A general responsibility to assist employees and employers with the maintenance of effective employment relationships is given in s 78(1). The Tribunal may offer, at its own instigation, mediation assistance in respect of “any matter” in order to facilitate the settlement of differences under s 78(2). This proactive section is complemented by s 78(4)(a) and (b), which allow the parties to invite mediation assistance from the Tribunal over matters which are beyond its formal jurisdiction and where no formal application has been made to the Tribunal for mediation assistance.

To encourage the parties to settle prior to coming before the Tribunal several preliminary steps are required. All contracts must contain an effective procedure for settling both personal grievances<sup>64</sup> and disputes arising from the interpretation, application or operation of the contract.<sup>65</sup> Where the individual contract contains no specific procedures to cover these areas, the standard procedures of the First and Second Schedules are implied into the contract. To date, what constitutes an “effective” grievance or disputes procedure has not been decided by either the Tribunal or the Employment Court. Consequently, while ss 32 and 44(2)(b) allow for agreed procedures other than those in the First or Second Schedules these must form a good model of an “effective” resolution procedure. Churchman is critical of this:<sup>66</sup>

The Act therefore mandates what amounts to a system of compulsory dispute resolution which severely restricts the parties’ freedom to choose an appropriate forum.

The validity of this assertion remains to be seen, but the result of both procedures is that the parties must have made genuine attempts to resolve their

<sup>62</sup> Supra at note 59, at 36.

<sup>63</sup> Miller, *The Resolution of Disputes and Grievances in New Zealand* (1983) 29.

<sup>64</sup> ECA, s 26(a).

<sup>65</sup> ECA, s 44.

<sup>66</sup> Churchman, “Tracing the arc of the pendulum: The regulation of collective bargaining in New Zealand II” [1991] NZLJ 350, 354.

dispute prior to appearing before the Tribunal. Preliminary steps in the Schedules lay down limitations on the time an employee has to notify an employer of a grievance.<sup>67</sup> This is presumably aimed at speeding up resolution and keeping disputes contained within the workplace.<sup>68</sup>

The Tribunal may enquire, and under certain circumstances is likely to enquire, into whether these preliminary procedures have been adhered to. The Tribunal may adjourn proceedings where these procedures have not been adhered to, and direct that the parties make a bona fide effort to resolve the issue prior to any return to a hearing. This is likely to arise where there is no agreement as to the nature of the issue before the Tribunal, no agreement as to obvious facts, no agreement as to which facts are in dispute, and no prior agreement to meet before attending the Tribunal hearing in order to resolve these matters.

## 2. Separation of Functions

During the second reading of the Bill, the Minister described the Tribunal as having two functions – mediation and adjudication.<sup>69</sup> The Act specifically separates these two functions. Section 81(5) states that when the Tribunal is required to mediate and adjudicate in the same dispute, the same member of the Tribunal shall not perform both functions. This has been welcomed by some for its potential to remove much of the confusion which arises when both functions are performed by the same party.<sup>70</sup> The processes are so diametrically opposed that the merging of the two tasks enormously influenced the processing and outcomes of disputes. Mediation involves a voluntary movement from divergence to convergence upon an acceptable agreement. If the parties are unwilling or unable to agree then the dispute remains unresolved. Howells describes mediation as:<sup>71</sup>

[A] process in which an impartial neutral (or chairman with no right of decision) assists the disputants in settling their differences. The mediator's role is to facilitate voluntary agreements by the parties themselves; The parties' final decision is their own and not the mediator's ....

Adjudication and arbitration, on the other hand, impose judgments arrived at by a third party who weighs the evidence presented by both sides to come to a final resolution for them. The possibility of a switch to adjudication or arbitration, should the parties fail to resolve their dispute in mediation, tempers any concessions by the parties with an awareness that their concessions may be used against them by the mediator, turned judge or arbitrator. Thus the willingness to settle in one process may be undermined by the threat of a different process being imposed by the same "neutral" person. In removing this possibility, the Act is actively endorsing mediation as a means of dispute resolution.<sup>72</sup>

This prohibition does not mean that both processes cannot take place within the same hearing. A dispute may begin as a request for adjudication, but be

67 ECA, First Schedule cl 3(1).

68 Churchman & Grills, *supra* at note 61, at para 2.2.7.

69 *Supra* at note 53, at 1439.

70 Toogood & Muir, *Employment Contracts Bill* (NZ Law Society Seminar, 1991).

71 Howells & Cathro, "Mediator strategies in New Zealand: the views of the mediated" (1983) 8 NZJIR 171.

72 Churchman & Grills, *supra* at note 61, at para 2.2.3.

assessed as being capable of settlement through mediation. The adjudicator has two choices in this situation: he or she can either refer the matter to another Tribunal member qualified to mediate, or may mediate within the hearing, encouraging the parties to reach a settlement. If they fail to do so, then the matter will have to go to another adjudicator for formal adjudication.<sup>73</sup>

The point is that the Act is not so inflexible as to prohibit the mixture of adjudication and mediation, but simply prevents formal adjudication by a member of the Tribunal that has been involved in mediation of the same dispute.

The resultant duplication of processing is a negative aspect of this prohibition. Recent statistics show that 6.3 per cent of cases fall into this category of duplicated hearings.<sup>74</sup>

The Act makes a distinction between formal and informal adjudication. Only those decisions made in formal adjudication can be appealed to the Employment Court. If a matter is being mediated, the parties may request its determination by the mediator. Such decisions cannot be appealed and are binding on the parties.<sup>75</sup> The Tribunal may also be asked to arbitrate where the parties in a dispute have reached a consensus on the scope of their possible settlement, and want the mediator to make a final choice within those defined parameters. The Tribunal, as a “low level”, informal means of providing speedy and just resolution of disputes<sup>76</sup> needs such flexibility to allow it to settle an infinite variety of disputes.

Throughout the Act there is an emphasis on mediation. Under s 76(b), the Tribunal is to provide mediation services in the many cases where the parties are best able to resolve their own differences. In the few cases where mutual resolution is either inappropriate or impossible, s 76(c) gives the Tribunal power to adjudicate. There is no prerequisite of mediation prior to adjudication, although there is a clearly signalled intent that the majority of issues should go to mediation rather than adjudication. In the First Schedule, which provides a standard personal grievance settlement procedure, the Tribunal is directed to mediate where “appropriate” but to adjudicate only when “necessary”.<sup>77</sup>

### 3. Assessment

This emphasis on mediation as the preferred settlement option in a “low-level” institution such as the Employment Tribunal is open to criticism on several counts. First, because mediated hearings are held in private, no record of proceedings is available. This results in a lack of precedent, which precludes certainty because there is no guarantee that like cases will be settled in a like manner. These are, however, also two of the strengths of mediation. An individual’s privacy is

<sup>73</sup> Ibid, para 2.2.4.

<sup>74</sup> Ibid, para 2.2.6.

<sup>75</sup> ECA, s 88(2).

<sup>76</sup> ECA, s 76(c).

<sup>77</sup> Clause 8.



maintained and settlements can be tailored to meet the needs of the parties in their particular dispute, rather than being made to conform to a rigid set of procedural rules and solutions, as is the case with adjudication.

A second criticism of mediation is its potential to favour the stronger party in any dispute. The employment relationship is ongoing and dependent. In times of high unemployment, the relative strengths of most disputants in the employment relationship will be far from equal. The power imbalance inherent in such relationships can make mediated settlements an exercise in coercion by the stronger party. The greater the need to settle the dispute, the higher the likelihood that the employee will agree to a less favourable settlement.

Mediation is not a prerequisite to adjudication before the Tribunal.<sup>78</sup> This may ameliorate some of these concerns by allowing direct access into the formal protection of adjudication, rather than informal, private mediation. A Tribunal Officer decides whether mediation should be undertaken before adjudication.<sup>79</sup> Both parties will be consulted on this issue. As a general policy, while recommended in most cases, mediation will only be undertaken where both parties agree to it.<sup>80</sup> The Tribunal has been given some guidance on the “appropriateness” of mediation in *Grant v Superstrike Bowling Centres Ltd*,<sup>81</sup> where Finnigan J considered that it was not appropriate to refer a case to mediation on the request of the respondent, in the face of the applicant’s strong opposition to it.<sup>82</sup> If the parties do not agree to mediation the matter will be adjudicated by the Tribunal. Initial statistics on the types of matters mediated and adjudicated indicate that certain processes are felt to be appropriate for certain types of disputes:<sup>83</sup>

Personal grievances	61.1% chose mediation.
Arrears of wages	73.3% chose adjudication.
Compliance orders	87.6% chose adjudication.

#### IV: SOME COMPARISONS

The emphasis of the Employment Contracts Act is getting the parties to discuss the dispute or grievance as soon as possible and as close as possible to the workplace. Any alternative, privately agreed grievance or dispute resolution procedures would also have to incorporate this early settlement option. There is no such emphasis or responsibility in the Family Court. Even those spouses who have reached their own agreements can be subjected to counselling by the Court if it is

78 ECA, s 78(6).

79 ECA, s 80(2).

80 Churchman & Grills, *supra* at note 61, at para 2.2.6.

81 [1991] 4 NZELC 95,374.

82 *Ibid*, 95,379.

83 Churchman & Grills, *supra* at note 61, at para 2.2.6.

not satisfied that the agreement is in the child's best interest. Moreover, given the Court's marked preference for certain custody and access options, a great deal of pressure can be exerted to vary the previous solutions formulated by the parties. One of the objectives of a mediation conference in the Family Court is to identify the matters in issue between the parties. Employers and their employees are required to sort out these initial issues, whereas spouses are not given this responsibility. This ties in with the basic aims of the Acts under which each operates. As the prime objective in the employment context is the continued and efficient functioning of the working relationship, the early settlement of disputes is encouraged. The Family Court's obligation to make the interests of children paramount means that any settlements must be sanctioned to determine whether they meet this crucial criterion.

Mediation in the two institutions is shaped by these basic objectives and moulded into an institutionalised process of dispute resolution within the state legal system. They are alternatives to the formal litigation system and owe their existence to a groundswell of public concern at the shortcomings of the court system – its inability both to meet the needs of families in the process of reformulating and to deal effectively with the complexities of industrial relationships. The use of mediation as a principal resolution process is indicative of the belief that the “law”, in its formal litigation mode, is too rigid and clumsy to supply acceptable solutions in such situations. The diversion into mediation has brought with it a new set of influences which shape and mould the whole resolution process. Entry into this new regime has been at the expense of the safeguards built into the litigation system over hundreds of years.

It may be suggested that mediation is a way of moving disputes out of the courts and into a private setting where weaker parties can be pressed into settling for less than they could gain from litigation. It has been described as the weakest of all available legal remedies.<sup>84</sup> The relative power balance between disputants in family and industrial disputes seems consistently to favour one party at the expense of the other. For the state to promote mediation in such an imbalanced situation seems to deprive the weaker party of an opportunity to make valid claims in the public arena of the courtroom.

The form of mediation in the Family Courts is a two-stage process which serves to distance the disputants from litigation but gives them very little control over outcomes. The Court's duty to regard the interests of children as paramount provides a justification to supervise and, if necessary, revise any settlements the parties might reach. This duty seems to be discharged once a settlement is reached which accords with the current vogue, as there is no attempt to check on the actual welfare of children under such settlements. The value of such processing to the disputants is questionable; the authoritarian figure of the mediator sets the settle-

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<sup>84</sup> Lerman, as quoted in the Busch Report, *supra* at note 39, at 16.

ment options and the parties tend to acquiesce to these rather than learning to appreciate one another's perception of the issues and desire for resolution.<sup>85</sup> This educative aspect of mediation, based on communication and understanding of the other party's view of the issues, is put forward as one of the advantages of mediation over litigation or arbitration. This aspect is largely lost, however, as the mediator can only help to facilitate this process to the extent that he or she understands the disputants' perception of the issues, and is able to translate these to a point where they coincide, or are able to coexist.

Mediation in the Employment Tribunal is a process agreed to by both parties and, unlike that undertaken in Family Court mediation conferences, cannot be foisted on the parties. While mediation is the preferred settlement process under the Employment Contracts Act, there is no evidence that those who opt for adjudication are likely to be discriminated against, even though this is the perception of disputants in the Family Court.<sup>86</sup> There is a recognition within the Tribunal that certain types of disputes are better suited to mediation than others. While violence is recognised as a factor detracting from the effectiveness of mediation,<sup>87</sup> the evidence suggests that victims of violence are nevertheless being processed through mediation by the Court.

Mediation under the Employment Contracts Act is only carried out in the Tribunal by specialist mediators. The Employment Court Judges are only able to operate in adjudication, which removes the "contaminating" influence of Judges as mediators. In the Family Court, mediation is present in the counselling process, and again, at a higher level of coercion, in the mediation conference chaired by Judges. This duplication of processing distances disputants from adjudication, but falls short of the mediation theory of voluntary settlements.

As with many alternative dispute resolution processes, mediation has been widely acclaimed. However, like any system it has its shortcomings, and these begin to surface as it is institutionalised to process large numbers of divergent cases. This is true, whatever the legislative provisions under which it is set up. The competition between the need for settlements agreed by the parties, speedy outcomes, and consumer satisfaction, is a constant complication of the process. State control of mediator appointments, or the use of Judges as mediators, adds further to the complexity. What began as simple, third party intervention to facilitate resolution controlled by the parties, has become a subtle means of political control, with an ever growing state presence in dispute processing at all levels.

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<sup>85</sup> Barry & Henaghan, *supra* at note 10, at 87.

<sup>86</sup> The Busch Report, *supra* at note 39, at 249.

<sup>87</sup> *Ibid*, 241.

# Whither Provocation?

Garth Stanish

## I: INTRODUCTION

Provocation, generally accepted in criminal law as a concession to human infirmity,<sup>1</sup> operates as a partial defence to a charge of murder. It developed “in order to accommodate homicides which were not malicious enough to be designated murder nor justifiable enough to warrant total absolution.”<sup>2</sup> It does not make an unlawful homicide excusable or justifiable but it does enable the accused to have his or her sentence reduced from murder to manslaughter. Although recent developments in the law have somewhat muddied its conceptual waters, it has been generally used when the accused claims that he or she lost self control due to some provocative incident.

In *Johnson v R*,<sup>3</sup> Gibbs J noted that:<sup>4</sup>

[T]he law as to provocation obviously embodies a compromise between a concession to human weakness on the one hand and the necessity on the other hand for society to maintain objective standards of behaviour for the protection of human life.

Jurisprudence in the area has revolved around this tension. As Brown states:<sup>5</sup>

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<sup>1</sup> *R v Hayward* (1833) 6 C & P 157, 159; 172 ER 1188, 1189, per Tindal CJ.

<sup>2</sup> Gormally, “Battered Wives Who Kill” (1978) 2 Law & Hum Behav 133, 135, cited in Walker, “Cumulative Provocation and Domestic Killings” (unpublished dissertation, University of Auckland, 1992) p6.

<sup>3</sup> (1976) 136 CLR 619 (HCA).

<sup>4</sup> *Ibid*, 656.

<sup>5</sup> Brown, “The “Ordinary Man” in Provocation: Anglo-Saxon Attitudes and “Unreasonable Non-Englishmen” (1964) 13 ICLQ 203, 204.

[W]hat should constitute the primary aim of the criminal law in its attitude to provocation? Should it be to foster respect for the sanctity of human life and the preservation of order, or should it be the recognition of the effect of provocation on human frailty?

It seems that no answer to this question has yet been reached and the road of provocation has been a long and curious one. Subjective, objective and hybrid standards of liability have all had their part to play in the development of the defence. As the law stands in New Zealand today it may be said that a crossroads has been reached.

The hybrid test implemented by s 169(2)(a) of the Crimes Act 1961, and as interpreted in *R v McGregor*<sup>6</sup> is under attack both judicially and legislatively. Recent decisions of the Court of Appeal, culminating with *R v McCarthy*,<sup>7</sup> have altered the defence beyond all recognition. Furthermore, initiatives undertaken by the legislature in review of the defence have made its position even more precarious. It is the purpose of this article to determine the path which provocation should take and whether the proposed changes have any merit. In order to do this it is necessary to investigate the development of provocation since its inception in the sixteenth century and the tribulations attendant on this problematic defence.

## II: THE LEGAL BACKGROUND

### 1. Early Common Law

“[P]rovocation developed in the sixteenth and seventeenth centuries as the law’s sole contribution to severe emotional perturbation.”<sup>8</sup> It took its place within a rigidly structured law of homicide in which killings were presumed to proceed from the existence of *malice aforethought*.<sup>9</sup>

[T]he theory being that such evidence showed that the cause of the killing lay not in some secret hatred or design in the breast of the slayer but rather in provocation given by the deceased which inflamed the slayer’s passions.

Malice aforethought implied a manifestation of a “wicked, depraved, malignant spirit”,<sup>10</sup> which was rebutted by an instinctive reaction of ungovernable anger. There was an intention to kill, but as it had been formed “in hot blood” which deprived the accused of self control it “was not the result of a cool deliberate judgment and previous malignity of heart, but imputable to human infirmity alone.”<sup>11</sup>

At these early stages the test for provocation was a subjective one: had the

<sup>6</sup> [1962] NZLR 1069 (CA).

<sup>7</sup> [1992] 2 NZLR 550.

<sup>8</sup> Brookbanks, “Provocation – Defining the Limits of Characteristics” (1986) 10 Crim LJ 411, 413.

<sup>9</sup> Ashworth, “The Doctrine of Provocation” [1976] CLJ 292, 292-293.

<sup>10</sup> Foster, CC & CL 256, cited in Turner, 1 *Russell on Crime* (12th ed 1964) 518.

<sup>11</sup> East, “Homicide From Transport of Passion, or Heat of Blood” 1 *A Treatise of the Pleas of the Crown* 232.

accused so lost self control as to negative the presumption of malice?<sup>12</sup> Lord Holt CJ in the judgment of *Mawgridge*<sup>13</sup> summarised the categories of provocation which would be legally sufficient to rebut the implication of malice. They were:

- (i) angry words followed by an insult;
- (ii) the sight of a friend or relative being beaten;
- (iii) the sight of a citizen being unlawfully deprived of liberty;
- (iv) the sight of a man in adultery with the accused's wife; and
- (v) someone striking the accused.

Categories which were insufficient were:

- (i) words alone;
- (ii) affronting gestures;
- (iii) trespass to property;
- (iv) misconduct by child or servant; and
- (v) breach of contract.<sup>14</sup>

The test was subjective, yet when the question was left to the jury, the jurors had to scrutinise the evidence in order to see if it was reasonable to believe the contention of the defence. They would use their own experiences and the experiences of people they knew in the community, and judges gradually developed a practice of directing jurors to decide whether in their opinion the provocative acts were enough to cause a reasonable person to lose control over his or her passions. However, it is crucial to remember that at this stage the objective test was merely "a practical canon for measuring the truth of the defendant's allegation."<sup>15</sup>

The first judicial recognition of the "reasonable man" test came in *R v Kirkham*,<sup>16</sup> where it was made plain to the jury that "though the law condescends to human frailty it will not indulge human ferocity. It considers man to be a rational being and requires that he exercise a reasonable control over his passions."<sup>17</sup> This was the start of a process during which "what began as a matter of evidence crystallized into a rule of law and became an objective legal test of liability."<sup>18</sup>

However, until the decision in *R v Welsh*<sup>19</sup> some thirty-three years later, the question of provocation was still left to juries in subjective terms. In that case Keating J stated that a prerequisite for the successful operation of the defence was that, "such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion."<sup>20</sup>

<sup>12</sup> See *Maddy's case* (1671) 1 Vent 159; 84 ER 524.

<sup>13</sup> (1707) Kel J 119; 84 ER 1107.

<sup>14</sup> *Ibid*, 130.

<sup>15</sup> Turner, *supra* at note 10, at 534. For a statement of the law at this time see *R v Thomas* (1837) 7 C & P 817; 173 ER 356.

<sup>16</sup> (1837) 7 C & P 111; 173 ER 422.

<sup>17</sup> *Ibid*, 119; 424, per Coleridge J.

<sup>18</sup> Turner (ed), *Kenny's Outlines of Criminal Law* (19th ed 1966) 176.

<sup>19</sup> (1869) 11 Cox CC 336.

<sup>20</sup> *Ibid*, 338.

In this case the accused had lost a civil law suit against the deceased. In a subsequent squabble the deceased raised his hand, apparently in self defence against the accused, who then stabbed him with a knife. Obviously mindful of this, Keating J continued:<sup>21</sup>

When the law says that it allows for the infirmity of human nature, it does not say that if a man, without sufficient provocation, gives way to angry passion, and does not use his reason to control it – the law does not say that an act of homicide, intentionally committed under the influence of that passion, is excused or reduced to manslaughter.

## 2. Later Common Law

Despite a lack of reported case law on the matter, in the next thirty years this test became firmly established as part of the common law.<sup>22</sup> Although there is a lack of writing and analysis on just why so fundamental a change took place in the law, it was clearly a judicial initiative, as there had been no legislative action in this area. Obviously expanding industrialisation and urbanisation, with increasing population density and resultant scope for personal friction, led to the courts' concern that juries were being too lenient towards some accused.<sup>23</sup> The pendulum of provocation was swinging towards order.

The vital question with regard to provocation thus became, just what are the attributes of the reasonable man? Some of the difficulty with this doctrine can be gauged by the fact that the courts themselves have baulked at providing a concrete definition. Lord Goddard CJ stated:<sup>24</sup>

No court has ever given, nor do we think ever can give, a definition of what constitutes a reasonable or an average man. That must be left to the collective good sense of the jury....

Instead of giving a concrete definition, the "portrait of the "reasonably provoked man" at common law was created out of a series of judicially conceived negative attributes."<sup>25</sup> Hence the accused was precluded from relying on any physical or psychological characteristic which may have rendered that person particularly susceptible to the alleged provocation. In *R v Lesbini*,<sup>26</sup> where the accused had shot the woman in charge of a firing range after she made some impertinent personal remarks about him, the fact that he suffered from defective

21 Ibid.

22 See the comment of North J in *R v McGregor*, supra at note 6, at 1075.

23 It should be remembered that the death penalty was still in force at this stage and it is entirely understandable that juries would be loath to send someone to his or her death when there was even a small amount of doubt as to guilt or innocence. Even without the death penalty there still exists some concern today that juries think with their hearts rather than their minds as regards this defence. See the Crimes Consultative Committee, *Report on the Crimes Bill 1989* (April 1991).

24 *R v McCarthy* [1954] 2 QB 105, 112 (CCA). Although note the attempt to define the "reasonable man" made in *R v Ward* [1956] 1 QB 351, 356 where the words "any reasonable person, that is to say, a person who cannot set up a plea of insanity" were used by the English Court of Appeal. This very broad definition was never used in practice.

25 Brown, supra at note 5, at 208.

26 [1914] 3 KB 1116 (CCA).

control and want of mental balance was of no moment in deciding whether he was provoked.<sup>27</sup> Nor could the accused rely on pregnancy,<sup>28</sup> exceptional pugnacity,<sup>29</sup> or self-induced intoxication.<sup>30</sup> The nadir of the purely objective test came in the case of *Bedder v Director of Public Prosecutions*,<sup>31</sup> where the accused was a youth of eighteen who was sexually impotent. When he attempted in vain to have sexual intercourse with a prostitute, she jeered at him and attempted to leave. In the ensuing struggle he killed her. The House of Lords found that the jury was correctly directed in being told to consider what effect the prostitute's acts would have had on an ordinary person who was not impotent. Simonds LJ opined that if "the normal man is endowed with abnormal characteristics the test ceases to have any value."<sup>32</sup>

In essence the "reasonable man" was strictly limited to three categories. The first of these was the finding of a spouse in an act of adultery.<sup>33</sup> This was tightly circumscribed by the fact that a mere confession of adultery or threat to commit adultery would not suffice;<sup>34</sup> nor would there be provocation if the parties were merely engaged,<sup>35</sup> or merely living together.<sup>36</sup> Some variations, such as finding a man sodomising your son, could constitute sufficient provocation.<sup>37</sup>

The second situation was serious physical assault, in which case self defence was the preferred defence. The third situation was mere words in circumstances of the most extreme and exceptional character.<sup>38</sup> In practice this was never.

On top of these narrowly confined criteria the plight of the accused was worsened by the requirement that the reasonable person would reassert self control within a reasonable period of time,<sup>39</sup> and by the controversial requirement in *Mancini*<sup>40</sup> that the degree of reaction must bear a reasonable relationship to the alleged provocation if the defence is to succeed.

The reasonable relationship criteria assumes that although a person has lost self control, he or she is in some way able to regulate the degree of his or her reaction.

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27 Following *R v Alexander* (1913) 9 Cr App R 139.

28 *R v Smith* (1915) 11 Cr App R 81.

29 *Mancini v Director of Public Prosecutions* [1942] AC 1 (HL).

30 *R v McCarthy*, supra at note 24.

31 [1954] 2 All ER 801 (HL).

32 Ibid, 804.

33 A common favourite of the courts. See for instance Blackstone, 4 *Commentaries on the Laws of England* 192 where he says that such killing "is of the lowest degree of [manslaughter]; and therefore ... the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation".

34 *Director of Public Prosecutions v Holmes* [1946] AC 588 (HL).

35 *R v Palmer* [1913] 2 KB 29.

36 *R v Greening* [1913] 3 KB 846.

37 *R v Fisher* (1837) 7 C & P 182; 173 ER 452.

38 *Director of Public Prosecutions v Holmes*, supra at note 34. By contrast, in New Zealand s 184(2) of the Crimes Act 1908 provided that an insult could be provocation.

39 *R v Alexander*, supra at note 27.

40 Supra at note 29.



This seems a strange assumption, for as Wells comments:<sup>41</sup>

If the jury has found that the defendant has lost his self control and that this was "reasonable," it does seem otiose for them to consider further the relationship between the gravity of the provocation and the reaction. If the nearest available weapon is a bread knife, the fact that the defendant walked across the room to fetch a wooden spoon would surely discredit his plea of loss of self-control.

The courts tended to justify this requirement by saying that there are degrees of loss of self control<sup>42</sup> but just how does one regulate the degree of reaction in cases where someone has lost self control? A recurrent feature of a number of provocation cases is that the defendant could not remember much about the incident.<sup>43</sup> Overall, it does not really add to the fundamental question of whether the accused lost self control.

This requirement, like the objective test itself, was crystallised into a rule of law when it had been previously used as a loose evidentiary guide to exclude the defence in bad cases of extreme violence. Its original function is summarised by East:<sup>44</sup>

[W]here the punishment inflicted for a slight transgression ... is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty ....

Under *Mancini* this requirement became an inflexible legal test. Whatever the justifications and machinations of the courts in establishing these tests, the result was that, by 1954, "the personal equation in provocation had been almost completely eliminated",<sup>45</sup> and judges showed a marked reluctance to leave the decision to the jury in the first place.

It should be noted however that to mitigate the harshness of the law the courts did not always apply the "archetype of improbable propriety"<sup>46</sup> as strictly as they might. In *R v Raney*,<sup>47</sup> for example, the fact that the accused had a wooden leg was taken into account. This judicial leniency was lauded by the Royal Commission on Capital Punishment in 1953 which stated that although they supported the objective test they acknowledged that "if the criterion of the reasonable man was strictly applied by the courts and the sentence of death was carried out in all cases where it was so applied, it would be too harsh in its operation."<sup>48</sup>

41 Wells, "The Death Penalty for Provocation?" [1978] Crim LR 662, 666.

42 See Brett, "The Physiology of Provocation" [1970] Crim LR 634; contrast the opposing view expressed by Ashworth, *supra* at note 9.

43 See, for example, *Bedder v Director of Public Prosecutions*, *supra* at note 31, at 802. The accused claimed that "she kicked me in the privates. Whether it was with her knee or her foot I do not know. After that I do not know what happened till she fell."

44 *Supra* at note 11, at 234.

45 Brown, *supra* at note 5, at 210.

46 *Ibid.*

47 (1942) 29 Cr App R 14.

48 *Report of the Royal Commission on Capital Punishment* (1953) Cmd 8932, para 145.

### 3. The Merits of the Objective Test

This period marked the high water mark of the strictly objective test, when the scales of justice were tilted towards the maintenance of order. As such it is an apposite time to assess how just or sensible the objective test is. Brett notes that “[i]t seems likely, however, that a number of factors, some genetic, others environmental, combine to produce the differences of susceptibility and response.”<sup>49</sup> Is it fair to punish the person who has a power of self control below that of the “ordinary” person? As a result of the objective test:<sup>50</sup>

[T]he law judged, and continues to judge, the abnormally strong by the same standard as the abnormally weak. There is every reason for a doctrine which was first conceived of as a shelter for human frailty, closing its doors on the super strong; but there is no justification for its exclusion of those whom it was originally established to accommodate.

With the benefit of hindsight the plight of Bedder and similar “abnormal” killers seems almost comic in its absurdity and the judges’ overriding concern to maintain consistency in the law came at a very heavy cost. Once the unadorned objective test was enshrined as a legal principle of liability there were a number of undesirable consequences:

- (i) there was a conflict with the original basic justification for the admission of the defence; the “concession to human frailty” – that people do not have impregnable powers of self control and it is morally wrong to punish people for things they could not prevent themselves from doing;
- (ii) its vagueness led to uncertainty. The concept did not need precise definition when it was a mere evidential guide to keep the jury within the margins of probability. The accused could always adduce evidence to rebut the presumption that he or she was a “reasonable” person. This was not the case when the test was elevated into a legal principle;
- (iii) it introduced a morally insupportable distinction between the treatment of a person born “normal” or average and a person born “abnormal” or varying from the average;
- (iv) the test produced results which offend the moral sensibility of many people and bring the law into disrepute.<sup>51</sup>

So while strict objectivity may have provided some form of consistency in the law in this area it was obvious that some change was needed, and it was in New Zealand that the most innovative change came.

## III: THE NEW ZEALAND EXPERIENCE

### 1. The Crimes Act 1961 and *R v McGregor*

Section 169 of the Crimes Act 1961 formulated an innovative test for determining whether the provocation experienced was sufficient to cause a loss of self

<sup>49</sup> Supra at note 42, at 637.

<sup>50</sup> Brown, supra at note 5, at 230.

<sup>51</sup> See Turner, supra at note 10, at 535.

control. In “a very difficult feat”<sup>52</sup> the legislature attempted to retain the objective standard while mingling with it some subjective characteristic of the accused. The test is only satisfied when it is shown that the allegedly provocative words and acts were “sufficient to deprive a person having the power of self control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self control”.<sup>53</sup> This is somewhat problematic, requiring the “fusion of ... two discordant notions.”<sup>54</sup> As Brown notes, “[o]n the face of it, an imperative subjective force meets an unyielding objective obstacle.”<sup>55</sup>

The first decision to deal with s 169 was *R v McGregor*.<sup>56</sup> The dicta of the Court of Appeal in that case have until very recently provided the touchstone for New Zealand courts in their interpretation of s 169.

The Court of Appeal, in its interpretation of the section, showed the same degree of innovation that the legislature had in drafting this *via media*, sacrificing grammar and plain meaning as a result. Its interpretation centred on the meaning of “but otherwise” in s 169. The Court rejected giving “but otherwise” the meaning of “in other respects”, which would have made the offender’s characteristics irrelevant to the central question of lack of self control and would therefore have effected little.<sup>57</sup>

To the Court, “[t]his could not have been the intention of the Legislature, for the purpose of adopting the new provision must have been to give some relief from the rigidity of the purely objective test”.<sup>58</sup> An interpretation was preferred which transmuted “but otherwise” into “nevertheless”, with the result that the offender was deemed to possess the power of self control of an ordinary person except in so far as that self control was weakened because of some characteristic of the offender.

As a corollary to this construction it was necessary to place some limit on what could be a “characteristic”, for otherwise the objective element of the provocation equation would be rendered virtually irrelevant.<sup>59</sup> As the Court noted, “[i]t is not every trait or disposition of the offender that can be invoked to modify the concept of the ordinary man.”<sup>60</sup>

The Court stated that “a characteristic must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind.”<sup>61</sup> It could encompass physical qualities and some mental

52 *R v Tai* [1976] 1 NZLR 102, 105 (CA).

53 Section 169(2)(a) of the Crimes Act 1961.

54 *R v McGregor*, *supra* at note 6, at 1081.

55 Brown, “Provocation: Characteristics, Diminished Responsibility and Reform”, in *Movements and Markers in Criminal Policy* (Legal Research Foundation 1984) 40, 41.

56 *Supra* at note 6.

57 *Ibid*, 1080.

58 *Ibid*, 1081.

59 The fact that no guidance was given in the legislation as to the meaning of “characteristics” may be an indication that the legislature did not intend that they should be elevated to such an important position within the Act.

60 *Supra* at note 6, at 1081.

61 *Ibid*, 1081.

qualities, as well as colour, race or creed but had to be of “sufficient degree of permanence to warrant its being regarded as something constituting part of the individual’s character or personality.”<sup>62</sup>

The Court of Appeal expressly excluded dispositions such as pugnacity and hot temper, and temporary states of mind such as depression, excitability or irascibility.<sup>63</sup> Still less could a self induced transitory state such as intoxication be relied upon, although this will be relevant as regards the subjective test contained in s 169(2)(b). Of special concern to the Court was the issue of mental peculiarities. A substantial peculiarity, such as a phobia, was necessary. Mere mental deficiency or weak-mindedness would not suffice, as to allow such conditions would “go far towards the admission of a defence of diminished responsibility without any statutory authority in this country to sanction it.”<sup>64</sup>

It was stressed that there must be “some real connection”<sup>65</sup> between the alleged provocation and the particular characteristic of the offender which must have been “exclusively or particularly provocative to the individual because, and only because, of the characteristic.”<sup>66</sup> As Brookbanks notes, “[t]he sense is that the provocation must be more than tangentially associated with the characteristic. It must be *connected* with it in some significant sense”.<sup>67</sup>

As well as the lengthy discourse on characteristics *McGregor* also established that, despite the lack of terms like “heat of passion”, “sudden provocation”, and “before there has been time for passion to cool”,<sup>68</sup> the time element was important as the accused must act “under provocation.”<sup>69</sup> Nevertheless a jury should not be told that the provocation must occur immediately before the killing.<sup>70</sup>

In *R v Dougherty*,<sup>71</sup> four years after *McGregor*, the law as regards a reasonable relationship between provocation and mode of resentment was established. While the relationship was a weighty factor to be taken into account, it was not a rule of law in itself.<sup>72</sup>

Clearly the Courts were trying to allay the harshness of the objective test while at the same time being careful not to make the defence too lenient. For the next decade provocation, led by *McGregor*, travelled in relatively calm waters, but from 1976 there were increasing signs of mutiny both from the judiciary and from the Criminal Law Reform Committee. In 1993 it appears that this mutiny has taken

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62 Ibid.

63 Ibid.

64 Ibid, 1082.

65 Ibid, 1081.

66 Ibid, 1082.

67 Supra at note 8, at 416.

68 Section 184 of the Crimes Act 1908 provided for all of these characteristics.

69 Section 169(1) of the Crimes Act 1961.

70 Supra at note 6, at 1079. See also *R v Savage* [1991] 3 NZLR 155, 160 (CA).

71 [1966] NZLR 890 (CA).

72 See also *R v Savage*, supra at note 70, at 160, where it was stated that a direction to the jury that “what the person did must bear some reasonable proportion or relationship to the provocation” is as bad as elevating the proposition to the status of a matter of law.

place, that *McGregor* has been ignored, and that the doctrine is about to be swept into the diminished responsibility debate.

## 2. The Attack from the Judiciary

The signs of mutiny can be traced back as far as *R v Tai*<sup>73</sup> in 1976. The Court of Appeal noted, most sensibly, that:<sup>74</sup>

By "ordinary person" is meant, naturally, an ordinary New Zealander – not one of exclusively British blood or background. We have in this country a population of markedly mixed racial origins with, especially a substantial Polynesian minority.

However, it then opined in dicta that as the anger of Samoan people takes longer to reach its peak than is the case with Europeans, this could be a "characteristic" within s 169(2)(a), despite noting that this assumption was probably contrary to *McGregor*.<sup>75</sup> The immediate question is, what was the link between the provocation and the characteristic? With all due respect, the analysis of characteristics contained in this case is neither penetrating nor sizeable. Indeed the Court of Appeal's lack of concern in contradicting *McGregor* comes as a surprise, bearing in mind the tone of the rest of the judgment, which while noting criticism of *McGregor* also states that it "was a most careful and reflective judgment and it rapidly became the foundation of the Judge's direction in all subsequent cases where provocation was raised."<sup>76</sup>

Six years later there followed the case of *R v Dixon*.<sup>77</sup> The accused had shot his separated wife after her response to inquiries about the wellbeing of their children, who were in her custody. She had telephoned the police from the public bar where he had found her and had then said "[t]he police are on their way and you will never see the children ever again." Chilwell J noted that the ordinary person experiencing matrimonial problems of this order would not be expected to act in this way. His Honour stated, however, that on the view of the facts most favourable to the accused, there was a credible narrative of events such that evidence of the accused's "unusual attitude of fear" could go to the jury, in order to decide whether there was a sufficient degree of permeance about Dixon's phobia to constitute part of his character or personality.

<sup>73</sup> Supra at note 52.

<sup>74</sup> Ibid, 106.

<sup>75</sup> Ibid, 107. Brown expresses some disdain for this analysis which he terms "mythical-psychological" and indeed it does seem a very facile and unsubtle assertion. For a somewhat more patronising summary of a Pacific Island race see *Latoatama, Folitolu, and Tamaeli v Williams* [1954] NZLR 594, 606, where the Court of Appeal was content to accept "that the Niuean is a simple being whose thoughts are largely of sex, food, and bodily comfort, and that provocative conduct in respect of these simple requirements may preoccupy his mind longer and more effectively than that of his European brother."

<sup>76</sup> Supra at note 52, at 105.

<sup>77</sup> High Court, Auckland. 1 October 1982 T 36/82 Chilwell J.

This case is more in keeping with *McGregor* than *Tai*, and indeed, “[i]t seems clear that his Honour’s ruling fell square within the inclusory dictum in *McGregor*.”<sup>78</sup> There was a firm nexus between the alleged provocation and the phobia in *Dixon*, which was exactly the example *McGregor* had offered. This clearly illustrates the flexibility of the *McGregor* test, if it is taken on its own terms.

It also illustrates the overlap between the New Zealand defence of provocation and the English defence of diminished responsibility.<sup>79</sup> The Crown had argued that the evidence went no further than to establish diminished responsibility. Chilwell J agreed that it fell under this heading, but noted that this was not an issue he had to decide, for if it fell within the meaning of s 169(2) then it was of no moment that it also happened to be analogous to a foreign defence.

*R v Taaka*<sup>80</sup>

While *Dixon* was a reasonable interpretation of *McGregor*, *R v Taaka* stretched the traditional jurisprudence on provocation to breaking point. The events started after a night’s drinking, following which Taaka and his wife repaired to bed. Taaka’s cousin, Hongi, was later that night discovered by Taaka in bed with them. Not surprisingly, Taaka suspected Hongi of raping his wife. Hongi was chased from the house and there was evidence, some of it psychiatric, that Taaka was deeply shocked by the incident and spent the next fortnight in a quagmire of deep depression and drink.

Thirteen days later Taaka attended a party and had a fist fight with Hongi. He then drove a round trip of forty-two kilometres to get a gun. When he returned to the party, a concerned bystander dismantled the gun. Taaka regained it, reassembled it, strode through the house and shot Hongi point blank in the head.

Counsel for Taaka argued that his client was suffering from an obsessive-compulsive personality disorder in regard to the deceased’s upsetting the tightly knit family grouping of Taaka, his wife, their severely handicapped daughter and Hongi himself. This, according to counsel, would make him brood in resentment for a longer period than the ordinary person and also make him significantly more vulnerable to provocation than the ordinary person.

While the Court of Appeal was primarily concerned with evidence relating to s 169(2)(b), it did state that:<sup>81</sup>

We think that [the psychiatric evidence] is capable of supporting an inference that the appellant’s characteristics *could* cause him to feel the insult of Hongi’s conduct unusually deeply and impel him to lose self-control and take public revenge for an insult publicly known. Counsel for the Crown indeed accepted ... that it would be evidence of “characteristics” relevant under s 169(2)(a).

<sup>78</sup> Brown, *supra* at note 55, at 42.

<sup>79</sup> As defined by s 2(1) Homicide Act 1957 (UK). This defence is discussed *infra*.

<sup>80</sup> [1982] 2 NZLR 198 (CA).

<sup>81</sup> *Ibid*, 201-202.

It was held that there was “just enough” evidence of provocation to leave it to a jury.<sup>82</sup>

The fact that the Court included both the original incident and the public revenge indicates that the same characteristic was viewed as relevant thirteen days later in the nature of a characteristic brooding resentment. This is a characteristic very like that in *R v Tai*, which Brown terms a “putative” as opposed to a “strict” characteristic.<sup>83</sup> Where a strict characteristic is evident there will be a direct causal relationship between the alleged provocation and the claimed characteristic. A good example is furnished by *Bedder v Director of Public Prosecutions*,<sup>84</sup> where the alleged provocation was directed at the accused’s impotence. *Dixon* also provides an excellent example, as the wife’s taunts were directed at Dixon’s particular phobia.

However, with a characteristic such as that in *Tai* and *Taaka* no such link is possible. The forensic relevance of this type of characteristic is “sourced by the *mode and circumstances* of the offender’s homicidal *response* to the provocation, not by his special vulnerability (due to his characteristics) to deprivation of his self-control by that provocation.”<sup>85</sup> A direct connection between a provocative act and a putative characteristic is highly unlikely. As Brown points out, it is unlikely that anyone would have called *Tai* a “slow burning Samoan.”<sup>86</sup> In effect, these putative characteristics are a loose cannon in the provocation doctrine. They clearly override the requirement that the alleged provocation be directed at the characteristic, for the simple reason that the characteristic overarches all aspects of the accused’s personality to the extent that any action would be enough to constitute a provocative act. To take *Taaka* as an example, it is difficult to see just what provocative act Hongi committed on the night of the killing; it seems that his mere existence was enough to inflame Taaka and that it would not have mattered what Hongi had done that night. The Court of Appeal used the word “revenge” in its judgment and that is really what this case appears to be – a case of a revenge killing for what Taaka considered a grave breach of trust and a public insult. Traditionally, the finding of “precedent malice” deprived provocation of all legal effect,<sup>87</sup> for evidence that the accused had intended to take revenge would severely damage any claim of a sudden inflammation of the passions. In *Taaka*, however, the desire for revenge was inextricably connected to the alleged characteristic, and the existence of evidence of a desire for revenge supported the existence of this characteristic, rather than making the defence unavailable.

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<sup>82</sup> *Ibid*, 202.

<sup>83</sup> *Supra* at note 55, at 44.

<sup>84</sup> *Supra* at note 31.

<sup>85</sup> Brown, *supra* at note 55, at 46.

<sup>86</sup> *Ibid*.

<sup>87</sup> See for example *Maddy’s Case*, *supra* at note 12, where a husband returned home to find his wife in an act of adultery and struck the man over the head with a joint stool. The jury was asked to find whether Maddy had the precedent knowledge, in the form of a prior determination to take revenge. If he had declared his intention to take revenge, then not even the discovery of his wife in the act of adultery would have reduced murder to manslaughter.

*R v Leilua*<sup>88</sup>

The strict definition of the defence was further assailed in *R v Leilua*. The deceased had been involved in an argument, lost his temper, and gone along a road pulling down letterboxes. The appellant, who was intoxicated, saw this happening, took a knife, sprinted out into the street, and with the assistance of the co-accused, stabbed the deceased fourteen times.

Leilua was convicted of murder, but following a psychologist's report fourteen months later filed an application for leave to appeal based on the availability of new evidence. The report had stated that there was a possibility that the accused had been suffering from a condition known as post-traumatic stress disorder ("PSD"), a condition found sometimes in survivors of extremely stressful and dangerous situations, such as combat veterans and concentration camp survivors. As the report fell somewhat short of concluding that Leilua was actually suffering from PSD, the Court of Appeal dismissed the application. However, it noted that:<sup>89</sup>

We are disposed to think, notwithstanding *R v McGregor*, that a chronic disorder of this type, if it rendered the sufferer particularly susceptible to certain kinds of provocation, could amount to such a characteristic.

With respect, it is striking that such a broad statement could be made with such a minimum of reasoning. No discussion is made of "characteristics" or of the effect of holding that PSD could be considered to be one. Again it is clearly a "putative" characteristic, an all-encompassing mental condition that virtually any action could trigger. Spare a thought for the dustman who might one morning make a fraction too much noise, or a friend who sees the PSD sufferer in public three weeks after the latter had perceived that he had made a pass at his wife. In neither case will the deceased have done anything directly against the accused, but still the question of provocation will arise.

It is submitted that the New Zealand Court of Appeal has effected major changes in the law of provocation, with little discussion of the justifications for, or ramifications of doing so. One commentator has noted that:<sup>90</sup>

[W]hat does emerge from *Taaka* and *Leilua* ... is a movement away from traditional jurisprudence on provocation, concerned as it was with sudden passion, immediacy between the provocative act and the response to it, and the actual loss of self-control, to a position which views mental characteristics as a discrete exculpatory factor in defining legal provocation.

Traditional provocation jurisprudence appears to be of little use in cases like *Taaka*, and:<sup>91</sup>

The question which arises is whether the acceptance of these conditions comprises a logical extension of a complex legal doctrine whose boundaries have never been fully chartered, or whether the conditions themselves are simply convenient "abnormalities" for the unself-controlled killer to shelter behind.

<sup>88</sup> Court of Appeal, Wellington. 20 September 1985 CA 19/84 (Cooke, Richardson, and Tompkins JJ).

<sup>89</sup> Ibid, pp4-5, quoted in Brookbanks, *supra* at note 8, at 412.

<sup>90</sup> Brookbanks, *supra* at note 8, at 413.

<sup>91</sup> Ibid, 417.



The law, quite apart from its need to be internally consistent, also needs to appear to effect justice. As Brown points out:<sup>92</sup>

General acceptance by the Courts of the putative “characteristic” countenanced by dicta in *Tai* (and possibly *Taaka*) could erode public confidence in the administration of the existing defence of provocation.

The obvious conclusion to be drawn from these cases, with their willingness to expand the concept of characteristics “to embrace a growing range of bizarre mental aberrations”,<sup>93</sup> is that the law of provocation has been dipping its toes into the lake of diminished responsibility. The expansion seems to attack the moral base of provocation; if it is to be allowed to be commensurate with diminished responsibility, where does that leave the premise that the deceased brought the attack upon himself or herself in some way? Did the Court of Appeal intend to completely undermine the defence?

*R v McCarthy*<sup>94</sup>

Any doubts on this matter have been removed by *R v McCarthy*, where observations in the judgment of Cooke P completed the job begun in *Tai*. The appeal in *McCarthy* concerned the Crown Prosecutor’s address to the jury concerning the accused’s failure to give evidence and to provide explanations for his conduct. A new trial was ordered. Provocation was one of the defences pleaded at the first trial, and as it had given the trial judge difficulty in his summing up, Cooke P felt obliged to make some general observations about the defence. He notes that *McGregor* has given rise to difficulties in cases like *Tai* and *Taaka*, and that the recent case of *R v Tounson*<sup>95</sup> had forecast that *McGregor* might have to be revisited. Then follows the observation that “*McGregor* may have unduly restricted the ambit of the provocation that under the current New Zealand section may reduce murder to manslaughter.”<sup>96</sup> The Court of Appeal notes:<sup>97</sup>

[I]n light of judicial experience of the operation of s 169, that the added and obiter observations in *McGregor* go somewhat too far and add needless complexity to the application of the section.

To add insult to injury the Court of Appeal then states “[w]e do not think that [the obiter comments] have been found workable or followed closely in practice.”<sup>98</sup>

Following *McCarthy*, age and gender,<sup>99</sup> mental deficiency or “a tendency to

<sup>92</sup> Brown, *supra* at note 55, at 46.

<sup>93</sup> Brookbanks, *supra* at note 8, at 411.

<sup>94</sup> *Supra* at note 7.

<sup>95</sup> [1991] 3 NZLR 690.

<sup>96</sup> *R v McCarthy*, *supra* at note 7, at 558.

<sup>97</sup> *Ibid*.

<sup>98</sup> *Ibid*. This is a stunning assertion considering the regard in which this case has been held. See for example *Tai*, *supra* at note 52; and the English case of *R v Newell* (1980) 71 Cr App R 331, 340, where the Court, commenting on *McGregor*, stated: “[T]hat passage, and the reasoning contained therein, seems to us to be impeccable.”

<sup>99</sup> These characteristics have never previously been allowed under *McGregor*, although they have been allowed as relevant factors to be taken into account in the English case of *DPP v Camplin* [1978] 2 All ER 168 (HL).

excessive emotionalism as a result of brain injury”<sup>100</sup> can be a characteristic. What one first notices when reading the judgment is the lack of justification for the changes. The second aspect of the judgment that attracts attention is how vague some of the allowed characteristics are. What exactly constitutes a mental deficiency? Will any half-formed Oedipal syndrome suffice? The fact that intoxication is expressly excluded because it is of too transitory a nature indicates that the mental deficiency must have some permanence, but the journey from the careful dicta in *McGregor* that mental peculiarities must be tightly defined, to this vague pronouncement, is a questionable one.

The Court also necessarily rejects the argument that any provocation must be directed at the characteristic. In a startling statement the Court of Appeal noted “difficulty in comprehending or applying that suggestion.”<sup>101</sup> Of course the only reason that this requirement should afford any difficulty at all is because of the sorts of putative characteristics that the courts have been allowing, which have made traditional provocation jurisprudence redundant.

The rather awkward construction that *McGregor* gave to s 169(2)(a) is also replaced. The test is now “whether a person with the ordinary power of self-control would in the circumstances have retained self-control notwithstanding such characteristics.”<sup>102</sup> Hence the test now involves a conflict between an ordinary power of self control and the defendant’s particular susceptibility to the provocation. It is difficult to see how this will work if the alleged characteristic is a condition like paranoia.<sup>103</sup> How clearly will a jury understand a direction that they have regard to a person with the self control of an ordinary person but one who happens to be paranoid? Surely the essence of paranoia is that it affects the power of self control? Clearly there is not much sense in allowing such conditions to be characteristics while still retaining an objective power of self control.

As regards the spectre of diminished responsibility the Court is quite definite in its views, stating with regard to the *McGregor* line of cases:<sup>104</sup>

[They] appear to have been influenced by the view that diminished responsibility had not been accepted by the New Zealand Parliament; yet, within a limited field, this may be seen as the inevitable and deliberate effect of the statutory changes embodied in s 169 of the Crimes Act 1961.

With all due respect, it is hard to see the justification for this statement. A reading of s 169 certainly does not give the impression that it was meant to be the harbinger of a new age in diminished responsibility for murder. The *McGregor* decision explicitly stated that this was not a diminished responsibility defence, and surely the legislature, if it had desired such a defence, would have expressly provided for

<sup>100</sup> *R v McCarthy*, supra at note 7, at 558.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid. This was the test strenuously advocated by Sir Francis Adams. See Robertson (ed), *Adams On Criminal Law* (3rd ed 1992) paras 1264-1269 for his criticism of the *McGregor* test.

<sup>103</sup> See *R v Aston*, Court of Appeal, 17 May 1989 CA 390/88 (Cooke P, Casey and Wylie JJ), where the Court did not question that paranoia could be a characteristic.

<sup>104</sup> *R v McCarthy*, supra at note 7, at 558.

one, as is the case in the United Kingdom, rather than trying to disguise it within provocation. One cannot help but question the Court of Appeal's reasoning. Its judgments since 1976 have expanded the boundaries of s 169 far beyond what was originally envisaged and it comes full circle by saying that this must have been the intention of the legislature in the first place. It replaces what had been a reasonable, working interpretation of s 169 with a completely new understanding thirty years later.

### 3. The Defence of Diminished Responsibility

The preceding discussion may have given the impression that the defence of diminished responsibility is an entirely unwelcome visitor. This is not the case, as the following discussion will show, but it is clearly undesirable for it to be introduced under the umbrella of some other defence.

Diminished responsibility was introduced in the United Kingdom by s 2 of the Homicide Act 1957 which provides that:

Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being party to the killing.

A successful plea of diminished responsibility will result in a manslaughter conviction. Diminished responsibility is pleaded in cases where there is no chance of a defence of insanity succeeding, such as with mercy killers, deserted spouses, disappointed lovers who kill in states of depression, or persons with chronic anxiety. Even though the abnormality of mind has to be such as to *substantially* impair mental responsibility, this is a question of degree and is essentially for the jury to decide.

The impulse acted on need not be irresistible. It is sufficient that the difficulty which the defendant experienced in controlling it was substantially greater than would be experienced in the circumstances by an ordinary person not suffering mental abnormality.<sup>105</sup> While the impairment need not be total, it must be more than trivial or minimal.<sup>106</sup>

As Smith and Hogan comment, "[t]he test appears to be one of moral responsibility"<sup>107</sup> and as such the capacity for overlap with provocation is obvious. A case like *Taaka* or *Dixon* could very easily be accommodated under this defence.<sup>108</sup> Nonetheless, while both defences are concessions to human infirmity,

<sup>105</sup> *R v Byrne* [1960] 2 QB 396, 402.

<sup>106</sup> *R v Lloyd* [1967] 1 QB 175.

<sup>107</sup> Smith & Hogan, *Criminal Law* (6th ed 1988) 205.

<sup>108</sup> See for example, *R v Bathurst* [1968] 2 QB 99, where there was a successful diminished responsibility plea for the accused, who had killed his ex-mistress while in the throes of a reactive depression caused by the break up. There is also an overlap with insanity; see Smith & Hogan, *ibid*, at 103-105.

they are by no means identical. Diminished responsibility does not require evidence of lack of self control, and requires neither a comparison with the archetypal reasonable person nor evidence of provocation. Diminished responsibility is obviously broader than provocation as regards mental elements. This accentuates the difference between the two defences. They are clearly not the same and this article has already noted the problems that can occur when trying to squeeze what would more properly be included under diminished responsibility into the provocation defence. Just as New Zealand led the world with the hybrid objective-subjective test, we now appear to be the only common law country which has a hybrid provocation-diminished responsibility defence.

It cannot be overestimated that the purpose of this paper is not to denigrate diminished responsibility, but as Brookbanks states:<sup>109</sup>

By its very nature as a partial exculpatory claim, diminished responsibility has a significant impact on the way mental abnormality has been traditionally perceived in the criminal law. It should not be permitted to evolve by a process of extension of existing defences without an accompanying careful consideration of its theoretical considerations.

It seems ridiculous to assert that merely because there is some overlap of a doctrine in one country with a foreign doctrine, a judge should refuse to apply the local defence in that manner. In Brown's words:<sup>110</sup>

[I]t would be pettifogging to exclude the engagement of a constituent of a defence enacted by the New Zealand Parliament because it partially and incidentally trespasses on the ground of another palliative doctrine not recognised by New Zealand law.

Once *McGregor* held that mental characteristics, albeit tightly constrained, could constitute a characteristic under s 169(2)(a), it became obvious that there would be some overlap with diminished responsibility, which in itself is of no real concern. The problem becomes apparent when the area of concurrence expands, as appears to be, for as noted above the doctrines are not exactly the same and the intermingling which is occurring supports the possibility of "provocation being used consistently, or cynically, as an alias for diminished responsibility plea".<sup>111</sup>

That the Court of Appeal in New Zealand has felt the need to expand the defence of provocation is clearly indicative of the need for a broadly based defence of diminished responsibility, if only to catch difficult cases which do not correlate exactly with existing statutory defences (insanity, self defence and provocation). Nonetheless, "[t]he task to consider the imperious claims of such a defence lies with the legislature. It should not be allowed to pass to the courts by default."<sup>112</sup> One is reminded of the admonishment of Lord Reid in *Shaw v Director of Public Prosecutions*:<sup>113</sup>

Where Parliament fears to tread it is not for the courts to rush in.

<sup>109</sup> Brookbanks, *supra* at note 8, at 418.

<sup>110</sup> *Supra* at note 55, at 46.

<sup>111</sup> *Ibid.*, 47.

<sup>112</sup> Brookbanks, *supra* at note 8, at 418.

<sup>113</sup> [1962] AC 220, 275.

At present it appears that the New Zealand Court of Appeal has expanded the defence of provocation further than was ever originally intended. Analysis of a case like *Taaka* leads one to the conclusion that, whatever else it may have been, it was not a case of provocation. The traditional desire of the judiciary to keep this defence tightly constrained is not presently in evidence in New Zealand and with this in mind we turn to the second area of attack on the provocation doctrine.

#### 4. The Attack from the Legislature: The Crimes Bill 1989

The Crimes Bill 1989, which was based on the Criminal Law Reform Committee's Report on Culpable Homicide (1976), proposes radical changes to the law of culpable homicide. Of most importance to provocation is the move away from a mandatory life sentence for murder, which is what Wells calls "[t]he lifeline of provocation as a separate defence".<sup>114</sup> As a result, provocation ceases to be a partial defence and becomes merely a factor relevant in sentencing.<sup>115</sup>

The Criminal Law Reform Committee considered that provocation as it stood in 1976 was unsatisfactory to a degree which justified its abolition. They had three main concerns.

Of most concern was that the defence did not do justice to the accused, with the result that people who could not fairly be described as ordinary people were not benefitting from the defence. It is to be remembered that the Report was written in the same year as *Tai*, the case which to some extent opened the floodgates to a far wider view of what could constitute a characteristic. As a result it is submitted that the criticism is not nearly as cogent today as it once was. Cases such as *Dixon*, *Pita*<sup>116</sup> and *Taaka* show such a willingness by the court to expand the purview of characteristics. What Orchard identifies as "an expansive view of which "characteristics" might qualify the objective test"<sup>117</sup> appears to have been transmuted into an overly expansive test.

The Committee was also of the view that it was anomalous that provocation should change the nature of the crime when there had been a killing, whereas it only affected the penalty in other cases. This is certainly an arguable point but an excellent rebuttal comes from Sir Robin Cooke's extra-judicial assertion that the defence is "wholly consistent with confining the stigma of murder to the worst of killings. It is the very gravity of murder that justifies singling it out from the generality of offences".<sup>118</sup> If the law recognises such a defence it makes sense that "[p]lain murder should be stigmatised as such, killings as a result of real

<sup>114</sup> *Supra* at note 41, at 662.

<sup>115</sup> Clause 128 of the Crimes Bill 1989.

<sup>116</sup> (1989) 4 CRNZ 660. In this case the accused's particular aversion to drugs and her horror at the effect of drugs on her lover, which usually made him violent towards her, appeared to gain approval as a characteristic.

<sup>117</sup> "Homicide", in Cameron & France (eds), *Essays on Criminal Law in New Zealand: Towards Reform?* (1990) 20 VUWLR 147, 149.

<sup>118</sup> "The Crimes Bill 1989: A Judge's Response" [1989] NZLJ 235, 239.

provocation should not be.”<sup>119</sup> Having already noted that deserving persons have been missing out on the defence it makes sense to recognise the distinction.

The third contention is that the defence is difficult for juries to understand and for judges to sum up. However, Sir Robin Cooke has stated, “I am not aware that any judge now serving complains that summing up on provocation is too hard.”<sup>120</sup> Similarly, Lord Simon of Glaisdale in the English case of *Director of Public Prosecutions v Camplin* opined “I have heard nothing to suggest that juries in New Zealand find the task beyond them.”<sup>121</sup>

On the other hand, Bisson J, as he then was, has commented judicially that provocation is not a simple matter to deal with in summing up, and that it is occasionally difficult to know whether to leave the defence to the jury.<sup>122</sup> Again there is obviously some merit in the suggestion that the unreformed provocation defence is difficult and overly technical but overall its fundamentals are easily understood and it involves issues which are surely ideal to go to a jury.

The suggestion has also been made that a desirable consequence of the change will be that it will encourage more guilty pleas and the avoidance of unnecessary trials. The argument assumes that someone like *Taaka* would plead guilty, thus avoiding a long and complicated trial. This assumption is not enough in itself to change such an important part of the law. It is also highly questionable how much of a saving will be made, bearing in mind how elaborate sentencing hearings will become.

None of these arguments are particularly compelling on their own grounds, and while one commentator has argued that taken as a whole they paint a gloomy picture of provocation as it now stands,<sup>123</sup> it is doubtful whether the picture was stygian enough to warrant an abolition of the defence. Some commentators, however, have been most enthusiastic about the defence.<sup>124</sup>

[A] five-hundred-years overdue element of sanity would be returned to homicide law. Out of the shadow of the gibbet, out of the shadow of the mandatory “life” sentence, provocation would assume its proper place as merely a factor to be taken into account in sentence. Gone would be that inhibiting anachronism the hypothetical person (with or without “characteristics”) and, with it, other questionable enacted and common-law distinctions pertaining to “over-reaction” to provocations, to misdirected retaliation and to indirect provocation.

Certainly *prima facie* there appears to be a victory for subjectivity, the question simply being: was the accused provoked? The query that immediately surfaces is what would in fact be lost by the complete abolition of the objective test? Primarily, “[t]he link with popular moral judgments about causation and blame-worthiness would be severed”.<sup>125</sup> The objective test stands for certain moral

119 Orchard, *supra* at note 117, at 149.

120 *Supra* at note 118, at 239.

121 [1978] AC 705, 727.

122 *R v Pita*, *supra* at note 116, at 666.

123 Wells, *supra* at note 41, at 671.

124 Brown, *supra* at note 55, at 49.

125 Ashworth, *supra* at note 9, at 318.

standards, as it reflects the values of society in a general way. Ashworth makes the excellent point that "it is surely intelligible in moral discourse to state that a person was provoked to lose his self-control in a situation in which he ought to have retained control."<sup>126</sup>

Of course not every instance of provocation will result in a reduction of sentence. But surely in order to adequately reflect the culpability of various offenders, some regard will have to be paid to what is reasonable, and every exercise of a judge's discretion will involve such a judgment. The danger is clearly that some sort of pseudo-objectivity will creep in, without rules of law or precedent to constrain it. Eventually the sentencing guidelines handed down by the Court of Appeal would result in a defence that was far more straitjacketed than those adherents of subjectivity would like.

It can also be asked whether the judiciary should wield such power. As the law stands today a judge may occasionally decline to leave provocation to the jury if there is insufficient evidence<sup>127</sup> or in rare cases when the accused's conduct is so extreme in its brutality that the judge will be warranted in refusing to allow it.<sup>128</sup> Under the Crimes Bill proposal the judge would have far wider powers and this could be of some concern. It has been commented that:<sup>129</sup>

The longer a judge sits on a bench the less he is likely to become or remain acquainted with ordinary men or women in their daily activities and their patterns of thought and behaviour.

Provocation as a whole, while couched in technical legal terms, essentially involves crimes of passion and it seems that the average person on the street would be more well equipped to pass judgment on such matters than the judge. As it stands the balance appears excellent; the judge is there to guide the jury through the legal points, but the jury has the leeway to come to a good decision. This would be taken away by the Crimes Bill.

Overall this writer has grave doubts as to the efficacy of the Crimes Bill proposal<sup>130</sup> and it is questionable whether any of the problems that have accompanied the hybrid test will be solved. More importantly, it is highly questionable whether the defence will be improved. It is perhaps fortunate, with regard to provocation, that the Crimes Bill is unlikely to become law.

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<sup>126</sup> Ibid.

<sup>127</sup> *R v King* (1987) 7 CRNZ 591 (CA). The victim had produced a knife after a night of verbal altercations with the appellant. The appellant's accomplices attacked the victim, who dropped the knife and ran off. He was pursued and the appellant stabbed him repeatedly.

<sup>128</sup> *R v Erutoe* [1990] 2 NZLR 28 (CA). The accused had run over his wife repeatedly and then refused to help her.

<sup>129</sup> Victorian Law Reform Commission, Working paper No 6, *Provocation As A Defence to Murder* (1979) 27.

<sup>130</sup> This aspect of the Bill was re-approved by the Crimes Consultative Committee, *supra* at note 23, at 45-46, 48-49.

#### IV: CONCLUSION

The law of provocation has undergone such significant change in New Zealand that it bears little resemblance to any previous incarnations of the defence. Provocation as it stood under *McGregor* may not have been perfect but one should not be unrealistic in searching for utopias in an area as contentious as criminal law. Perfection is relative and the *McGregor* dicta seemed to steer as fair and reasonable a path as one could logically hope for between the harshness of pure objectivity and the indulgence of pure subjectivity. Brown believes that the s 169(2) hybrid person “would still be more comfortably received by Mary Shelley than by logicians or criminologists”,<sup>131</sup> yet as a balancing of competing interests it seems as fair as could be logically hoped for.

What must be avoided is the mutation of provocation into something that it should not be. The need for diminished responsibility is obvious but it is not yet part of our law, and with the current political climate may not be for some time. It is not for the judiciary to decide whether the country needs a new criminal defence, and the New Zealand Court of Appeal has set a dangerous precedent in introducing such a defence into New Zealand law without any authority to do so. Provocation, as defined in *McGregor*, coupled with diminished responsibility, appears to be the best solution to the problems facing the law in this area, but until that time comes New Zealand criminal lawyers will have to deal with a provocation defence that has a severe identity crisis.

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<sup>131</sup> Supra at note 55, at 47.



## LEGISLATION NOTES

### TREATY OF WAITANGI (FISHERIES CLAIMS) SETTLEMENT ACT 1992

The Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 (the “Act”) had a turbulent passage through Parliament. Not one Maori member of the House of Representatives supported its enactment.<sup>1</sup> Indeed, it was suggested in debate that the Act might be more aptly titled “The Extinguishment of the Treaty of Waitangi and of Aboriginal Rights of the Maori and Moriori People of New Zealand”.<sup>2</sup>

The Act has an overwhelming impact upon the scope of Maori fishing rights and interests. Both Maori commercial and non-commercial fishing rights are directly affected. The Act also affects the rights of any Maori seeking resolution from the courts or the Waitangi Tribunal regarding Maori commercial fishing claims.

The Prime Minister has said of the Act, “[n]o piece of legislation has been exposed more to the Maori people”.<sup>3</sup> However, the Act was passed without the support of significant coastal iwi,<sup>4</sup> and, “without any pretence of attempting to arrive at an amicable agreement with them”.<sup>5</sup> Furthermore, the Act was passed with such haste that it was not placed before a select committee. This meant that Maori and the general public were not given the chance to make their views known. To compound matters, allegations abound that some of those who signed the Deed of Settlement (which the Act purports to implement), did so without the mandate of the people they were supposed to represent.<sup>6</sup> As another commentator has said of the Act, “there is the sense that history is repeating itself.”<sup>7</sup>

#### Background – Maori Fishing Rights

Recognition of Maori fishing rights stems from the guarantees provided in Article 2 of the Treaty of Waitangi 1840. Both English and Maori texts guarantee to Maori tribes, “the full exclusive and undisturbed possession of their ... fisheries”.<sup>8</sup> Since the signing of the Treaty, however, numerous Acts have been

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1 Labour Members: B Gregory; Hon W Tirikatene-Sullivan; Hon P Tapsell; Hon K Wetere. National members: W Peters; I Peters 532 NZPD 12821-12839 (3 December 1992). Cf R Meurant 532 NZPD 12973 (8 December 1992).

2 B Gregory 532 NZPD 12824 (03 December 1992).

3 Rt Hon J Bolger 532 NZPD 12826 (3 December 1992).

4 Nga Puhi, Ngati Kahungunu, Whanau-a-Apanui, Ngati Porou and others.

5 Hon P Tapsell 532 NZPD 12828 (3 December 1992).

6 Waitangi Tribunal, *The Fisheries Settlement Report* (Wai 307 1992) 11-15.

7 W Peters 532 NZPD 12942 (8 Dec 1992). See also McHugh, “Sealords and Sharks: The Maori Fisheries Agreement (1992)” [1992] NZLJ 354, 358.

8 Taonga has been interpreted to include fisheries; Waitangi Tribunal, *Report of the Waitangi Tribunal on the Muriwhenua Fishing Claim* (Wai 22 1988) 74.

passed attenuating Maori fishing rights.<sup>9</sup>

Section 77(2) of the Fisheries Act 1908 provided an apparent exception. It stated that nothing in that Act affected “any Maori fishing rights”. However, it was held in *Waipapakura v Hempton*<sup>10</sup> that this phrase meant any rights *conferred by statute*.<sup>11</sup> The provision was continued in s 88(2) of the Fisheries Act 1983 which also stated that “[n]othing in this Act shall affect any Maori fishing rights.”

*Te Weehi v Regional Fisheries Officer*<sup>12</sup> heralded the turning of the tide toward recognition of Maori fishing rights. Te Weehi had been convicted of taking undersized paua, but on appeal to the High Court, the conviction was quashed on the grounds that Te Weehi had been exercising a customary Maori fishing right under s 88(2) of the Fisheries Act 1983. This was in accordance with the doctrine of common law aboriginal title.<sup>13</sup> Furthermore:<sup>14</sup>

*Te Weehi* indicated to Maori that their fishing claims had a legal as well as ‘moral’ or purely political basis. The case ... also coincided with the emergence in the mid 1980s of the Waitangi Tribunal as a potent force in Crown-tribe relations: This meant that fishing claims could now proceed, and indeed did proceed, on two fronts – in the Courts and before the Tribunal .... With the threat of legal proceedings and the associated encouragement from the bench as well as the publicity of Tribunal recommendations, the Crown found negotiation unavoidable.

It was from ensuing negotiation that the Deed of Settlement emerged.

### Recent Legislative Background – the 1980s

The Fisheries Act 1983 was enacted in reponse to the overfishing of inshore stocks.<sup>15</sup> Its purpose was to replace outmoded legislation with an Act designed to meet the needs of a modern fishing industry. The Fisheries Amendment Act 1986 followed. It established the Quota Management System (“QMS”), a system designed to manage and conserve New Zealand’s fisheries. It also created valuable property rights in the form of Individual Transferable Quotas (“ITQs”). These “rights were allocated to existing fishers largely in accordance with their catch history.”<sup>16</sup> By September 1987, several species of fish had been brought under the

9 See Dawson, “The Fisheries Claims Act and John R Common’s Reasonable Value” (Policy Discussion Papers, No 14, Department of Economics, University of Auckland 1993) 11.

10 (1914) 33 NZLR 1065.

11 See *Wi Parata v The Bishop of Wellington* (1877) 3 NZ Jur (NS) 72; *Te Heuheu Tukino v Aotea District Maori Land Board* [1941] NZLR 590 (PC); *Inspector of Fisheries v Weepu* [1956] NZLR 920; *Keepa v Inspector of Fisheries* [1965] NZLR 322.

12 [1986] 1 NZLR 680.

13 See *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641 (HC & CA); *R v Symonds* (1847) NZPCC 387; *Guerin v R* (1985) 13 DLR (4th) 321 (SCC); *Mabo v State of Queensland (No 2)* (1992) 175 CLR 1.

14 See McHugh, *supra* at note 7, at 355.

15 *Supra* at note 9, at 11.

16 See Marshall, “Maori Fishing Claims”, Unpublished Seminar Paper presented at a Conference of the Energy and Natural Resources Law Association of New Zealand Inc (15 and 16 October 1992) p5.

QMS, and ITQs had been issued to commercial fishers. In response, Maori effectively sought interim declarations to prevent any further species being brought under the QMS without the consent of Maori.<sup>17</sup>

The Maori Fisheries Act 1989 provided for ten per cent of the total fishing quota to be acquired by the Crown and transferred together with \$10 million to the Maori Fisheries Commission by 21 October 1992.<sup>18</sup> A trading company, Aotearoa Fisheries Ltd, was established to hold the quota. Although not stated as such in the Act, it was regarded by the Crown and Maori as an interim settlement of Maori fishing claims.

### **Deed of Settlement**

The Act embodies promises made between the Crown and certain Maori in the Deed of Settlement (the “Deed”). The Deed provided:<sup>19</sup>

[F]or the Crown to pay \$150 million over the next two years to fund Maori into a 50-50 joint venture with Brierley Investments [Ltd] to buy Sealord Products Ltd which presently holds 26% of the total fishing quota. Maori ... also receive 20% of all new species brought under the QMS. In return Maori ... agree that their Treaty fishing rights in respect of commercial fishing have been honoured and that the deal is effectively a full and final settlement of Maori commercial fishing claims.

Prior to the signing of the Deed, a Memorandum of Understanding was canvassed on 27 August 1992. This document:<sup>20</sup>

[W]as rarely seen except by the Maori negotiators who went round to Maori people expounding this “unknown document” .... [T]he argument they used was that it was privileged information, commercially sensitive, and, therefore, it remained hidden.

The memorandum, which proposed the settlement in principle, was subject to Maori ratification. In the limited time span of two weeks, Maori at a national hui and some twenty-three marae throughout the country were canvassed by Maori negotiators.<sup>21</sup>

The Government readily accepted the general support of Maori toward the settlement as expressed in the negotiators’ report. It chose, however, to ignore Maori opposition to the inclusion of traditional and freshwater fisheries in the Deed.<sup>22</sup>

### **The Act**

From the Crown’s perspective, the “proposed sale of Sealord Products opened a window of opportunity to achieve a final settlement”<sup>23</sup> in respect of Maori

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17 These interim orders are cancelled under s 11 of the Act.

18 See Marshall, *supra* at note 16, at p9. Maori originally sought fifty per cent of the total fishing quota.

19 Signed 23 September 1992. See Marshall, *ibid*, p10.

20 B Gregory 532 NZPD 12945 (8 December 1992).

21 See the Preamble to the Act, clause (1).

22 See McHugh, *supra* at note 7.

23 Hon D Kidd 532 NZPD 12817 (3 December 1992).

commercial fishing claims. The settlement would establish “Maori as major and active players in New Zealand’s fishing industry ... [and] change the focus of Maori in relation to commercial fisheries, from grievance mode to development mode.”<sup>24</sup>

The Crown’s intentions are stated in the long title to the Act:

- (a) To give effect to the settlement of claims relating to Maori fishing rights; and
- (b) To make better provision for Maori non-commercial traditional and customary fishing rights and interests; and
- (c) To make better provision for Maori participation in the management and conservation of New Zealand’s fisheries.

*(a) Settlement of Claims Relating to Maori Fishing Rights*

Section 9 of the Act brings Maori fishing claims to a standstill. It declares that all Maori commercial fishing claims (current and future), whether they are founded in common law (including customary law and aboriginal title), the Treaty of Waitangi (statute or otherwise), and whether “such claims have been the subject of adjudication by the courts or any recommendation from the Waitangi Tribunal ... are hereby finally settled”. Further, “no court or tribunal shall have jurisdiction to inquire into the validity of such claims”, as the “[o]bligations of the Crown to Maori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged”.

Under s 11, listed civil proceedings lodged against the Crown since 1989 are discontinued, and all interim orders made and undertakings given by parties in respect of those proceedings are cancelled.

Section 40 abolishes the jurisdiction of the Waitangi Tribunal to consider Maori commercial fishing rights. It can no longer make inquiries, findings or recommendations in respect of commercial fishing, the Deed of Settlement, or any other enactment to the extent that it relates to commercial fishing or fisheries.

By removing the fora in which fishing claim grievances may be aired, the above provisions effectively shift Maori away from “grievance mode to development mode”, whether they like it or not.

*(b) Non-commercial Fishing Rights and Interests*

Maori are now required by the Act to account to government regarding the regulation of traditional and customary fishing rights and interests. One questions why non-commercial aspects of Maori fishing should even be included in the Act, since the settlement is commercially based.

The Act emphasises the importance of recognition of traditional fisheries by the Crown in its role as Treaty partner. The Crown has a duty to “develop policies to help recognise use and management practices and provide protection for and

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<sup>24</sup> Ibid.

scope for exercise of rangatiratanga in respect of traditional fisheries”.<sup>25</sup> Thus, regulations are to be made to recognise and provide for:<sup>26</sup>

[C]ustomary food gathering ... and the special relationship between the tangata whenua and places of importance for customary food gathering ... to the extent that such food gathering is not commercial in any way nor involves commercial gain or trade ....

Section 10 empowers the Minister of Agriculture and Fisheries to recommend the making of such regulations. The Minister is to act in accordance with Treaty principles and shall:

- (i) consult with tangata whenua about; and
- (ii) develop policies to help recognise –  
use and management practices of Maori in the exercise of non-commercial fishing rights ....

Any claims by Maori to non-commercial fishing rights or interests (be they common law, Treaty, statute based, or otherwise), henceforth have no legal effect, “except to the extent that such rights or interests are provided for in regulations made under section 89 of the Fisheries Act 1983.”<sup>27</sup>

### (c) *Maori Participation in the Fishing Industry*

The third aim stated in the long title to the Act encapsulates the “potential benefits” Maori stand to gain from the Sealord deal (the “deal”).<sup>28</sup> Any benefits, however, must be balanced against the “measures of compromise”, which have been a cause of complaint amongst non-signatories to the Deed. In summary, complaints to the Waitangi Tribunal identified the Deed of Settlement as being contrary to the Treaty and prejudicial to claimants, as it diminished rangatiratanga in respect of fishing rights and imposed new arrangements which had not been the subject of adequate agreement.<sup>29</sup>

The groundswell of tribal opposition to the deal was generated in particular by the Government’s insistence on three things:<sup>30</sup>

- (i) that this would be a *full and final* settlement which terminated Maori commercial fishing rights under the Treaty;
- (ii) that it be premised on *acceptance of the quota management system*;
- (iii) that it be *framed and implemented in the manner dictated by the Crown*.

Under the Act, Maori participation in the New Zealand fishing industry will continue to be dictated by the Crown.

<sup>25</sup> Ibid.

<sup>26</sup> The Preamble to the Act, clause (l)(iv).

<sup>27</sup> Section 10 (d).

<sup>28</sup> See Marshall, *supra* at note 16. See also ss 5-8, ss 12-20 and ss 42-45 of the Act.

<sup>29</sup> *Supra* at note 6.

<sup>30</sup> Kelsey, “Why are you here? A Sceptic’s View of Market Motives for Economic Co-operation with Maori”, Unpublished Seminar Paper presented at a Conference of the Institute for International Research (18-19 March 1993).

### *Maori and the Fishing Industry*

The deal effectively opens the way for government and the fishing industry to progressively develop the QMS without the continual threat of Maori commercial fishing claims.

The New Zealand Fishing Industry Board viewed Maori fishing claims as a “serious threat to their businesses and to the stability and development of the industry as a whole”.<sup>31</sup> It was clearly in the interests of the fishing industry to settle the claims, provided that “existing property rights and existing investments of the fishing industry would be protected”.<sup>32</sup>

Indeed, it was also in the interests of Maori to determine the extent of their rights and interests in the New Zealand fishing industry. The past handling of Maori fishing disputes, however, has often been unfavourable to Maori.<sup>33</sup> It is only in recent years that traditional Maori fishing rights have been recognised by the courts. The Act, however, effectively brings that “success” to an abrupt halt.

### **Conclusion**

The Government concedes that the Deed is not a perfectly drafted document.<sup>34</sup> However, due to the urgency with which the Act was passed, the imperfections of the “parent” Deed have not been improved.

It is unfortunate that the Government equates the settling of Treaty of Waitangi claims with the extinguishment of Treaty-based rights and interests. The Crown clearly adopted a “take it or leave it subject to conditions” approach in respect of the deal. It did not attempt to negotiate “a full and final settlement” between the Treaty partners in a just and fair manner.

Objections raised by Maori in relation to the deal reflect a division in the Maori community. Some Maori viewed the deal as an opportunity to be seized. Others, had they been given the choice, would rather have preserved the integrity of the Treaty.<sup>35</sup> Although a report by the Waitangi Tribunal clearly identified the complaints of Maori in respect of the deal, the Tribunal’s recommendations were not given legislative recognition in the Act. Such recognition may have harmonised the Maori community to some extent.

In respect of the passage of the Act, Maori were given only limited time in which to think, check, consult and move. Already, the euphoria has lifted, and one can see what weighty costs have been exchanged for the uncertainties of a commercially based venture.

The crucial task of allocating the deal’s benefits amongst iwi could be quite like feeding crumbs to a school of starving fish in a crowded fishbowl. Further-

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<sup>31</sup> Marshall, *supra* at note 16, at p12.

<sup>32</sup> *Ibid*, pp13-14.

<sup>33</sup> *Waipapakura v Hempton*, *supra* at note 10.

<sup>34</sup> Hon D Graham 532 NZPD 12953 (8 December 1992).

<sup>35</sup> Waitangi Tribunal, *supra* at note 6, at 3.

more, the Act provides for the enactment of new fisheries legislation.<sup>36</sup> Thus, with the continuing practice of full and fair consultation between the Crown and Maori, Maori can now look forward to new legislation which will further refine and define the extent of their fishing rights.

Aroha M. Waetford\*

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### THE PRIVACY ACT 1993

The Privacy Act 1993 (the "Act") experienced a "somewhat tortuous route"<sup>1</sup> through Parliament. The resulting changes have certainly strengthened the Act which, in time, will become an important part of New Zealand law.

#### The Scope of the Act

The Act concerns the privacy of personal information. More specifically, it deals with the collection, use and disclosure of, and access to such information. The Act extends the functions of the Privacy Commissioner, the guardian of the Act. The Act is not, however, a complete codification of the law of privacy. Nor does it deal with many of the "popular" issues relating to privacy, for example, long range photography, electronic surveillance, and many activities of the news media. The Act's influence is almost completely confined to the area of "information privacy".

#### Information Privacy

The field of information privacy is relatively new to the law. It results largely from the recent development of powerful information technology. There has been international recognition of the need to protect the privacy of personal information. In 1980, the OECD produced guidelines on the Protection of Privacy and Transborder Flows of Personal Data.<sup>2</sup> The United States, United Kingdom, Canada and Australia have all implemented privacy legislation.

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<sup>36</sup> See s 15 of the Act.

<sup>1</sup> L Dalziel 535 NZPD 15212 (5 May 1993).

<sup>2</sup> Organisation for Economic Co-operation and Development, *Guidelines on the protection of privacy and transborder flows of personal data* (1981).

The “information boom” poses a real threat to personal privacy. Details of such threats comprise 124 pages of the Australian Law Reform Commissions paper on privacy.<sup>3</sup> The most topical issue in New Zealand is the matching of data between agencies. The Department of Social Welfare is currently matching information with the Customs Department, the Department of Education (Student Allowances), and the Department of Inland Revenue.

### Key Definitions

The Act is potentially broad in scope, as many of the key definitions are very wide. The Act defines “personal information” simply as “information about an identifiable individual”.<sup>4</sup> An “agency” for the purposes of the Act is any person or body of persons, whether public or private. This includes government departments. The courts, Parliament and news media remain outside the operation of the information privacy principles. In general, however, the Act will apply to almost all organisations within New Zealand.

The exemption of the news media from the Information Privacy Principles is interesting. Since the Act defines “news” in a circular fashion, the courts will need to develop a more workable definition. This could lead to a challenge in court that many “news” programmes are in fact merely “entertainment”. Radio New Zealand and Television New Zealand are not included in the exemption applied to the news media. They are subject to the Act in respect of access to, and the correction of, personal information. It will be interesting to see whether this distinction between private and public sector news agencies will have any practical effect. In any event, all broadcasters remain subject to the privacy requirements of the Broadcasting Act 1989.<sup>5</sup>

### The Aims of the Act

The Privacy Act is designed to encourage agencies to adhere to certain basic principles regarding personal information. Very simply, the Act is about:

- (i) controlling the collection of information about people;
- (ii) giving people access to information about themselves;
- (iii) giving people the opportunity to correct information about themselves;  
and
- (iv) controlling the use of such information.

In addition, there are controls on data matching, unique identifiers and public information registers.

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<sup>3</sup> Australian Law Reform Commission, *Privacy and Personal Information*, ALRC R22(1) (1983).

<sup>4</sup> Section 2.

<sup>5</sup> Section 4(1)(c) of the Broadcasting Act 1989 requires broadcasters to maintain standards consistent with the privacy of the individual.



## **The Operation of the Act**

The Act is “not designed to be used as a sledge hammer .... [It] aims to encourage those agencies and organisations that are holding personal data to ... recognise that people’s personal information is precious to them.”<sup>6</sup> Three things are central to the operation of the Act: the information privacy principles; the Privacy Commissioner; the codes of practice.

### **The Information Privacy Principles<sup>7</sup> (the “IPPs”)**

In essence, the IPPs state that:

- (i) agencies should collect personal information only where it is necessary to do so. Personal information should be collected directly from, and with the knowledge of the person concerned. Such information should be obtained fairly and unobtrusively. It should be stored securely, and kept no longer than necessary.
- (ii) individuals should have access to any information held by an agency about themselves, and should be able to request that the information be corrected.
- (iii) personal information should be used by agencies only for the purpose for which it was collected. The information should not be disclosed to any other person or agency.

These principles do not create enforceable legal rights, nor are they absolute.<sup>8</sup> Many of the principles are self-qualifying. For example, principle Two states that personal information should be collected directly from the person concerned. However, the principle does not apply if:

- (i) the information is available publicly; or
- (ii) there would be no prejudice to the individual concerned by collecting the information other than directly from that individual; or
- (iii) compliance would prejudice the purpose of the collection; or
- (iv) compliance would not be reasonably practical; or
- (v) the individual concerned could not be identified through the information.

In addition to qualifications within the IPPs, Part IV of the Act sets out “good reasons for refusing access to personal information”. These include the protection of national security and the preservation of trade secrets. Thus, the Act contains wide statutory exceptions to the broadly stated principles.

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<sup>6</sup> Hon D Graham 535 NZPD 15210 (5 May 1993).

<sup>7</sup> The information privacy principles are set out in s 6.

<sup>8</sup> Principle 6(1) is an exception, as it retains the right of access to personal information stored by public sector agencies.

## The Privacy Commissioner

The Privacy Commissioner (“the Commissioner”) is the “statutory guardian”<sup>9</sup> of privacy. The Commissioner’s role is essential to the working of the Act. New Zealand has had a Privacy Commissioner since April 1992. Until now, however, the Commissioner’s role has been somewhat limited and preparatory. Under s 13 of the Act, the Commissioner now has twenty-one separate functions to perform. These range from general education and research to investigation and reporting.

## Complaints

The present Privacy Commissioner wishes to avoid making his office “complaints driven”.<sup>10</sup> However, dealing with complaints will be a very important part of the Commissioner’s role. Under the Act, any person may complain to the Commissioner about an “interference with the privacy of an individual”.<sup>11</sup> Section 66 defines this phrase as including a breach of either an IPP, a code of practice, or an information matching provision. Any such breach must have caused, or be likely to cause loss or damage to the individual, interference with the individual’s rights or interests, or significant humiliation or loss of dignity to that person.<sup>12</sup>

The Commissioner may respond to a complaint in several ways. If the complaint is trivial or unworthy of investigation, the Commissioner may decide to take no further action.<sup>13</sup> If deemed otherwise, the Commissioner may investigate the complaint, act as conciliator between the parties, call a compulsory conference to try to obtain agreement between the parties, or finally, refer the complaint to the Proceedings Commissioner (a Human Rights Commissioner). This final course of action will not be properly available until July 1996. Until then, only complaints relating to a breach of a code of practice or of IPPs 5, 6, 7 or 12<sup>14</sup> can be referred to the Proceedings Commissioner.

Upon receipt of a complaint, the Proceedings Commissioner will independently determine whether the matter should be brought before the Complaints Tribunal. If the complaint does proceed to the Tribunal, the Tribunal will determine whether there has been “an interference with the privacy of an individual”. Remedies available for interference include damages, an order restraining or requiring action by the agency concerned, a declaration, or any other relief which the Tribunal sees fit to grant.

Although the IPPs are neither legal rights nor absolute, the Act provides a

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<sup>9</sup> Australian Law Reform Commission, *supra* at note 3, at xlvii.

<sup>10</sup> Slane (Privacy Commissioner), “Overview of the Privacy Act 1993”, (Institute for International Research Conference, 9-10 June 1993) 8.

<sup>11</sup> Section 67.

<sup>12</sup> Section 66(1)(b).

<sup>13</sup> Section 71.

<sup>14</sup> These principles relate to access to, and the security and correction of, personal information, and to unique identifiers.

procedure for their enforcement. It is hoped, however, that the codes of practice described below will reduce the need to enforce the IPPs in this way.

### Other Functions of the Commissioner

The Act assigns some extremely wide functions to the Commissioner. The Commissioner may, for example, inquire into and receive submissions from the public on any matter that appears to affect the privacy of the individual. This may involve undertaking research and/or cooperating with other persons or bodies concerned with the privacy of the individual. The Commissioner may then recommend to the Prime Minister legislative or other action. Similarly, the Commissioner may suggest to any person the need for action to protect individual privacy. The Commissioner may examine any proposed legislation and report any privacy implications to the responsible Minister. The role also includes providing general education programmes, and making public statements in relation to personal privacy.

The wide functions assigned to the Commissioner allow him or her to respond to new developments and threats to personal privacy. It will be interesting to see whether the Commissioner will choose to comment on the development of a common law tort of invasion of privacy. The existence of such a tort has been discussed in several recent High Court cases.<sup>15</sup> The fullest discussion, however, has been provided by the Broadcasting Standards Authority.<sup>16</sup>

### Codes of Practice

One of the most important functions of the Commissioner is to ensure the development and monitoring of codes of practice. This particular function was added relatively late in the Bill's progress. It shows an intention on the part of the legislature to encourage sound privacy practices constructively, rather than to threaten agencies with penalties for non-compliance. It also answers early criticisms that the Bill was too inflexible.

The Commissioner may issue a code of practice for any industry, activity or type of information.<sup>17</sup> A code may impose stricter or more lenient standards than the IPPs,<sup>18</sup> and may prescribe the way in which an IPP is to be applied. It may also prescribe a complaints procedure. Codes of practice have the same effect as the IPPs, and are deemed to be regulations for the purposes of the Regulations

15 See *Tucker v News Media Ownership Ltd* [1986] 2 NZLR 716; *Bradley v Wingnut Films Ltd* [1993] 1 NZLR 415; *Marris v TV3* High Court, Wellington. 14 October 1991 CP 754/91.

16 See *Re McAllister* [1990] NZAR 324; *Re Walker*, Broadcasting Standards Authority, 6 June 1990 6/90; *Re Cook*, Broadcasting Standards Authority, 27 February 1991 1/91; *Re Gisborne Boys High School*, Broadcasting Standards Authority, 2 March 1992 7/92; *Re Clements*, Broadcasting Standards Authority, 14 May 1992 19/92; *Re Presland*, Broadcasting Standards Authority, 28 September 1992 69/92; *Re Kyrke-Smith*, Broadcasting Standards Authority, 18 March 1993 27/93.

17 Section 46.

18 Except principles 6(1)(a), 6(1)(b) and 7 (which relate to access to, and correction of, information).

(Disallowance) Act 1989. In the “Draft Guidance Note on Codes of Practice under the Privacy Act”,<sup>19</sup> the Commissioner distinguished codes of practice from operational procedures. In general, codes of practice should deal explicitly with the IPPs, examining the application of each principle to the particular industry and recommending certain standards for compliance. The Commissioner gives the following example: “information held for purpose X should be destroyed (or deleted from a computer system) Y months after the last transaction.”

The role of the Commissioner to develop codes of practice will vary from approving industry initiated codes to actively encouraging the preparation of a code.

### Information Matching

The post of Privacy Commissioner was established under the Privacy Commissioner Act 1991, an Act viewed by many as merely a measure to enable the matching of data between government departments. The rules and machinery established by that Act to control information matching by public sector agencies have been retained under the new Act. Thus, any information matching programme must be pursuant to a written agreement with the Privacy Commissioner, who will examine the programme and report to the responsible Minister. That report will follow the guidelines set out in s 98 of the Act. These include the consideration of the importance of the programme’s objective, the possibility of using other means to achieve that objective, the scale of the programme, and whether public interest favours allowing the programme to proceed.

In 1994, the Privacy Commissioner will review and report on the operation of every information matching provision since 1991.

### Conclusion

Privacy law, in general, requires the balancing of competing interests. The Act allows those applying the balance to do so with broad-mindedness and flexibility. It also affords substantial protection to the privacy of individuals, thus bringing New Zealand law in line with international human rights agreements.<sup>20</sup> The Act will clearly have a significant effect on the attitudes and practices of those dealing with personal information, and will ensure that this is achieved in a reasoned and principled manner.

*Simon Mount*

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<sup>19</sup> Slane (Privacy Commissioner), 29 April 1993.

<sup>20</sup> See Article 17, International Covenant on Civil and Political Rights; Article 8, European Convention on Human Rights.

## HEALTH AND SAFETY IN EMPLOYMENT ACT 1992

The Health and Safety in Employment Act 1992 ("the Act") reflects a marked shift in the focus of health and safety legislation. The previous statutory regime provided specific health and safety rules.<sup>1</sup> The Act, however, imposes general duties on employers and employees to provide for health and safety in the workplace.<sup>2</sup>

This approach is consistent with other recent labour market reforms, for example: the Employment Contracts Act 1991; the Accident Rehabilitation and Compensation Insurance Act 1992; the Industry Training Act 1992.<sup>3</sup>

Underlying all of those reforms is the premise that the Government's role is to *enable management to take full responsibility* for work-places ....

The principal object of the Act is to "provide for the prevention of harm to employees at work."<sup>4</sup> "Place of work" is defined widely<sup>5</sup> to include any place where an employee might be working temporarily, and any other place under the control of the employer where employees might eat or rest during the course of the working day. The safety of any person entering the workplace is also covered.

### Duties

The most important change implemented by the Act is the imposition of general duties on employers, employees, the self-employed, principal contractors and those in control of places of work (for example, lessors or building owners). There is also scope under ss 16-19 for the liability of principals, sub-contractors, lessors and lessees, and sub-contractors and employees (for themselves).

Not all of those connected with work or workplaces are required to fulfil duties under the Act. Householders who employ contractors to work on their home, for example, are not covered. Nor does the Act cover voluntary workers, since the definition of "employee" covers only work done for hire or reward.

The duties outlined in the Act are stated in very broad terms. They contrast sharply with the specific rules provided by previous legislation. Section 6, for example, requires an employer to "take all practicable steps to ensure the safety of employees while at work".<sup>6</sup> This contrasts with such provisions as s 25 of the Boilers, Lifts and Cranes Act 1950:

Every glass water gauge fitted to a boiler shall be properly protected and shall be so placed that the water level in the gauge is clearly visible.

1 This was achieved under a variety of statutes which included the Agricultural Workers Act 1977, the Machinery Act 1950, and the Bush Workers Act 1945.

2 For example, to "identify hazards" (s 7) and "ensure safety" (s 6).

3 Rt Hon Bill Birch 529 NZPD 10895 (15 September 1992), emphasis added.

4 Section 5(1).

5 Section 2.

6 Section 6.

Specific duties of employers include providing a safe workplace and developing procedures to deal with emergencies. In relation to “significant hazards”,<sup>7</sup> the employer has a duty to identify, then eliminate, isolate or minimise such hazards.<sup>8</sup> Employers are required to provide employees with information about any monitoring of health and safety issues relating to employees generally. Section 25 of the Act requires employers to keep a register of all accidents in the workplace, and to notify the Secretary of any accidents and/or serious harm caused.

Section 14 imposes on employers a duty to involve employees in the development of health and safety procedures. The impact of s 14 is limited, however, as no penalty is provided for its breach. Thus, the right of workers to be involved in the development of safety procedures under the Act is not enforceable.

### **Codes of Practice**

Section 20 of the Act provides for the establishment of codes of practice for specific industries. Once established, they are to be made available to the public through the Department of Labour.

It is intended that the provision of codes of practice will minimise compliance costs for small to medium-sized industry members. Codes of practice in respect of these industries will be developed by the Chief Executive of the Department of Labour, and will be subject to final approval by the Minister after consultation with affected parties.

Codes of practice are not enforceable by penalties under the Act. Compliance with a code of practice, however, will go towards showing that an employer took all practicable steps to provide a safe workplace, and therefore has not breached the duty imposed under Part II of the Act.

### **Inspectors**

Sections 29-33 detail procedures relating to the appointment, functions and powers of inspectors. The general functions of inspectors are to provide health and safety information to employees at the workplace, and to ensure compliance with the Act.

Inspectors are empowered by the Act to issue “improvement” and “prohibition” notices. Such notices may require that certain practices meet a higher standard of safety, or to cease altogether. Failure to comply with improvement and prohibition notices render the person served liable to penalties under ss 49 and 50. Only inspectors have standing to institute proceedings for an offence under the Act.<sup>9</sup>

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<sup>7</sup> Defined in s 2 as a potential cause or source of serious harm.

<sup>8</sup> Sections 7-9 and 10.

<sup>9</sup> Section 54.

## Penalties

The penalty provisions<sup>10</sup> are the principal means by which compliance with the Act may be ensured. Section 49 imposes stiff penalties upon any person who knowingly takes action, and any person who, “knowing that failure to take any action is reasonably likely to cause serious harm to any person, fails to take action”. Section 50 provides hefty fines in respect of less serious breaches.

Section 53 implements a significant change, as it states that offences prosecuted under s 50 are strict liability offences. This contrasts with a case decided under the previous statutory regime, *AHI Operations Ltd v Department of Labour*.<sup>11</sup> In that case, it was held that s 17 of the Machinery Act 1950 constituted an absolute liability offence. Under the new scheme, however, s 53 provides that a defence of total absence of fault is available to employers. The onus is on the defendant to prove on the balance of probabilities that he or she did all that was reasonable to comply with the law.

By contrast, a successful prosecution under s 49 requires proof that the defendant had the requisite *mens rea*.

## Recent Reforms of the Labour Market

The Act was intended to operate in conjunction with other recently enacted labour statutes. Of particular relevance to the Act is the Employment Contracts Act 1991. The practical working of that Act has resulted in the omission of many health and safety provisions from current employment contracts. This is disturbing when viewed in light of the fact that the Health and Safety in Employment Act does not provide workers with the basic right to know about hazards in the workplace. Nor does it provide employees with the right to refuse to do hazardous work.

In many situations, the only action available to workers concerned about their safety will be to exercise the right to strike under s 71 of the Employment Contracts Act 1991. Workers are unlikely to resort to action of this nature, however, given the current economic climate.

The issue of union involvement was addressed by the Right Honourable Bill Birch during the Second Reading of the Bill:<sup>12</sup>

Health and safety in the work-place must now become the prime concern of employers, rather than becoming a bargaining tool for union-dominated committees.

This is typical of the Government’s approach to recent labour market reforms. The intention of the Government is to “enable management to take full responsibility for workplaces”.<sup>13</sup> In light of this, the question arises whether management responsibility should be achieved at the expense of worker involvement.

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<sup>10</sup> Sections 49 and 50.

<sup>11</sup> [1986] 1 NZLR 645 (HC).

<sup>12</sup> Supra at note 3, at 10896.

<sup>13</sup> Ibid.

The Act was also intended to work in conjunction with the Accident Rehabilitation and Compensation Insurance Act 1992. The employer levies under that Act are to be used to punish those workplaces which exhibit high accident rates. Punishment will take the form of higher levies, however. This may not have the desired punitive effect. The New Zealand economy comprises a high number of small workplaces and it is unlikely that the accident rates of these workplaces will correspond to the actual level of safety they provide. This is due to statistically insignificant numbers of workers in small workplaces.

## Conclusion

The Act attempts to shift responsibility for the research and monitoring of health and safety from government to employers and others. The costs of health and safety management will similarly shift. The costs of compliance for smaller businesses, however, will be reduced by the establishment of codes of practice.

The Act contains general duties rather than specific health and safety rules. This may result in increased prosecution costs, since proving a breach of the duty to be safe is likely to be more difficult than proving whether or not a gauge was covered with glass, for instance.

The Health and Safety in Employment Act 1992 requires employers to take positive action to ensure the provision of health and safety in the workplaces they control; mere compliance with a set of specific safety measures is no longer sufficient under New Zealand's new health and safety regime. Duties are also imposed on employees to be safe in the workplace, the breach of which entails severe penalties. However, there is no guaranteed right of employees to be involved in the development of health and safety procedures. As already mentioned, the Employment Contracts Act 1991 has resulted in health and safety provisions being written out of many current employment contracts. In light of this, the Health and Safety in Employment Act should have provided employees with an enforceable right to be involved in the management of health and safety at their own workplaces.

*Rochelle Hume*

## DEFAMATION ACT 1992

The Defamation Bill 1988 attracted the following comment from Professor J F Burrows: "although the New Zealand Bill is largely comprised of matters of detail, any reform is better than nothing."<sup>1</sup> This note outlines the changes implemented by

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<sup>1</sup> Burrows, "Media Law: Recent Developments", *Media and Advertising Law* (1992) 29.



the Defamation Act 1992 (“the 1992 Act”), and concludes whether the changes amount to a significant improvement in the law of defamation, or whether they are merely “better than nothing.”

### Causes of Action

Part I of the 1992 Act deals with causes of action. Section 6 provides that a corporation may pursue a defamation action only if it is able to prove the publication has caused or is likely to cause pecuniary loss to the corporation. This section is legislative confirmation of the decision of Tipping J in *Mount Cook Group Ltd v Johnstone Motors Ltd*.<sup>2</sup> Section 7 establishes the rule that a single publication constitutes a single cause of action, regardless of the number of imputations the single publication contains.

### Defences

#### *Truth*

The defence of justification has been renamed “truth”.<sup>3</sup> This term more clearly represents to the jury the essence of the defence. The requirements of the defence are clarified in s 8(3)(a) which states that one must prove the imputations were “true, or not materially different from the truth”.<sup>4</sup>

Section 8(2) changes the rule in *Templeton v Jones*.<sup>5</sup> That rule required that where a plaintiff had chosen to pursue only one allegation from the publication, the defendant could not prove the truth of the other allegations in support of the defence. Section 8(2) now provides that, “in proceedings for defamation based on only some of the matter contained in a publication, the defendant may allege and prove any facts contained in the whole of the publication.” On a literal reading, this suggests that the defendant may prove the truth of facts which are not wholly relevant to the subject of the proceedings. In light of this, it is preferable that the court adopt a strict approach when considering the relevance of the truth of such facts to the allegation at hand.

#### *Honest Opinion*

The defence of fair comment has been renamed “honest opinion”.<sup>6</sup> Section 10 establishes the requirements of the defence: the defendant author must be able to

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2 [1990] 2 NZLR 488.

3 Section 8(1).

4 As recommended in the *Report of the Committee on Defamation* (1977) (McKay Report) 11.

5 [1984] 1 NZLR 448.

6 Section 9. In *Silkin v Beaverbrook Newspapers Ltd* [1958] 2 All ER 516, 518, Diplock J noted that “fair comment” was “a little misleading [for the jury in a defamation action]. It may give the impression [that] the jury have to decide whether [they] agree with the comment [or] think that it is fair”.

prove the opinion was the defendant's genuine opinion. This subjective approach parallels that taken by the Supreme Court of Canada in *Chernesky v Armadale Publishers Ltd*,<sup>7</sup> and contrasts with the objective requirements set down by the House of Lords in *Telnikoff v Matusevitch*.<sup>8</sup>

Section 10(2) provides that where the author is an employee or agent of the defendant, the defendant must first show that the defamatory words in the publication were not purported to be the defendant's own opinion, and secondly, that the defendant believed it was the genuine opinion of the author. Where the author is not an employee or agent of the defendant, the defendant is required to show only that he or she had no reasonable cause to believe the opinion was not genuinely held by the author. Malice no longer acts to negate this defence.<sup>9</sup>

The defendant is no longer required to prove the truth of every statement of fact if the opinion is genuine.<sup>10</sup> This applies in respect of both the facts alleged or referred to in the publication and any other facts generally known at the time of publication.

Section 12 abrogates the rule which applied to allegations of corrupt motives. That rule required that, in addition to proving that the opinion was honestly held, the defendant also had to prove that it was "warranted by the facts".<sup>11</sup> By removing the second limb of that test, s 12 has effectively abolished the rule.

### Privilege

The 1992 Act codifies the rules relating to absolute privilege.<sup>12</sup> Live broadcasts of proceedings in the House of Representatives are protected by absolute privilege, as are the judicial proceedings of tribunals and authorities. Section 14 extends absolute privilege to cover communication between barristers or solicitors and their clients.

The 1992 Act extends the range of publications to which qualified privilege applies. The following are now covered: press conferences held by or on behalf of those bodies listed in the First Schedule to the Act; reports to shareholders by boards of directors or auditors; and pleadings in court cases.<sup>13</sup> Section 18(1) provides the test to be used in determining whether qualified statutory privilege should apply. The publications listed in Part II of the Second Schedule are protected only where the publication is "a matter of public interest in any place in which that publication occurs". This test has been described as simpler than its

<sup>7</sup> (1978) 90 DLR (3d) 321.

<sup>8</sup> [1992] 2 AC 343.

<sup>9</sup> Section 10(3).

<sup>10</sup> Section 11.

<sup>11</sup> Cockburn CJ in *Campbell v Spottiswoode* (1863) 3 B & S 769, 776-7; 122 ER 288, 290-291; adopted by the New Zealand Court of Appeal in *News Media Ownership v Finlay* [1970] NZLR 1089.

<sup>12</sup> Sections 13 and 14.

<sup>13</sup> Part II, First Schedule to the Act.

predecessor.<sup>14</sup> However, “public interest” seems just as unclear as the former test, which employed the phrases “public concern” and “public benefit”.<sup>15</sup>

Section 19 abolishes the concept of malice in respect of qualified privilege. The new test asks whether “the defendant was predominantly motivated by ill will towards the plaintiff, or otherwise took improper advantage of the occasion of publication.”

## Remedies

### *Declarations*

A declaration is an authoritative assertion that the plaintiff’s character is as it was before the defamation – it justifies the plaintiff to the world. In many cases, a declaration will be more appropriate to address the harm suffered by the plaintiff than an award of damages.<sup>16</sup>

Prior to the 1992 Act, courts often exercised an inherent discretion to clear the name of a plaintiff by issuing a declaration. The remedy is now given legislative effect by s 24 of the 1992 Act.<sup>17</sup> However, the effectiveness of this remedy is seriously limited by the fact that it does not avoid problems of delay, as the plaintiff is still required to pursue a court action.

### *Retraction or Reply*

Section 25 of the 1992 Act introduces the remedy of retraction or reply. This remedy enables the defamed person to request that the defamer publish a retraction or reply in respect of the offending statement. The parties are thus provided with a remedy which is relatively quick and inexpensive.<sup>18</sup> This remedy is particularly appropriate in circumstances where a publisher makes a genuine mistake and is willing to correct it. However, its effectiveness depends on whether the retraction or reply actually reaches those persons who encountered the defamation. Furthermore, it is unclear what is meant by a “reasonable” reply. Precise definition of that term will require judicial input. Thus, problems of delay and expense are likely to remain.

### *Correction Recommendations*

Section 26 of the Act introduces the remedy of “correction recommendations”. Section 27 empowers the court to make recommendations as to the content of the

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<sup>14</sup> Burrows, *News Media Law in New Zealand* (3rd ed 1990) 104.

<sup>15</sup> Section 17(3)(b) Defamation Act 1954.

<sup>16</sup> See text, *infra* at page 421 for further discussion on the appropriateness of damages as a remedy in defamation actions.

<sup>17</sup> *Supra* at note 4, at 85.

<sup>18</sup> Section 25(1). The request must be made no later than five working days after the defamed person becomes aware of the publication.

correction, time of publication, and level of prominence in the particular medium. If the defendant does not follow the recommendations and the court gives final judgment in favour of the plaintiff, the plaintiff may be awarded solicitor and client costs. This penalty appears to restrict the right of the media to freedom of speech in so far as members of the media may be required to publish statements with which they do not agree. The media can, of course, publish the correction without expressing agreement with it.

It is unclear where the burden of proof lies in such proceedings. Should it shift to the plaintiff to prove the truth of the matter, as it is he or she who demands the correction? Until this issue is litigated, the exact nature of the remedy will remain uncertain. As with retraction and reply, it is impossible to ensure the correction will reach those persons who encountered the defamation.

### *Damages*

The law relating to damages falls into two categories: compensatory and punitive. Punitive damages in defamation actions serve to punish the defendant where the defendant has exhibited serious disregard for the plaintiff's rights.

The harm caused by defamation is rarely actual financial loss, and any prospective losses are difficult to calculate. More often the injury takes the form of mental hurt and damage to the person's reputation.<sup>19</sup> In light of this, it is a little inaccurate to term the function of damages as compensatory, for the plaintiff's emotional state and reputation prior to the defamation can never be truly redressed by financial means.<sup>20</sup> Burrows notes that the nature of the injury means that an "almost arbitrary process" of instinctive nomination occurs when the courts endeavour to settle an appropriate figure for damages.<sup>21</sup>

The 1992 Act makes no reference to compensatory damages. However, the availability of alternative remedies suggests that damages will be awarded only where they are the most appropriate remedy, and not simply because of lack of a more desirable remedy.

In respect of punitive damages, s 28 provides that the defendant must have acted in flagrant disregard of the plaintiff's rights.<sup>22</sup>

Sections 29, 30, 31 and 32 relate to the mitigation of damages. Section 29 specifies the matters to be taken into account in mitigation of damages. The mitigating effect of an apology is to be considered in light of the nature, extent, form, manner, and time of the apology.<sup>23</sup>

Under s 30, the defendant may prove specific instances of misconduct by the

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<sup>19</sup> Supra at note 4.

<sup>20</sup> Supra at note 14, at 43. It is more accurate to describe the function of an award of damages as providing consolation or solatium.

<sup>21</sup> Ibid, 44.

<sup>22</sup> See *Uren v John Fairfax & Sons Ltd*, (1966) 117 CLR 118.

<sup>23</sup> Section 29(a).

plaintiff and thus establish that the plaintiff's reputation is "generally bad in the aspect to which the proceedings relate."<sup>24</sup> This will be taken into account in mitigation of damages. Section 32 renders the matters to be taken into account in mitigation of damages non-exhaustive.

Prior to the 1992 Act, the amount of damages capable of being awarded in defamation actions in New Zealand was not limited in any way. The new legislation again fixes no limit. This does nothing to slow the trend toward awards of higher damages, a trend considered by some to be problematic.<sup>25</sup>

### *Statements in Open Court*

Prior to the 1992 Act, statements in open court could be made on the settlement of a defamation action in two situations: first, upon agreement between the parties, and secondly, where the plaintiff accepted money paid into the court by the defendant as being in full satisfaction of his or her claim. Section 34 of the Act is a direct enactment of three of the recommendations made by the Committee on Defamation:<sup>26</sup> first, that the circumstances in which statements can be made in open court be specified in legislation, secondly, that the court be able to grant leave for interim statements to be made prior to disposal of the action, and thirdly, to allow either party to see the judge in chambers to settle disputes as to the terms of the statement.

### *Injunctions*

The 1992 Act makes no mention of the remedy of injunction. As with damages, the availability of alternative remedies under the Act should ensure that an injunction will be granted only where it is the most appropriate remedy.

### **Procedural Changes**

The 1992 Act contains interesting procedural changes. Section 36 provides that the judge must decide, in the absence of the jury, whether the words in question are capable of bearing a defamatory meaning. Section 37(2) is legislative confirmation of the *de facto* position prior to the 1992 Act. That is, where a plaintiff alleges the matter is defamatory on its natural and ordinary meaning, he or she must give the particulars of every meaning the matter is alleged to bear.

Finally, the Act signifies a purposive stand against gagging writs. Section 43 states that in proceedings in which the defendant is a member of the news media, the amount of damages claimed by the plaintiff shall not be specified in the statement of claim. This should prevent the intimidation of news media defendants by the specification of grossly excessive sums. Section 43(2) deters plaintiffs from

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<sup>24</sup> Section 30. See also *Plato Films Ltd v Speidel* [1961] AC 1090, at 1134 per Denning LJ.

<sup>25</sup> See for example, Palmer, "Defamation: An Overview" *Media Law* (1988) 14.

<sup>26</sup> *Supra* at note 4.

claiming excessive sums by enabling the court to award solicitor and client costs to the defendant in such cases.

Under s 45, the commencement of proceedings for the recovery of damages is deemed to be vexatious if the plaintiff has, at commencement, no intention of proceeding to trial. Although such an intention may be difficult to prove, s 45 endorses the view that gagging writs are unacceptable.<sup>27</sup>

## Conclusion

Parts II and III of the 1992 Act effect substantial changes to existing defences in the law of defamation. Some of these changes relate only to detail, such as the name changes to “truth” and “honest opinion”. It is submitted that these changes have some value, for they improve the ability of the jury to fulfil its function, as does the procedural change in s 36 of the 1992 Act. Other changes to the defences are substantive. The 1992 Act has codified much of the existing law, and amended some requirements of the defences.

The Committee on Defamation was established out of concern for the balance between the protection of reputation and the right to freedom of speech. There was particular concern that the balance needed adjustment in favour of freedom of speech.<sup>28</sup> Whether the interests of freedom of speech will be furthered by the range of non-monetary remedies now available under the 1992 Act is questionable. Correction recommendations appear to restrict freedom of speech. Furthermore, although the media now have less reason to fear an award of damages against them, this will be counterbalanced by the fact that the court may award solicitor and client costs to the plaintiff.

The extent to which the Act encourages the early settlement of grievances is limited by the fact that many of the defences depend on the plaintiff having brought a successful action. The 1992 Act provides alternatives to lengthy and expensive litigation. These should be effective to counteract the situation prior to the Act where only “wealthy, prominent, and well-situated citizens” were able to bring defamation actions.<sup>29</sup> However, the extent to which the Act provides a system that is fairer for all citizens<sup>30</sup> is limited by the fact that litigation is still necessary in many cases.

Correction recommendations and the remedy of retraction or reply are an improvement in so far as they focus on clearing the plaintiff’s name and redress the real nature of the injury caused. However, in many cases, substantial time will have lapsed since the occurrence of the defamation. Therefore, the probability of a correction, retraction or reply reaching those persons who were exposed to the defamation is low. It is the unfortunate nature of defamation that the harm suffered

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<sup>27</sup> See also s 50.

<sup>28</sup> 491 NZPD 6369 (25 August 1988).

<sup>29</sup> *Ibid*, 6372.

<sup>30</sup> *Ibid*, 6373.

by the plaintiff is often irreparable.

Applying Professor Burrows' observation, the 1992 Act is "better than nothing" to the extent that it provides greater clarity, more certainty, and fairer, more efficient proceedings and remedies. The forecast he gives in respect of the changes to detail is that they will "affect our view of principle".<sup>31</sup> This seems a likely outcome, as the 1992 Act provides a fuller statement of the law of defamation and more accurately reflects its objectives.

Jacqueline Bryant

### THE MENTAL HEALTH (COMPULSORY ASSESSMENT AND TREATMENT) ACT 1992

The Mental Health (Compulsory Assessment and Treatment) Act 1992 (the "1992 Act") marks a significant departure from the Mental Health Act 1969 (the "1969 Act") in terms of general philosophy, the definition of mental disorder, assessment and review procedures, and the articulation of patients' rights. The emphasis in the 1969 Act was clearly on detention, and the need to keep difficult and dangerous mentally disordered persons out of mainstream society. Under the 1992 Act, the assessment of whether compulsory detention should be imposed is determined by a "test of treatability",<sup>1</sup> followed by a decision as to whether treatment should be provided on an inpatient or outpatient basis. This reflects a shift in philosophy; from an institutional model of delivery of services in 1969, to an assumption in 1992 that it is preferable for mentally disordered persons to maintain their normal patterns of life within the community.<sup>2</sup>

The technical and ideological changes brought about by the 1992 Act need to be examined in light of the current restructuring of health services generally. Many of these services are underfunded, particularly in the mental health sector. In this respect, the Act is based on the flawed assumption that persons previously sheltered in psychiatric hospitals will now receive adequately funded care in the community.

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31 Supra at note 1, at 28.

1 Brookbanks, "The Mental Health (Compulsory Assessment and Treatment) Act 1992" in Brooker & Friend, *Trapski's Family Law (The Mental Health Act)* Vol III (1993) A-5.

2 Dawson, "Community Treatment Orders" (1991) 7 Otago LR 410.

## “Mental Disorder”

“Mental disorder” is defined in s 2 of the 1992 Act:

“Mental disorder”, in relation to any person, means an abnormal state of mind (whether of a continuous or intermittent nature), characterised by delusions, or by disorders of mood or perception or volition or cognition, of such a degree that it—

- (a) Poses a serious danger to the health or safety of that person or of others; or
- (b) Seriously diminishes the capacity of that person to take care of himself or herself ....

Two conflicting interpretations of this provision are possible. On the first interpretation, the provision contains a narrow definition of “mental disorder”.<sup>3</sup> Conversely, s 2 is capable of a broad definition. The definition of “mental disorder” is crucial to the working of the Act, as it establishes the threshold for compulsory treatment.<sup>4</sup>

## Narrow View

The view that s 2 provides a narrow definition of “mental disorder” is supported by reference to the long title to the Act:

An Act to redefine the circumstances in which and the conditions under which persons may be subjected to compulsory psychiatric assessment and treatment, to define the rights of such persons and to provide better protection for those rights, and generally to reform and consolidate the law relating to the assessment and treatment of persons suffering from mental disorder ....

Proponents of the narrow view understand this to imply that the 1992 Act should not be used for purposes of detention.

The narrow view is further supported by reading the definition of “mental disorder” together with s 4 of the 1992 Act. Section 4 provides that the rules relating to liability to assessment or treatment shall not be invoked in respect of any person by reason only of:

- (a) That person’s political, religious, or cultural beliefs; or
- (b) That person’s sexual preferences; or
- (c) That person’s criminal or delinquent behaviour; or
- (d) Substance abuse; or
- (e) Intellectual handicap.

When read together, ss 2 and 4 allow for compulsory assessment and treatment of those who will respond to treatment, but exclude those in respect of whom treatment in a psychiatric hospital would be inappropriate, such as the intellectually handicapped. This narrow construction of “mental disorder” raises serious questions as to the place of intellectually handicapped offenders within the health system. Under the definition of “mental disorder” in the 1992 Act, the intellectually handicapped may be subjected to compulsory treatment only when they also suffer from a “mental disorder”, and only then if they pose a serious threat of danger to themselves or others, or are incapable of taking care of themselves.

<sup>3</sup> Ibid. See also Department of Health, *A User’s Guide to the Mental Health (Compulsory Assessment and Treatment) Act 1992* (1993) 3.

<sup>4</sup> Supra at note 1, at A-5.



## Broad View

The contrary view of s 2 is that the definition of “mental disorder” lends itself to a broad interpretation. This was the interpretation favoured by Judge McElrea in *R v Tetai*.<sup>5</sup> Tetai, who was mentally retarded (but not mentally ill), had been charged with assault with intent to commit sexual violation. The two issues before the Court were whether Tetai should stand trial, and whether he should be deemed a special or ordinary patient under the Act.<sup>6</sup> For the purpose of determining fitness to plead, the Court held that mental retardation did come within the phrase “disorder of cognition” and thus fell within the s 2 definition of “mental disorder”. Judge McElrea reasoned:<sup>7</sup>

The legislature has not adopted established medical terminology and therefore it is for the Court to interpret the legislative language according to ordinary principles.

Judge McElrea further reasoned that, “the specific exclusion [of intellectual handicap] in s 4 would not have been necessary if the definition of “mental disorder” already excluded mental retardation – except perhaps for the avoidance of doubt”.<sup>8</sup> Judge McElrea concluded that it would be fundamentally unfair to require a mentally retarded person such as Tetai to defend himself at a hearing.<sup>9</sup> Psychiatrists gave evidence that Tetai posed a danger to others and his mental retardation inhibited his ability to care for himself. Thus, the second element of “mental disorder” was also fulfilled. Judge McElrea ordered that Tetai be detained in hospital as a patient under s 115(2)(a) of the Criminal Justice Act 1985.

*Tetai* highlights the practical problems likely to arise in applying the s 2 definition of “mental disorder”. Psychiatrists are likely find it difficult to determine whether a person is “mentally disordered” or not, as s 2 does not readily translate into the medical terminology used by psychiatrists in diagnosis. This could prove highly problematic, as a person cannot be treated under the Act unless he or she is first deemed to be “mentally disordered”.

## Assessment and Review Procedures

The assessment and review procedures outlined in the 1992 Act represent a significant departure from the 1969 Act. Under the earlier Act, it was possible for a person to languish in hospital for unnecessarily long periods of time. The 1992 Act puts in place a detailed procedure of committal which entails many checks and balances.

Part I of the Act details the compulsory assessment and treatment procedures. Section 8 provides that any person who has attained 18 years of age may apply for

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5 District Court, Auckland. 26 March 1993 CR NO 3004004634 Judge McElrea.

6 Ibid, p2.

7 Ibid, p12.

8 Ibid.

9 Ibid, p14.

the assessment of another person.<sup>10</sup> The first step of the assessment procedure consists of an initial examination by a psychiatrist. If the psychiatrist finds reasonable grounds for believing the patient to be mentally disordered, he or she may require the patient to undergo five days of compulsory assessment and treatment. Before the five days expire, the psychiatrist may require the patient to undergo a further fourteen days of compulsory assessment and treatment. If the psychiatrist concludes at the end of this period that the patient is not fit to be released from compulsory status, then an application may be made to the District Court to determine whether the patient should be placed under a Compulsory Treatment Order (“CTO”). There must be a court hearing within fourteen days of this application. A person may, therefore, be compulsorily held in a hospital for a maximum of thirty-three days before he or she is discharged or placed under a CTO.

There are two types of CTOs: Inpatient Orders and Community Treatment Orders. A major reform effected by the 1992 Act is a presumption in favour of Community Treatment Orders.<sup>11</sup> Under s 28(2):

[T]he Court shall make a community treatment order unless the Court considers that the patient cannot be treated adequately as an outpatient ....

The 1992 Act institutes an extensive, ongoing process of review. At any point after the first assessment at five days, and prior to the formal hearing for a CTO, a patient or other person specified in the Act may apply to have the situation reviewed by a Judge.<sup>12</sup> A CTO is initially granted for six months, with the requirement that a treatment team complete a clinical review after three months, and then every six months after that. If the patient is no longer in need of treatment, he or she must be discharged. After every formal clinical review, there is available to the patient a right of appeal to the Review Tribunal.<sup>13</sup>

In keeping with the 1969 Act, s 84(1) of the 1992 Act provides that, upon an application by any person, or by Judge alone, a Judge may order an investigation by a District Inspector. Further, a Judge may order the release of a person (other than a special patient) if satisfied that the person is illegally detained or fit to be discharged.<sup>14</sup>

<sup>10</sup> The applicant must state the grounds for his or her belief, his or her relationship to the person, and that he or she has seen the proposed patient within three days immediately preceding the date of application.

<sup>11</sup> Dawson, “Mental Health (Compulsory Assessment and Treatment) Act 1992 – significant advance on previous law” *Law Talk* 378 (1992) 4.

<sup>12</sup> Section 16.

<sup>13</sup> Sections 76 and 79.

<sup>14</sup> Section 84(3).

## **Compulsory Treatment**

Part V of the Act relates to compulsory treatment. The right of patients to refuse consent to treatment<sup>15</sup> reflects a move toward recognition of patient autonomy in mental health. One questions, however, whether those persons defined as “mentally disordered” can be regarded as competent to make decisions about their own condition or treatment.

## **Consent**

There are three levels of consent. First, a person undergoing assessment beyond the preliminary stage is required to accept such treatment for mental disorder as directed by the responsible physician. A patient subject to a CTO is also required to accept treatment for the first month of that order, but patient consent is required thereafter.<sup>16</sup> That requirement may, however, be over-ridden in the event of an emergency.<sup>17</sup>

The second level of consent relates to electro-convulsive treatment (“ECT”). Under s 60, no patient shall be required to accept ECT unless he or she consents, or:<sup>18</sup>

The treatment is considered to be in the interests of the patient by a psychiatrist (not being the responsible clinician) who has been appointed for the purposes of this section by the Review Tribunal.

This section directly conflicts with the principles of competency and patient autonomy. One commentator has written:<sup>19</sup>

In the context of this legislation such measures should not be employed unless the prospect of therapeutic success is significantly greater than the detriment to the patient conceived in terms of loss of liberty and the right to self-determination.

Moreover, “competency” is determined solely by clinicians. The Act does not specify what criteria are to be used to determine “competency”, and there is no procedure to enable an objective, external evaluation of a clinician’s decision. Thus, the right of a patient to refuse consent to ECT under the Act is limited, and there is no right of review.

The third level of consent relates to brain surgery.<sup>20</sup> That patient cannot be required to undergo brain surgery unless the consent of the patient, the Review Tribunal, and an appointed psychiatrist has been obtained.

Any consent given by a patient to treatment while under a CTO, or in relation to ECT, or brain surgery, may be withdrawn at any time. Thereafter, further treatment becomes unlawful.

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15 Section 57.

16 Section 59.

17 Section 62.

18 Section 60(b).

19 *Supra* at note 1, at A-11.

20 Section 61.

## Rights of Patients

Part VI of the 1992 Act sets out the rights of patients. Under s 64, patients are entitled to be informed of their rights as patients, and of any proposed treatment, including expected side effects, before treatment is given. The 1992 Act further guarantees the right of patients to receive treatment appropriate to their condition.

The importance of a patient's cultural identity is acknowledged for the first time in mental health legislation. Section 65 provides:

Every patient is entitled to be dealt with in a manner that accords with the spirit and intent of section 5 of this Act.

Section 5 specifically states that every court, tribunal or person exercising any power under this Act in respect of any patient shall do so with "proper respect" for the cultural identity and personal beliefs of the patient, and:

With proper recognition of the importance and significance to the patient of the patient's ties with his or her family, whanau, hapu, iwi, and family group, and the contribution those ties make to the patient's well-being.

Part VI outlines general rights of patients which include:

- (i) the right to be informed of any video or audio recording of treatment;
- (ii) the right to independent psychiatric advice;
- (iii) the right to legal advice;
- (iv) the right to company;
- (v) the right to receive visitors and make telephone calls; and
- (vi) the right to send and receive letters and postage articles.

Provision exists for the patient or a third party to file a complaint regarding the breach of the patient's rights,<sup>21</sup> but only in relation to those rights articulated in Part VI of the Act, and not, for example, to the right to refuse consent to treatment.

## Conclusion

The 1992 Act reflects an enlightened approach to mental health care in New Zealand. The move towards community care and protection of patient autonomy is a welcome reform, as is the provision of new procedures for assessment and review. However, significant gaps are evident in the legislation. In particular, the provision of rehabilitation for institutionalised patients moving out into the community is insufficient. Similarly, the Act does not meet the special needs of intellectually handicapped offenders. These gaps are likely to result in some mental health consumers being left vulnerable under the Act. As such, these matters need urgent attention.

*Jacqui Barker*

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<sup>21</sup> Section 75.

## CASE NOTES

*Federated Farmers of New Zealand (Inc) v New Zealand Post Ltd*, High Court, Wellington, 1 December 1992 CP 661/92. McGechan J.

The common law imposes duties on monopoly suppliers of essential services such as postage, electricity, gas, telephone, and water.<sup>1</sup> In New Zealand, the suppliers of these services historically have been state or local authorities, and common law duties have been supplanted by statute or statutory regulations. The recent wave of corporatisation and privatisation has removed most of these statutory duties. *Federated Farmers of New Zealand v New Zealand Post Ltd*<sup>2</sup> is the first significant test of whether the common law duty, in this case to deliver mail free within the monopoly area,<sup>3</sup> has survived the demise of the statutory regime.

In the year to 31 March 1992, the loss on the rural delivery service of New Zealand Post was estimated at \$12.1 million.<sup>4</sup> In an effort to recoup some of the shortfall, New Zealand Post announced an increase in the rural delivery service fee (“RDSF”) from \$40 to \$80 per annum. Rural box holders were angered by what they saw as arbitrary treatment. On their behalf, Federated Farmers brought this action, pleading that either New Zealand Post did not have the power to charge the RDSF or it had a duty to deliver to rural addresses without fee. Although seven causes of action were pleaded, I intend to deal with only five of them.<sup>5</sup>

First, the plaintiffs sought a declaration that New Zealand Post had no power to require addressees to pay the RDSF. They argued that at common law, postal authorities were unable to demand additional payments from addressees as a condition of delivery and that demands for fees required statutory authority. Since the statutory regulations<sup>6</sup> empowering the old Post Office to charge the RDSF had been revoked, the plaintiffs argued that the contracts entered into with the rural

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1 For example, Lord Hale’s business “affected with a public interest” in *De Portibus Maris*; *Allnut v Inglis* 12 East 527 (1810); 104 ER 206; *Minister of Justice for Canada v City of Levis* [1919] AC 505 (PC); *Wairoa Electric Power Board v Wairoa Borough* [1937] NZLR 211 (SC). This principle was recently affirmed in New Zealand in *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd*, High Court, Auckland. 18 February 1993 CL 20/92 Barker J.

2 High Court, Wellington. 1 December 1992 CP 661/92 McGechan J.

3 At that time they were called postal towns. See *Barnes v Foley* (1768) 5 Burr 2711; 98 ER 423; *Stock v Harris* (1771) 5 Burr 2709; 98 ER 422; *Rowning v Goodchild* (1773) 2 Black W 906; 96 ER 536; *Smith v Powditch* (1774) 1 Cowp 182; 98 ER 1033.

4 It is not stated in the judgment how this loss was calculated.

5 The plea that as a member of the Universal Postal Union New Zealand was bound by the Universal Postal Convention, which does not permit a charge for international postal articles, was rejected as an attempt to enforce a treaty as domestic law; supra at note 2, at p50. The seventh cause of action concerned boxholders who had paid fees at the old rate and was rejected by McGechan J; supra at note 2, at p59-60.

6 Post Office (Inland Post) Regulations 1977 (SR 1977/253), clause 22 of the 1st Schedule.

delivery box holders were beyond New Zealand Post's powers and so, therefore, was a demand for increased fees.

McGechan J reviewed at some length the origins of the common law position. This was in fact a gloss on the Statute of Anne (9 Anne c10) which established a Crown monopoly over postal services between and within postal towns<sup>7</sup> (primarily as a revenue gathering exercise rather than a public service). A line of eighteenth century cases<sup>8</sup> established that the Statute recognised a monopoly right to deliver and "a corresponding duty to deliver, within the so-called "limits of delivery".<sup>9</sup> Since the limits of delivery coincide with the limits of the monopoly grant, and the Postal Services Act 1987 gives New Zealand Post a monopoly throughout New Zealand, the common law seems to require free rural as well as urban delivery.

McGechan J found no express authorisation of the power to charge such fees in the Postal Services Act, but held that:<sup>10</sup>

There is no doubt ... that postal charges were envisaged. Clearly it was expected NZP would continue to sell stamps, and charge for private bags and post office boxes and the like. Section 3, providing for monopoly below (now) the 80 cent and 200g level, implicitly recognised NZP would be able to charge.

As to specific authority to charge the RDSF, his Honour relied on the assumption that "[i]f Parliament turned its mind specifically to the RDS fee" it would have intended that the existing fees regime should continue in existence.<sup>11</sup> His Honour concluded that:<sup>12</sup>

It is not a case where Parliament would have intended the powers of this new commercial entity would be limited by ancient doctrine .... The modern controls are commercial and political. Any former common law disability – if such ever existed – no longer applies.

While McGechan J is undoubtedly correct in concluding that New Zealand Post is entitled to charge for its services, his specific finding on the RDSF is less soundly based. Costs of the rural delivery service could equally well be recovered by increasing stamp charges or establishing a differential postage rate for rural addresses, neither of which would necessitate the abolition of the common law rule. His Honour relies on a judicial power to "fill a gap" in legislation where Parliament has not considered the point. However, the case he cites as authority for this power, *Northern Milk Vendors Association Inc v Northern Milk Ltd*,<sup>13</sup> was an example of the Court continuing an existing regime only as an interim measure, pending the establishment of new standards. Here McGechan J is using this power

7 Section 22 expressly allowed others to carry post into and out of postal towns.

8 Supra at note 3.

9 Supra at note 2, at p10.

10 Ibid, p19.

11 Ibid, p20.

12 Ibid.

13 [1988] 1 NZLR 530 (CA); ibid.

to graft<sup>14</sup> onto a statute a permanent regime, which arguably crosses the line from judicial to legislative prerogative.<sup>15</sup>

With the extinction of the common law duty the plaintiffs sought elsewhere for a duty to deliver. The second cause of action was that New Zealand Post had breached a statutory duty to deliver postal articles to the addresses specified on them. The plaintiffs relied on ss 2(2) and 2(3) of the Postal Services Act which stipulate when an article is deemed to have been “posted” and “delivered”.

McGechan J rejected this argument:<sup>16</sup>

I do not think it advisable to strain to impute a statutory duty from a mere interpretation section. Statutory duty, if any, must come from a wider source.

Nor did his Honour find anything else in the Postal Services Act that imposed such a duty. However, McGechan J did find the requirement in s 4 of the State-Owned Enterprises Act 1986 that State-Owned Enterprises (SOEs) “operate” as successful businesses meant that New Zealand Post “is not licensed to lie moribund”.<sup>17</sup> Since it is granted a monopoly in a very important sector “it is not hard to impute intended obligation”.<sup>18</sup> This is curiously inconsistent with his ruling on the common law duty, which he rejects despite acknowledging that it too arises from a monopoly grant. However, his Honour held that this duty, deriving as it did from s 4, was limited “to the commercially realistic”, and that in this case “the duty does not require provision of a rural delivery service which does not pay its way”.<sup>19</sup>

Thirdly, the plaintiffs pleaded that when New Zealand Post accepts letters from a sender, it enters into a contract to deliver those letters to the addressees. Although such a contractual relationship between the sender and the Post Office has been rejected by the common law in the past,<sup>20</sup> McGechan J, referring to New Zealand Post’s reconstitution as an SOE, held that:<sup>21</sup>

[C]learly this is a quite different animal from the postal authorities on which the traditional common law developed. It is a fully commercial animal, with commercial purposes and needs.

Again, noting the requirement in s 4 of the State-Owned Enterprise Act that New Zealand Post operate as “a successful business”, his Honour held that “[a] successful business obtains revenue by selling goods or services under contract.”<sup>22</sup> Thus, McGechan J concluded that there was a contractual relationship between the

14 Since it is there neither expressly nor by necessary implication.

15 However, Hammond J adopts a similar position in *Hamilton City Council v Waikato Electricity Authority*, High Court, Hamilton. 7 July 1993 CP21/93.

16 *Supra* at note 2, at p23.

17 *Ibid*, p26.

18 *Ibid*.

19 *Ibid*, p27.

20 *Lane v Cotton* (1699) 1 Ld Raym 646; 91 ER 1332; *Whitfield v Le Despencer (Lord)* (1778) 2 Cowp 754; 98 ER 1334; *Treifus & Co Ltd v Post Office* [1957] 2 QB 352 (CA).

21 *Supra* at note 2, at p35.

22 *Ibid*.

sender and New Zealand Post. However, the terms of the contract incorporated the Postal Users Guide, which included the terms and conditions of the rural delivery service, and therefore the sender would not expect the mail to be delivered unless entitlement to delivery actually exists. Alternatively, it was held that the contract is to deliver “correctly addressed” mail, and mail addressed to the rural delivery box of a non-paying box holder is incorrectly addressed. Accordingly, his Honour found no breach of contract.<sup>23</sup>

The plaintiffs’ next cause of action was based on s 4(1)(c) of the State-Owned Enterprises Act, which requires SOEs:

[T]o exhibit a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage those when able to do so.

The plaintiffs argued, *inter alia*, that it was in the interests of the rural community and all New Zealand through its export earnings that mail be delivered promptly and efficiently to rural addressees. However, McGechan J followed the line established by *Wellington Regional Council v Post Office Savings Bank Ltd & New Zealand Post Ltd*,<sup>24</sup> where Greig J held that in s 4(1) “the overriding consideration is commercial” and stated that he attached “some importance to the phrase in para (c) the endeavour to accommodate and encourage the interests of the community is “when able to do so”.”

McGechan J accepted that prompt and efficient postal delivery was in the interests of the rural community, but held that:<sup>25</sup>

Clearly, NZP is not required to provide efficient and prompt gate delivery if in doing so it makes a substantial business loss and does not make compensating gains of some other commercial character. It does make such a loss.

His Honour’s deference to the commercial imperatives of the SOE is consistent with other High Court decisions.<sup>26</sup>

Finally, the plaintiffs sought a declaration that the RDSF was in breach of s 14 of the New Zealand Bill of Rights Act 1990,<sup>27</sup> as it unlawfully restricted the plaintiffs’ right to “receive information and opinions in the form of postal articles addressed to them”.<sup>28</sup>

His Honour accepted that mail handling was a “public function”<sup>29</sup> as it is

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23 Ibid, p43. Nor, by extension, could the plaintiffs succeed in bailment; *ibid*, p44.

24 High Court, Wellington. 22 December 1987 CP 720/87 Grieg J. Cited with approval in *Landmark Corporation Ltd (in rec) v Telecom Corporation of New Zealand Ltd* (1990) 5 NZCLC 66, 264; *Auckland Electric Power Board v Electricity Corporation of New Zealand Ltd*, High Court, Auckland. 18 February 1993 CL 20/92 Barker J.

25 *Supra* at note 2, at p52.

26 *Supra* at note 24.

27 Section 14 provides that, “[e]veryone has the right to freedom of expression, including the right to seek, receive and impart information and opinions of any kind in any form”.

28 *Supra* at note 2, at p53.

29 Section 3(b) provides that the Act only applies to acts done “[b]y any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law”.



carried out “for the public, in the public interest, and moreover by a company which while technically a separate entity presently is wholly owned and ultimately controlled by the Crown”.<sup>30</sup> It was also accepted that this function was conferred by law, specifically the State-Owned Enterprises Act, the Companies Act 1955, and the Postal Services Act, plus the on-flow of private contracts.<sup>31</sup> Thus, his Honour held that New Zealand Post was bound by the New Zealand Bill of Rights Act. With regard to s 14 of the Act, it was considered that New Zealand Post’s refusal to deliver unless the RDSF was paid was a hindrance to the flow of information. However, it was also held that the RDSF was a reasonable limit prescribed by law (s 4(1) of the State-Owned Enterprises Act requiring New Zealand Post to operate as a successful business) and therefore permitted by s 5 of the Act.<sup>32</sup>

At a time when many essential services are being removed from direct political control and restructured into commercial enterprises, without the regulatory watchdogs found overseas,<sup>33</sup> it is disturbing to find a New Zealand Court extinguishing an established common law restraint on the monopoly provider of an essential service. New Zealand Post’s common law duty is replaced by those arising from s 4 of the State-Owned Enterprises Act. McGechan J relied on the requirement to “operate as a successful business” to find a power to contract and a power to charge, to oust duties of the common law and those of the New Zealand Bill of Rights Act, and to both impose and limit a general statutory duty to deliver. Further, his Honour followed the line consistently adopted by the High Court in interpreting s 4 as giving priority to commercial considerations over “a sense of social responsibility”.

Having determined that the duty to deliver arises from s 4, it was perhaps inevitable that McGechan J found that the controls on the duty are “political and commercial” and “the market”.<sup>34</sup> With respect, it is difficult to believe that these controls will be effective over a semi-autonomous monopoly provider of an essential service. Although consumer protection is more the province of the legislature, it is submitted that in the current deregulated environment it is more important than ever for the courts to take a vigorous approach to enforcing the few common law safeguards which exist. From this point of view, *Federated Farmers* is a disturbing step backwards.

Scott Mataga

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30 Supra at note 2, at p55.

31 Ibid.

32 Ibid, p56.

33 For example, the Office of Telecommunications in the UK, State Public Utilities Commissions in the USA, and Austel in Australia.

34 Supra at note 2, at p19-20.

*R v Goodwin* [1993] 2 NZLR 153. Court of Appeal. Cooke P (dissenting), Richardson, Casey, Hardie Boys, Gault JJ; *R v Goodwin (No 2)* [1993] 2 NZLR 390. Court of Appeal. Cooke P, Richardson, Casey, Hardie Boys, Gault JJ.

*R v Goodwin* involved two separate decisions by the Court of Appeal on the scope of ss 22 and 23 of the New Zealand Bill of Rights Act 1990.<sup>1</sup> The first case also considered the rationale for exclusion of evidence obtained in breach of the Act.

The appellant had been convicted of the manslaughter of his baby daughter. On appeal he sought to challenge the decision of the trial judge to admit incriminating statements made by him during police questioning. The police had initially questioned the appellant and his de facto wife separately. At the conclusion of the interview Goodwin was told by the interviewing detective that he was free to leave, but if there were inconsistencies between his statement and that given by his wife he would be required for a second interview.

As Goodwin was leaving, he was told by another officer to remain at the station. Later he was informed that he would need to answer further questions. During this second interview, Goodwin was vigorously cross-examined by a detective. It was put to Goodwin that only he or his de facto wife could have caused the child's injuries. He replied that they should not be questioning his wife any further. At this stage the interviewing officer cautioned him that he was not obliged to say anything, but did not advise him of his right to counsel. Goodwin then made further incriminating statements. He subsequently sought to have these excluded on the basis of the failure to inform him of his right to counsel, but was unsuccessful.<sup>2</sup>

## Section 23

The first issue on appeal concerned whether Goodwin had been "arrested or detained under any enactment" so as to trigger his right to counsel under s 23(1)(b).<sup>3</sup> It was conceded by the Crown that Goodwin had been told he was not free to leave. It followed that as there was no statutory power to detain him for questioning, there had been an unlawful detention.

Although the only member of the Court to dissent, the judgment of Cooke P provides the most comprehensive examination of the issues involved. His Honour gave weight to the trial judge's observation that the accused would reasonably

<sup>1</sup> Hereinafter referred to as the "Bill of Rights" or "the Act".

<sup>2</sup> Although Goodwin would seem to have had other grounds for challenging the admissibility of the statements, the appeal was restricted initially to consideration of s 23(1)(b), and subsequently to s 22.

<sup>3</sup> Section 23(1)(b) provides, "[e]veryone 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 ...."

have thought he was not free to leave at the time of the second interview, and concluded that the accused was either under *de facto* arrest or *de facto* detention.<sup>4</sup> As the only powers of arrest in New Zealand are those authorised by statute, every “arrest” is also a “detention under any enactment”. His Honour considered that there was no material difference between these two concepts where the detention was unlawful. Furthermore, s 23(1)(c)<sup>5</sup> shows that the subsection is not confined to lawful arrests and lawful detentions. Therefore, the unlawful detention in this case was covered by the Act.

His Honour did recognise the difficulty with s 23, namely that on a literal reading a person who is not arrested or detained under any specific statutory power would not be entitled to the rights conferred by that section, even though the person in this situation is arguably the most in need of protection.<sup>6</sup> He dealt with this problem by adopting a purposive approach to interpretation.<sup>7</sup>

To seek to cut down the scope of s 23(1) by denying its protection to some persons who are unlawfully deprived of liberty and interrogated by police officers on suspicion of an offence is necessarily an exercise in tabulated legalism.

There must be some doubt over this approach. A wider purposive approach is undoubtedly appropriate when interpreting the Bill of Rights, but the underlying purpose or objectives of the Act cannot be elevated above the clear words used, particularly when the purpose of the late addition of “under any enactment” appears to have been to narrow the scope of s 23.<sup>8</sup> The appropriate course is to work within the confines of the Act and leave the legislature to correct what appears to be either an unintentional oversight or a startling defect in the scope of rights secured under s 23. This is the approach favoured by *Hardie Boys J*:<sup>9</sup>

It may well be that the addition of the words “under any enactment”, focusing attention on the meaning of arrest, and rendering inapplicable much of the Canadian jurisprudence, has led to unexpected results. But the Court must take the statute as it finds it.

In direct contrast to *Cooke P*, the majority of the Court considered that there was a distinction between an arrest and a detention under any enactment.<sup>10</sup> In the present case, because there was no statutory power to detain for questioning, the detention was not one “under any enactment”. Their Honours then considered whether the detention came within the meaning of “arrest”.

Richardson J concluded that arrest in the context of the Bill of Rights has the same meaning as it does under the common law and in the Crimes Act 1961. He

<sup>4</sup> *R v Goodwin* [1993] 2 NZLR 153, 159.

<sup>5</sup> Section 23(1)(c) provides, “[e]veryone who is arrested or who is detained under any enactment ... shall have the right ... to be released if the arrest or detention is not lawful.”

<sup>6</sup> *Supra* at note 4, at 167, 174; see also at 201 per *Hardie Boys J*.

<sup>7</sup> *Ibid*, 168.

<sup>8</sup> *Ibid*, 187 per *Richardson J*.

<sup>9</sup> *Ibid*, 200.

<sup>10</sup> *Ibid*, 186 per *Richardson J*, 196 per *Casey J*, 200 per *Hardie Boys J*, 204 per *Gault J*.

expressly disagreed with the definition of arrest laid down by Cooke P in *R v Butcher*,<sup>11</sup> and concluded that the detention in the case before him did not trigger the rights under s 23.

Hardie Boys J recognised that detention for the purpose of questioning may be an arrest under the Act, because it is in this situation that a suspect has the greatest need of legal advice. However, he then concluded, rather surprisingly, that because the interviewing detective had been unaware of the constable's instruction to the accused that he was not free to leave the police station, there had been no arrest.

The approach of Hardie Boys J seems closest to the dissent of Cooke P. However, his conclusion that good faith action on the part of the police may be relevant to the issue of breach is difficult to support. Depending on the exclusionary rationale adopted it may be relevant to the appropriate remedy,<sup>12</sup> but from the suspect's perspective it must be irrelevant to the issue of breach. A breach of rights is nonetheless a breach if committed in good faith.

With regard to arrest, Gault J simply maintained the views he expressed in *R v Butcher*<sup>13</sup> and held that it was not restricted to formal arrest; it also included situations where the suspect is detained and the police intend to subsequently arrest him or her, or where it is made clear that the suspect is not free to go. However, he concluded that there was no arrest in this case, presumably because he considered that Goodwin thought he was free to leave.

This conclusion seems difficult to support on the facts. Although Goodwin had been told that he was not under arrest, he had previously been informed that he would be called back if it transpired that his statement was inconsistent with that given by his wife. Furthermore, he was accused of deceit and vigorously cross-examined. When he informed the police that they should be talking to him rather than his wife, it is unrealistic to suggest that he would have still considered himself free to leave.

Casey J concluded that there will be an arrest whenever the words or conduct of the arresting official make it clear that a suspect has been deprived of his or her liberty. Accordingly, his judgment is open to the same criticism as those of Gault and Hardie Boys JJ, as it seems reasonable to conclude that the conduct of the police gave the suspect sufficient justification to believe that he had been deprived of his liberty.

There are obviously still some differences of opinion amongst the members of the Court on the scope of s 23. Of greater concern, however, is the unrealistic application by Hardie Boys, Gault and Casey JJ of the principles laid down in their own judgments.

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<sup>11</sup> [1992] 2 NZLR 257, 264.

<sup>12</sup> For example, on a deterrence-based rationale the good faith of the police might be relevant, since the exclusion of evidence would not establish any deterrence principle.

<sup>13</sup> *Supra* at note 11.

## Exclusion of Evidence

The differing views expressed in *R v Butcher* as to the basis on which a court will exclude evidence obtained in breach of the Bill of Rights is in part resolved by this decision.<sup>14</sup> The judges who considered the issue favoured a prima facie exclusionary rule founded on a rights-based rationale.<sup>15</sup>

Cooke P rejected as too problematic the Canadian disrepute approach, which aims to preserve systemic integrity by balancing the disrepute caused by the admission of evidence with the disrepute that would result from its exclusion.<sup>16</sup> He observed that decisions which have displaced the prima facie rule have been made on appropriate grounds,<sup>17</sup> but that in the case before him no such reason applied and he would have excluded the incriminating statement.

Similarly, Richardson J, after considering three possible approaches to exclusion, concluded that a rights-based rationale which gave primacy to the vindication of individual rights was the appropriate basis for exclusion. This goal could be adequately achieved through a prima facie exclusionary rule. However, his Honour then suggested some factors which might displace this prima facie rule, among them good faith by the police.<sup>18</sup> With respect, it is difficult to see how the good faith of the police can be relevant to a rights-based exclusionary rationale. Where the emphasis is on the protection of the individual's rights, the reason the right was breached must be irrelevant to whether a remedy will be granted.

In contrast to Richardson J, Hardie Boys J noted:<sup>19</sup>

First, good faith can rarely be relevant; otherwise a premium would be put on ignorance of the law.

However, Hardie Boys J went on to state that he would not have excluded the statement because the denial of rights was unintentional or accidental. If his Honour meant to distinguish this from a situation where the police act in good faith, the distinction seems illusory.

The exclusionary rationale adopted by the Court and manifested in the prima facie exclusionary rule is appropriate for a Bill of Rights. However, the observation that good faith can displace the prima facie rule indicates that the Court may take an expansive approach to developing exceptions to the prima facie rule. This would greatly undermine the protection of the Act.<sup>20</sup>

<sup>14</sup> See Corlett, Case Note (1992) 7 AULR 216.

<sup>15</sup> Neither Casey nor Gault JJ examined the remedy point in detail, although Casey J agreed with the observations of Cooke P and Richardson J; *supra* at note 4, at 198.

<sup>16</sup> This approach appeared to be favoured by Holland J in *R v Butcher*; *supra* at note 11, at 274.

<sup>17</sup> *Supra* at note 4, at 202. One of the grounds given by Cooke P was waiver. It must be questionable whether waiver is an appropriate reason for displacing the prima facie rule. If a suspect is informed of the right to counsel and waives that right, then no breach has occurred and no issue of remedy arises. If the suspect has not been informed of the right to counsel then it is difficult to see how the right can be validly waived.

<sup>18</sup> *Ibid*, 194.

<sup>19</sup> *Ibid*, 202.

<sup>20</sup> This would be similar to the American experience under *Miranda v Arizona* 384 US 436 (1966). Although that case established a strong prima facie exclusionary principle, subsequent cases have eroded its protection by developing exceptions, for example, where the evidence is used for impeachment purposes.

## Section 22

As a result of observations by the Court, a further appeal was made under s 22.<sup>21</sup> In a single judgment delivered by the President, the Court held that there had been an “arbitrary detention”, and that the evidence obtained as a result should be excluded. The appeal was therefore allowed, and the defendant’s conviction quashed.<sup>22</sup>

On the issue of whether there had been a “detention”, their Honours agreed, with some differences in approach, that the police had failed to discharge their onus of proof in establishing that Goodwin had not been detained.

The second issue to be considered was the meaning of “arbitrary”. The Court held that generally any unlawful detention would be arbitrary. Cooke P justified this conclusion in part by reference to the Canadian case *R v Duguay*,<sup>23</sup> which considered the equivalent provision under the Canadian Charter. His Honour explained that the Ontario Court of Appeal had concluded that detention for the purpose of questioning or further investigation is arbitrary, and when the case was appealed to the Canadian Supreme Court<sup>24</sup> they did not interfere with this finding. However, Cooke P failed to point out that the Supreme Court was only asked to reconsider the lower Court’s decision on the basis of s 24, which is the remedies section of the Charter. Madame Justice L’Heureaux-Dube dissented on this point, but did consider arbitrary detention in a full and reasoned decision. She concluded:<sup>25</sup>

A detention is arbitrary if it is the result of an untrammelled discretion.

On her Honour’s approach, an arbitrary detention is one made without rational criteria rather than one made without legal justification. Where there is some logical reason for suspecting a person and therefore detaining him or her for questioning, the detention will not be arbitrary though it might be illegal.

Cooke P did not consider this reasoning and simply concluded that as there is no power in New Zealand to detain for questioning, the detention was arbitrary and in breach of s 22.

On the issue of exclusion, the Court held that the Crown had failed to disprove a causal connection between the breach and the evidence obtained as a result. Accordingly, the *prima facie* rule applied and the evidence was excluded.

The effect of the Court’s interpretation of s 22 is dramatic. Whenever a suspect is detained for questioning there will be an unlawful, and therefore almost inevitably, an arbitrary detention. Although the decision does not expressly state

<sup>21</sup> Section 22 provides, “[e]veryone has the right not to be arbitrarily arrested or detained.”

<sup>22</sup> Independent of the Bill of Rights ground, it was also held that there was insufficient evidence to maintain the conviction; *R v Goodwin (No 2)* [1993] 2 NZLR 390, 396.

<sup>23</sup> (1985) 18 DLR (4th) 32 (Ont CA).

<sup>24</sup> (1989) 56 DLR (4th) 46.

<sup>25</sup> *Ibid*, 67. This was in turn based on the judgment of Le Dain J in *Hufsky v The Queen* [1988] 1 SCR 621, 633 where he concluded that: “A discretion is arbitrary if there are no criteria, express or implied, which govern its exercise.”

that this would include a subjective detention on reasonable grounds, it is implicit in the judgment, since the finding of a detention seems based in part on the direction to the suspect prior to the second interview that he was not allowed to leave. In these circumstances, the gap created by the strict interpretation of s 23 is not only avoided by reference to s 22, but the protection of the Act is greatly increased, as any detention not under a specific statutory power will be a breach of s 22.

Furthermore, the somewhat confusing conclusion by the Court in the first case that the *prima facie* exclusionary rule may not apply where there has been a waiver<sup>26</sup> should not prevent exclusion under s 22, since waiver in this context relates to waiver of the right to be free from arbitrary (that is, illegal) detention. As it is unlikely that a suspect would appreciate that the detention was illegal, it is difficult to see how waiver could ever displace *prima facie* exclusion when there has been a breach of s 22.

In this second decision, the Court appears to have recognised the difficulty of the suspect who is neither arrested nor detained under a specific statutory authority. Its decision under s 23 deprives this suspect of protection from abuses by the police of his or her fundamental rights. Now such a suspect will be protected by the right under s 22. To a certain extent, this finding removes the justification for Cooke P's dissent in the first decision. However, the Court may have to reconsider this very broad interpretation of s 22 in future cases.

Marc Corlett\*

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*Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 NZLR 513; [1993] AC 295. Privy Council. Lords Templeman, Lane, Goff, Mustill, and Slynn.

*Downsview Nominees Ltd v First City Corporation Ltd*<sup>1</sup> required a consideration of the duties, if any, owed by a first debenture holder, and a receiver and manager appointed by it, to a second debenture holder. The case involved the receivership of Glen Eden Motors Ltd. Glen Eden was placed in receivership on 10 March 1987 by the holders of a second debenture, First City Corporation Ltd. At that time, Glen Eden was also encumbered by a prior debenture issued to Westpac Banking Corporation Ltd. On 23 March 1987, the Westpac debenture was assigned to Downsview Nominees Ltd, who appointed Russell, the second appellant,

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<sup>26</sup> Supra at note 4, at 202; also see supra at note 17.

<sup>1</sup> [1993] 1 NZLR 513.

as receiver. Since the Westpac debenture had priority, the receivers appointed by First City relinquished control of the receivership to Russell. Instead of liquidating the company, Russell decided to continue trading under the same management. First City wrote to Downsvie expressing concern at this decision, and offered to purchase the Westpac debenture. This offer was declined by Russell. When the debenture was finally assigned by court order, the value of the company was insufficient to cover the First City debt. Each of the Courts that heard the case accepted that the loss suffered by the First City group<sup>2</sup> was caused by the way Russell had conducted the receivership.

In the High Court, Gault J held that a debenture holder and a receiver owe a duty of care to the mortgagor company and, through the company, to a subsequent debenture holder.<sup>3</sup> On the facts, his Honour held that the conduct of Russell as receiver had breached this duty. Downsvie was also found to be negligent on the ground that it was no more than the alter ego of Russell. In addition, Gault J disqualified Russell from in any way taking part in the management of a company for five years, pursuant to s 189 of the Companies Act 1955.

The Court of Appeal agreed that a duty of care was owed, and that Russell had breached it.<sup>4</sup> The liability of Downsvie, however, was not upheld, as it was the conduct of Russell as receiver which was complained of and not that of Russell as the alter ego of Downsvie; the two have a separate legal status.<sup>5</sup> The disqualification of Russell under s 189 was also overturned.<sup>6</sup>

When the case came before the Privy Council, the Board was so troubled by the approach of the Courts below that it took the unusual step of granting the respondents leave to raise issues which had not been argued in the Court of Appeal. Both sides were asked to reconsider the “foundation and extent” of the duties owed.<sup>7</sup>

In its decision, the Board rejected the submission that a debenture holder or receiver could be liable in negligence to the mortgagor company or subsequent debenture holders, at least until a decision to sell the company is made. Until then, the only duties owed are the equitable duties to act in good faith and for the purpose of obtaining repayment of the debt. These duties are owed to both the mortgagor and subsequent encumbrancers. The conduct of Russell had breached these duties as his predominant purpose was preventing enforcement of the First City debenture, and not enforcement of the Westpac debenture.

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<sup>2</sup> In the Court of Appeal, it was argued that as First City had assigned its debenture to its subsidiary First City Finance, it had not suffered loss. This argument was rejected by the Court of Appeal, and was not mentioned in the decision of the Privy Council.

<sup>3</sup> [1989] 3 NZLR 710, 743; following *National Westminster Finance New Zealand Ltd v United Finance & Securities Ltd* [1988] 1 NZLR 226.

<sup>4</sup> [1990] 3 NZLR 265.

<sup>5</sup> *Ibid*, 278.

<sup>6</sup> *Ibid*, 282-284. A receiver was not a “manager” within the wording of s 189.

<sup>7</sup> *Supra* at note 1, at 521.



Their Lordships did not decide whether Downsview had breached its duty of good faith to First City. Such a breach would require knowledge by Downsview when it appointed Russell as receiver that he would act for improper purposes. That question had not been argued. However, Downsview was liable for the loss occasioned by its refusal to assign the Westpac debenture to First City when First City so requested. Like anyone liable to pay a mortgage debt, First City had the right to redeem.<sup>8</sup> On the question of the Court's jurisdiction to disqualify Russell under s 189 of the Companies Act, the Board agreed with the Court of Appeal.

The decision affirms that a debenture holder is in a unique position for which equity has developed special rules. When a secured creditor exercises its power to take control of assets given as security, it is acting in its own interest. The principal task of a receiver appointed by it is to recover the debt owed, whatever the effect may be on the mortgagor company or a subsequent debenture holder. A duty of care owed to either of these two parties would be inconsistent with this self interest.<sup>9</sup>

Their Lordships consider that it is not possible to measure a duty of care in relation to a primary objective which is quite inconsistent with that duty of care.

The only duties which it is fair to impose are those which equity has developed to prevent fraud or *mala fides*. To replace or supplement these duties with liability in negligence would lead to "confusion and injustice."<sup>10</sup>

It has been argued that this view is overstated, as it is unlikely a court would impose a standard of care which created injustice.<sup>11</sup> Indeed, both the judgment of Gault J and those of the Court of Appeal indicate that the Courts were well aware of the special position of receivers:<sup>12</sup>

The existence, nature and extent of the receiver's duty of care must be measured in relation to the primary objective of the receivership which is to enforce the security by recouping the moneys which it secures....

It is submitted, however, that even if the courts are unlikely to impose a duty of care that would create injustice, it is unnecessary to take that risk. When recognised principles have evolved specifically to deal with the enforcement of mortgages and the protection of borrowers, there is no reason to introduce the uncertainty of a tortious duty of care. Indeed, if the primary objective of receivership is properly taken into account, the nature and extent of a duty in negligence should be identical to the equitable duties owed by a receiver.

It has also been argued<sup>13</sup> that the decision of the Board is contrary to the authority established in *Cuckmere Brick Co Ltd v Mutual Finance Ltd*.<sup>14</sup> Such an argument fails to recognise the crucial distinction between that case and the

8 Ibid, 526.

9 Ibid, 524.

10 Ibid, 525.

11 Milroy, Case Note [1993] NZLJ 88.

12 Supra at note 4, at 276.

13 Supra at note 11.

14 [1971] Ch D 949 (CA).

situation in *Downsview Nominees*. *Cuckmere Brick* and the cases that follow it deal with the position of a mortgagee after the decision to sell the secured assets has been made. *Downsview Nominees* was concerned with the duties a mortgagee owes before that decision is made. This distinction was recognised by the Privy Council when they confined the decision of *Cuckmere Brick* to:<sup>15</sup>

Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price ....

In *Cuckmere Brick*, Salmond LJ made it clear that once the power of sale has arisen, the mortgagee is under no duty to sell the particular property at a time when the market price is high, or to refuse to sell to the highest bidder at auction merely because the turn out was low.<sup>16</sup> If the interests of the mortgagee conflict with those of the mortgagor, the mortgagee may prefer his or her own interests. It is only when the mortgagee chooses to sell the property that a duty to take reasonable care to obtain a proper price arises. This distinction was rejected by Gault J in the High Court, at least in relation to receivers:<sup>17</sup>

It would be absurd if a receiver selling up were bound to take reasonable care, but a receiver trading on were not.

This writer would argue that the distinction is not absurd.<sup>18</sup> When a receiver decides to continue trading the mortgagor company, it may be in the long term interests of the appointing debenture holder for the company to be managed in a fashion contrary to its short term interests. For example, a debenture holder may benefit from a short term profit which prejudices the company's long term performance. Any duty owed by the receiver to the company which is more onerous than the duty to act in good faith and for the purpose of enforcing the debenture would compromise this primary task. As equity already imposes this duty, only the possibility of injustice can be gained by adding an additional duty in negligence.

When the decision to sell is made, however, there can no longer be a conflict of interest. There is no lawful reason why it would be in the best interests of a debenture holder to obtain less than a proper price. Therefore it is appropriate that the receiver owe a duty of care to the mortgagor company, and those who claim through it.

The decision in *Downsview Nominees* is to be welcomed for recognising this distinction and reasserting the true nature of the relationship between a debenture holder, its receiver, and the mortgagor company. The disappointment with the case

<sup>15</sup> Supra at note 1, at 524.

<sup>16</sup> Supra at note 14, at 965.

<sup>17</sup> Supra at note 3, at 744. The authority Gault J relies on is *R A Price Securities Ltd v Henderson* [1989] 2 NZLR 257 (CA). However, that case concerned the duties owed by a receiver to the appointing debenture holder, not those owed to the mortgagor or a subsequent encumbrancer.

<sup>18</sup> This distinction is implicitly recognised by the legislature in s 345B of the Companies Act 1955. This section imposes a duty to take reasonable care on the receiver selling up, but does not consider the position of the receiver trading on.

is that the Board did not take the opportunity to examine critically the approach New Zealand Courts have taken to finding a duty of care in novel situations. With regard to the current trend of allowing a cause of action in negligence where rights and duties already exist, the Board restricted itself to this statement:<sup>19</sup>

The House of Lords has warned against the danger of extending the ambit of negligence so as to supplant or supplement other torts, contractual obligations, statutory duties or equitable rules in relation to every kind of damage including economic loss....

The limited impact *Downsview Nominees* is likely to have on the general approach to negligence in New Zealand has been illustrated by the recent Court of Appeal decision in *Connell v Odlum*.<sup>20</sup> There, Thomas J reaffirmed the *Anns v Merton London Borough Council*<sup>21</sup> two-stage test, and cited *Downsview Nominees* as an example of policy considerations that may negate a prima facie duty of care.<sup>22</sup>

It is hoped that *Downsview Nominees* will not be confined to the nebulous realm of policy considerations in stage two of the *Anns* test. The decision shows that the *Anns* test is too blunt an instrument to recognise distinctions such as those between a receiver's duties before the decision to sell is made, and those owed after the decision. It should bring to the Court's attention the possibility of "confusion and injustice" when the law of negligence is extended to smother clear and precise duties that have developed for a particular commercial relationship.

Simon R. G. Judd

*Cossey v Bach* [1992] 3 NZLR 612. High Court. Auckland. Fisher J.

At a time when equity and the constructive trust are increasingly being used to affect property distribution on the failure of a de facto relationship, the decision in *Cossey v Bach*<sup>1</sup> is valuable for its statement of the principles on which courts will intervene to effect justice between the parties. The facts of the case can be briefly stated. The plaintiff had obtained a divorce from the defendant in late 1980 without resolving issues of matrimonial property. In March 1989, the plaintiff received \$660,000 in Lotto winnings, and on the day he collected this sum the couple resumed cohabitation. As well as the Lotto winnings, the plaintiff brought to the relationship \$36,000 received from his ex-employer by way of accumulated super-annuation entitlement. For her part, the defendant had an interest in a home unit worth \$5000.

<sup>19</sup> Supra at note 1, at 525.

<sup>20</sup> [1993] 2 NZLR 257.

<sup>21</sup> [1978] AC 728.

<sup>22</sup> Supra at note 20, at 265.

<sup>1</sup> [1992] 3 NZLR 612.

In the first months of the renewed relationship the parties purchased substantial assets, including a new house, a Ford van, chattels and investments. Although the funds for these purchases came from the proceeds of the Lotto win and the plaintiff's superannuation, the ownership of the chattels was recorded in their joint names. In the time they were together, the defendant made domestic contributions to the relationship, including the provision of child care services. After fourteen months, the couple again separated.

Two main issues were addressed in the case. First, the classification of the parties' property under the Matrimonial Property Act 1976, and secondly, the principles governing the division of property at the termination of a de facto relationship. With regard to the first of these, the problem was whether property acquired during a de facto relationship, but after the dissolution of a prior legal marriage, could be matrimonial property for the purpose of an outstanding matrimonial settlement. Fisher J concluded that:<sup>2</sup>

[T]he Act rests on the general assumption that the matrimonial property falling for division under the Act will be directly or indirectly traceable to property created or used during the legal marriage partnership itself. On that view, a subsequent partnership in the nature of de facto marriage could not qualify as a "marriage partnership" and could not give rise to fresh matrimonial property calling for division under the Act.

As no issue of matrimonial property arose, his Honour examined the relevant principles of the common law.

Fisher J discussed at some length the decision of the Court of Appeal in *Gillies v Keogh*.<sup>3</sup> His Honour considered that the main focus of *Gillies v Keogh* was the situation where legal title to the property was vested in one partner, while the other made domestic contributions in the course of their relationship. It was thought that the present facts were radically different, as the legal ownership was vested in both parties, and his Honour attempted to set the core principles of *Gillies v Keogh* into a wider context to deal with this new situation.

The major decisions from New Zealand and other Commonwealth jurisdictions, dealing with de facto unions and the constructive trust, were examined. From these cases, Fisher J advanced ten principles.<sup>4</sup> The writer has attempted to reduce these to seven basic rules:

- (i) prima facie, the legal title is taken to reflect beneficial interests;
- (ii) unequivocally expressed intentions as to beneficial interests either made by the party holding the legal title, or that are common to both parties, will continue to be determinative, as long as they are still pertinent to the circumstances currently before the court;
- (iii) in the absence of a governing expression of intention, a convenient starting point may be to ascertain ownership according to traditional proprietary principles;

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<sup>2</sup> Ibid, 622.

<sup>3</sup> [1989] 2 NZLR 327.

<sup>4</sup> Supra at note 1, at 631-633.

- (iv) ownership determined provisionally under principles (ii) or (iii) will then be subject to any reasonable expectations by one party that she or he would receive an interest or greater interest in the property of the other;
- (v) for the purpose of reasonable expectations, contributions may be of an intangible nature and have little measurable value. They need not be traceable to the property in dispute;
- (vi) the quantum of a successful claim will be determined first by giving priority to any overriding expression of intention, secondly by reference to the parties' respective proprietary contributions to the property, and thirdly by reference to any reasonable expectations; and
- (vii) once the quantum of the claim has been determined, the remedy may take the form of an interest in the disputed property or a monetary award in lieu thereof.

On the facts, his Honour found the plaintiff had exclusive ownership of the investments, while the defendant retained a ring gifted to her and the chattels she brought to the home. She was also entitled to a fifteen percent interest in the house, the Ford van and the purchased chattels.

The value of this judgment is in the structure it attempts to give to an often confused area of the law. In general, the conclusions reached are both accurate and insightful. However, the writer would question his Honour's contention in the fifth principle that the domestic contributions made need not be traceable to the property in dispute.

Fisher J draws a distinction between "proprietary contributions" to the acquisition of property and "marital contributions". It was considered that the former were relevant for the purpose of establishing *prima facie* interests under a resulting trust, and the latter as "likely to provide the principal basis for a reasonable expectation."<sup>5</sup> Relying on Canadian authority<sup>6</sup> his Honour concluded that:<sup>7</sup>

[F]or the purpose of reasonable expectations, it will not be necessary to show any causative link between the domestic activities or other contribution of the claimant on the one hand and the acquisition or enhancement of the property in dispute on the other.

It is doubtful whether the Canadian authorities relied upon can be used to support this view. Although Canadian courts have adopted a more relaxed approach to the requirement of a factual connection, it could not be said that they have abandoned completely the requirement of a "causative link". In fact, the

5 Supra at note 1, at 630; see also *Lanyon v Fuller* (1988) 4 FRNZ 134; *Edwards v Prewett* (1988) 4 FRNZ 351; *Partridge v Moller* (1990) 6 FRNZ 147. It was accepted in these cases that domestic services are capable of constituting indirect contributions to property.

6 His Honour refers to the authorities mentioned in *Gillies v Keogh*, supra at note 3, which included; *Pettikus v Becker* (1980) 117 DLR (3d) 257 (SCC); *Sorochan v Sorochan* (1986) 29 DLR (4th) 1 (SCC); *Everson v Rich* (1988) 53 DLR (4th) 470 (Sask CA).

7 Supra at note 1, at 630.

leading case of *Sorochan v Sorochan*<sup>8</sup> expressly affirms that the services provided must have a “clear proprietary relationship” to particular assets.<sup>9</sup>

To further support his position, Fisher J relies on the acceptance by Canadian courts that spousal services per se constitute enrichment. This observation is correct but, with respect, the inference that unjust enrichment equates with the constructive trust cannot be justified. Dickson CJ in *Sorochan v Sorochan* noted that the restitutionary constructive trust is an important remedy for the substantive wrong of unjust enrichment, but not the only remedy; “[o]ther remedies, such as monetary damages, may also be available”.<sup>10</sup>

This point was developed by the Saskatchewan Court of Appeal in *Everson v Rich*.<sup>11</sup> In that case, the Court held that there was an insufficient link between the plaintiff’s provision of domestic services and the property in dispute to support the imposition of a constructive trust. However, the plaintiff was granted the alternative remedy of monetary damages, which could be measured by the market price of the services provided or the increased value of the defendant’s assets.<sup>12</sup>

Some support for the position of Fisher J can be found in the wider context of restitutionary actions. It has been suggested that the requirement that contributions have some causative link to the property may no longer be applicable to the restitutionary proprietary action.<sup>13</sup> This view is premised on a belief that the defendant is equally enriched whether or not the enrichment, namely the plaintiff’s contribution, can be identified *in specie*. Any enrichment will have swollen the general value of the defendant’s asset pool. This approach received some support in the case *Liggett v Kensington; Re Goldcorp Exchange Ltd.*<sup>14</sup> There, the majority of the Court of Appeal granted the claimants a proprietary interest in the property notwithstanding the lack of a causal connection between their contributions and the property. However, it does not follow that the causal connection requirement ought to be waived as a condition precedent to constructive trust relief in the domestic situation.<sup>15</sup>

A contrary view to that offered by Fisher J was given in the recent case *Nash v Nash*.<sup>16</sup> Distinguishing the commercial situation, where a purer tracing process

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<sup>8</sup> Supra at note 6.

<sup>9</sup> Ibid, 10. In that case, a proprietary relationship was established on the basis that the contributions of the plaintiff prevented the property in question from diminishing in value.

<sup>10</sup> Ibid, 7.

<sup>11</sup> Supra at note 6.

<sup>12</sup> Ibid, 475.

<sup>13</sup> See Goff & Jones, *The Law of Restitution* (4th ed 1986) 77-81; see also Litman, “The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust” (1988) 26 Alberta LR 407, 457.

<sup>14</sup> [1993] 1 NZLR 257 (CA).

<sup>15</sup> See Paciocco, “The Remedial Constructive Trust: A Principled Basis for Priorities Over Creditors” (1989) 68 Can Bar Rev 315, 334 n100.

<sup>16</sup> High Court, Auckland. 3 September 1992 CP 2900/88 Thorp J.

ought to be required to confer proprietary relief,<sup>17</sup> Thorp J emphasised that although a relatively loose factual connection between the domestic services provided and the disputed property will be sufficient, there must still be some connection established. It is submitted that this is the preferable view.<sup>18</sup>

It is acknowledged that the equitable rules of tracing, and other requirements of causation, are unlikely to advance justice in the area of property disputes on the failure of a de facto relationship. Fisher J's proposition that contributions need not be traceable to the property in dispute must, however, be treated with caution. In the interests of those partners who seek to preserve property ownership, it is submitted that a requirement of some loose factual connection is to be preferred. This would afford the legal owner at least some measure of control over the ownership of his or her property.

Jane M. Scott

*Television New Zealand Ltd v Prebble*, Court of Appeal. 14 May 1993, CA 161/92. Cooke P, Richardson, Casey, Gault and McKay (dissenting) JJ.

On 29 April 1990 Television New Zealand Ltd ("TVNZ") in its "Frontline" programme screened a documentary entitled "For the Public Good", which dealt with the sale of New Zealand State-Owned Enterprises. Mr Prebble alleged that the programme suggested that as Minister of State-Owned Enterprises he conspired to sell state assets to business leaders on unduly favourable terms and with the motive of securing donations to the New Zealand Labour Party. In defamation proceedings Mr Prebble claimed \$1,350,000 in general and punitive damages.

TVNZ pleaded several defences. It denied that the programme conveyed the meaning alleged, but that if it did it was true and was fair comment on a matter of public interest. To support its plea of fair comment, TVNZ wished to produce transcripts of Mr Prebble's speeches within Parliament, to show he was "saying one thing inside the House and doing another", and evidence that he aided the speedy enactment of legislation to implement this conspiracy. The case arose by

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17 In this respect, Thorp J would appear to be repeating the view he expressed at first instance in *Liggett v Kensington*, supra at note 14. It is doubtful that his interpretation of the commercial situation survives the appeal in that case.

18 In *Phillips v Phillips* (Court of Appeal, 26 February 1993 CA 369/91) the Court of Appeal had the opportunity to resolve this divergence in opinion. No substantial review of the case law since *Gillies v Keogh* was attempted, although Cooke P did conclude that "the reasonable expectations test appears to be working reasonably well", (at pp16-20).

way of an interlocutory application by Mr Prebble to strike out defence pleadings based on this evidence, claiming that it was protected by parliamentary privilege.

In the High Court, Smellie J held that the production of such evidence would breach parliamentary privilege.<sup>1</sup> He therefore excluded the evidence from trial. He recognised that this might work an injustice on the defendant, but considered that the public interest at stake outweighed the interests of the private citizen, and allowed Mr Prebble to continue his action.

The Court of Appeal agreed<sup>2</sup> that the evidence at issue was protected by parliamentary privilege, but by a majority (McKay J dissenting) held that to exclude the evidence would deny the defendant a fair trial. Mr Prebble's action was therefore stayed for a period of three months, allowing him time to attempt to gain a waiver of the House's privilege.

### Parliamentary Privilege

The question at issue was novel in the area of defamation law: can a member of Parliament sue in defamation yet still rely on parliamentary privilege to deny the defendant evidence to support its case? In tackling this problem, the Court looked first to the origins of the freedom of speech enjoyed by members of Parliament. Typically, this privilege is said to derive from article 9 of the Bill of Rights 1688.<sup>3</sup> It provides that:

[T]he freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

However, Cooke P considered that the source of this privilege could also be traced to two other sources; namely, the intrinsic necessity for the effective functioning of any legislative assembly that it be free to discuss matters and conduct its business as it sees fit, and a principle of mutual restraint exercised by Parliament and the Courts in respect of their separate spheres of activity.<sup>4</sup>

There was agreement within the judgments as to the application and meaning of this privilege. The privilege was recognised as having a very wide basis, it having been said:<sup>5</sup>

[W]hatever is done within the walls of a House of Parliament must pass without question in the Courts.

However, the privilege is not a blanket ban on the admission of evidence, and the Court noted the movement towards a narrowing of the privilege.<sup>6</sup> For there to be a breach, there must be a "questioning" of parliamentary material or the actions of its

1 *Prebble v Television New Zealand Ltd*, High Court, Auckland. 24 July 1992 A 785/90 Smellie J.

2 *Television New Zealand Ltd v Prebble*, Court of Appeal. 14 May 1993 CA 161/92.

3 In New Zealand, this has the force and effect of statute. See the First Schedule to the Imperial Laws Application Act 1988.

4 *Supra* at note 2, at p5.

5 *Ibid*, p5, quoting from *Bradlaugh v Gossett* (1884) 12 QB 271; *Stockdale v Hansard* (1839) 9 Ad & E 1; 112 ER 1112.

6 For example; *Hyams v Peterson* [1991] 3 NZLR 648 (CA); *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42 (HL); First Schedule to the Defamation Act 1954, and the new Defamation Act 1992.



members, and in the cases where evidence of parliamentary origin had been admitted there was no such questioning.

Although the element of questioning is vital to a breach of privilege, the Court found it difficult to give a precise definition to this term. However, it is clear that the motives of a member for speaking or voting in a particular way cannot be scrutinised, even if it is suggested that the member's motives were proper.<sup>7</sup>

The Court then considered the nature of the privilege in terms of who enjoys it, and can enforce its protection. It was held that the privilege exists on two distinct levels: there is the right of the House in its corporate capacity to be free from any questioning of its debates and proceedings, and there is a correlative privilege inherent in each member as an individual.

In terms of ensuring that the purposes of parliamentary privilege are met, this ruling is of fundamental importance. It means that the House does not have exclusive control of the privilege and therefore cannot deprive an individual member of his or her immunity by electing to waive it in a particular case. This is vital, as to hold otherwise would undermine the very purpose of the privilege, namely to keep members free from any civil or criminal penalties for what they say in the House.<sup>8</sup>

Applying these conclusions to the facts, the Court was of the opinion that:<sup>9</sup>

By alleging inconsistency between what was said in the House and what was said and done outside Parliament TVNZ necessarily questions whether Mr Prebble acted properly in Parliament in saying what he is alleged to have said.

Therefore, there was a questioning of Mr Prebble's behaviour in the House, and to admit such evidence at trial would breach his personal privilege.

The Court also recognised that the material was of a highly contentious nature. It would be used to impugn not only the activities of the plaintiff, but also other members of the Fourth Labour Government. It therefore bore on the activities of the House as a whole and its production at trial would breach the privilege of the House in its corporate capacity.<sup>10</sup>

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7 Supra at note 2, at p9 per Cooke J. This is contrary to Popplewell J's dictum in *Rost v Edwards* [1990] 2 QB 460, 475.

8 Ibid, p8. His Honour relies on the recent case of *Pepper (Inspector of Taxes) v Hart*, supra at note 6. Another method of achieving this result would be to hold that the corporate privilege of the House cannot be waived, but the Court rejected this approach; *ibid*, p12.

9 Ibid, p6 per Gault J.

10 It was also recognised that this case could amount to an inquisition into the policies of the Fourth Labour Government. Sir Ivor Richardson was of the view that this would be more appropriately traversed by a Commission of Inquiry than in adversarial proceedings in a court of law; *ibid*, p14 per Richardson J.

## Waiver of Parliamentary Privilege

The above conclusions are not surprising, involving the application of well recognised principle. A point of greater interest arises in the Court's treatment of the issue of waiver.

Although the Court does not analyse the issue in this way, the practical relevance of the parties' ability to obtain a waiver depends on the view the Court takes of the importance of the privileged evidence to the defendant's case. If exclusion of the evidence will prejudice the defendant's ability to gain a fair trial, the action might be stayed. It would therefore be incumbent on Mr Prebble to obtain a waiver to enable TVNZ to mount a reasonable defence to his action. However, if exclusion of the evidence will not deny TVNZ a fair trial, the issue of waiver is largely irrelevant. TVNZ may desire a waiver to strengthen its case, but it is not necessary for the action to proceed, and no party will be substantially disadvantaged by a failure to obtain one.

With regard to the effect exclusion of the evidence would have on the trial, the Court concluded:<sup>11</sup>

[I]t is impossible to be confident that justice can be done if the Court is precluded from any close examination of Parliamentary debates or proceedings.

Therefore, they considered that a waiver of the privilege by the affected parties would be needed for the action to continue.

McKay J dissented from this ruling, reasoning that:<sup>12</sup>

An experienced publisher should be aware of the danger of making defamatory statements or seeking to justify them in circumstances where it cannot prove that its statements are true.

As such, it was not obvious to his Honour that to allow the case to continue would result in an injustice. However, with the majority, he did examine the issue of waiver.

Cooke P and Casey J considered that where a member initiates proceedings and pursues the action in the face of a defence reasonably relying on statements made in the House, the member "must be held to waive his personal privilege."<sup>13</sup> Sir Ivor Richardson and McKay J reached the same conclusion, but on the basis of *Wright & Advertiser Newspapers Ltd v Lewis*.<sup>14</sup> They decided that a defendant in a defamation action brought by a member of Parliament can plead matters apparently in breach of parliamentary privilege, because in so doing a defendant cannot be regarded as questioning in any real sense the proceedings of Parliament. Therefore, the evidence could not be excluded on the basis of Mr Prebble's own personal privilege.

With respect, the reasoning of Cooke P seems preferable. It is artificial to say that there is no questioning of the member when he or she initiates the action, but

<sup>11</sup> Ibid, p16 per Cooke P.

<sup>12</sup> Ibid, p13 per McKay J.

<sup>13</sup> Ibid, p12 per Cooke P.

<sup>14</sup> (1990) 53 SASR 416.

where the member is being sued by another party the evidence does question the member's actions. The fact of who brings the proceedings is not relevant to whether the evidence questions actions in Parliament. It is only relevant to whether the privilege has been waived.

With regard to the corporate privilege of the House, the Court found that it had not been waived. In the absence of an express waiver, the Court was not prepared to admit the material as evidence and it was thus decided that Mr Prebble's suit should be stayed for a period of three months. This would allow a waiver to be obtained from the House and any individual members who might be affected by the material.<sup>15</sup>

Both of these conclusions necessarily involved a determination of whether waiver of the privilege is possible at all. This issue was considered in the context of the corporate privilege, but logically it is also relevant to the personal privilege.

Cooke P was firmly of the opinion that the House is competent to waive its own privilege. In Cooke P's discussion of parliamentary privilege he describes the source of immunity as a tripartite combination of logical necessity, article 9 of the Bill of Rights 1688,<sup>16</sup> and judicial restraint. Using these sources, the President decreases the significance of article 9 as a source of the privilege, and thereby circumvents (albeit *sub silentio*) a possible argument based on *Fitzgerald v Muldoon*<sup>17</sup> that waiver by a resolution of the House, a mere executive act, would not be competent to waive the statutory effect of article 9.

McKay J doubted that waiver was possible, giving no reasons but presumably his Honour had *Fitzgerald v Muldoon* in mind. Richardson and Casey JJ argued that it is for the House to decide whether waiver is possible, not a court. Therefore, the conclusion of the majority is that waiver might be possible, but Cooke P is the only judge to positively decide that the privilege is capable of being waived. Cooke P must be seen as dissenting on this point.

### The New Zealand Bill of Rights Act 1990

Cooke P, in an enigmatically concise passage, considered the effect of the New Zealand Bill of Rights Act 1990 on the privilege and the question of waiver. Essentially, the President recognised the problem that if article 9 of the Bill of Rights 1688 were given a strict interpretation it would be a breach of parliamentary privilege to make fair comment on anything that occurred inside the House. There would then be a restriction on the right to freedom of speech under s 14 of the New

15 It was recognised that Mr Prebble might have difficulty in obtaining these waivers. This proved to be correct, as the House Privileges Committee refused to waive its privilege. It seems that the Committee considered itself incapable of waiving the privilege, which is contrary to Cooke P's decision. This has apparently spurred Mr Prebble to lodge an appeal with the Privy Council. See "House Privilege Stays", *New Zealand Herald*, 23 June 1993, section 1, 2.

16 Article 9 of the Bill of Rights 1688 "has not infrequently been given as the ground *also* of the immunity." Emphasis added. *Supra* at note 2, at p5 per Cooke P.

17 [1976] 2 NZLR 615 (CA).

Zealand Bill of Rights Act.<sup>18</sup> Cooke P avoids this result by reading article 9 consistently with this right. Where a member sues in defamation, the member is deemed to have waived his or her individual privilege. This is a reasonable interpretation of article 9 and would therefore be preferred under s 6 of the New Zealand Bill of Rights Act.<sup>19</sup>

Article 9 need not be interpreted in a way leaving a member of Parliament free to sue a person in circumstances which would severely limit that person's rights under s 14.

However, when the member of Parliament is the defendant in the defamation action, the privilege will not be waived unless the member positively decides to do so. The protection here can be justified as a reasonable limit on the right in s 14,<sup>20</sup> or it can be said that article 9 prevails by virtue of its status as an enactment.<sup>21</sup>

### Waiver and Non-assertion

Some comment is made by the Court, most notably in the decision of Cooke P, on whether a failure to assert the privilege can be equated with a waiver of that privilege.

The mandatory rule laid down in article 9 of the Bill of Rights 1988 that a Court is not to admit evidence if so doing will question proceedings of Parliament would seem to place the burden of enforcement on the courts rather than the House. As such, it should not depend on the potential breach of privilege being brought to the court's attention by the parties involved.

It would also follow that there is a presumption in the absence of a positive waiver from the House, or an affected member, that such evidence will be excluded. A mere failure to assert the privilege cannot be equated with a positive waiver. This would accord with the decision of the Court that a waiver of the House is needed before the evidence could be admitted.

If this is correct, then it would seem that the apparent questioning of the House in *Adam v Ward*<sup>22</sup> and *News Media Ownership Ltd v Finlay*<sup>23</sup> should not be justified on the basis of there having been no assertion of the privilege, as Cooke P suggests. Perhaps these cases must be considered as having been decided *per incuriam*.

<sup>18</sup> Section 14 provides, "[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinion of any kind in any form."

<sup>19</sup> *Supra* at note 2, at p18 per Cooke P.

<sup>20</sup> See 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, 339; Cooke P would disagree, *Ministry of Transport v Noort* [1992] 3 NZLR 260, 271 (CA).

<sup>21</sup> Section 4 New Zealand Bill of Rights Act 1990.

<sup>22</sup> [1917] AC 309.

<sup>23</sup> [1970] NZLR 1089 (CA).

**Conclusion**

Finally, it is important to consider the general effect the decision will have on the ability of members of Parliament to sue for defamation, and on the media's ability to publish fair comment on material of parliamentary origin.

The Court was faced with the possibility that by excluding the evidence a publisher might well lose its defence to a defamation action, and as such could not make fair comment on material originating in the House. To avoid this harsh conclusion, the Court decided to stay the proceedings unless and until the privilege is waived by the House and any individual members affected. The practical difficulty in obtaining such a waiver leads to the equally harsh position that members of Parliament may often effectively be stripped of the ability enjoyed by other citizens to protect their reputation and character. It would seem that:<sup>24</sup>

In a democracy a price has to be paid for freedom of speech both in and out of Parliament ....

*Matthew D. J. Conaglen*

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<sup>24</sup> *Supra* at note 2, at p17 per Cooke P.

## BOOK REVIEWS

**PUBLIC LAW IN NEW ZEALAND: CASES, MATERIALS, COMMENTARY, AND QUESTIONS**, by Mai Chen and Geoffrey Palmer. Oxford University Press, Auckland, 1993. xxviii and 1016pp.

**CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND**, by P.A. Joseph. Law Book Company, Sydney, 1993. lvi and 951pp.

Since 1913 there has not been a general text for public law in New Zealand. Hard to believe isn't it?

So begins the media release for Philip Joseph's *Constitutional and Administrative Law in New Zealand* ("Joseph"). Now with this text and Mai Chen and Geoffrey Palmer's *Public Law in New Zealand* ("Chen and Palmer") there are two. Whether through luck or good management these books are largely complementary. However, while both are aimed mainly at law students taking the compulsory public law course, they are very different books. Chen and Palmer is designed as a teaching aid and is formatted to inculcate what the authors perceive as the essential tools to understand and practice public law. To a large extent one's reaction to it will depend on whether one shares this perception. In contrast, Joseph is a textbook which aims to provide a commentary on the rapidly changing New Zealand constitution. It covers, although from a specifically New Zealand perspective, similar material to that found in standard English texts such as *O. Hood Phillips*<sup>1</sup> and that of Wade and Bradley.<sup>2</sup>

Whilst Joseph is no slim volume, Chen and Palmer is a veritable leviathan of a book, at well over one thousand (large) pages. While it may appear perverse to criticise a text for being too complete, there are times when one feels that the authors have gone too far in their selection of material. The point of a casebook is, after all, to bring together relevant and related materials and reproduce them in an easily accessible format. The primary function should be utility. The task of the compilers is to strike a happy medium between what is selected and what is rejected.

Chen and Palmer is designed to be used in conjunction with a course taught via the socratic method of question and answer. Material is presented followed by questions intended to provoke thought and analysis. Typically the questions direct the student to consider why a particular decision was reached and by what reasoning, or to compare and evaluate competing ideas. One may have some sympathy for students who are on occasion required to make some fairly

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1 Phillips & Jackson, *O. Hood Phillips' Constitutional and Administrative Law* (7th ed) 1987.

2 Wade & Bradley, *Constitutional and Administrative Law* (10th ed) 1985.

fundamental judgments (for instance “[w]hat role should the law play in democracy?”<sup>3</sup>). However, the questions are deliberately open and the point of asking them is to promote discussion and invite opinions, and if on occasion the reader is forced to question basic assumptions there is no harm in that.

An inevitable result of a book such as this is that the authors, through their selection of material and the questions they pose, may enshrine particular opinions. This is more apparent in some areas than in others. Obviously where there is settled authority and basic cases to be cited the role of the authors is not so apparent; in other areas, however, the hands of Chen and Palmer (and one suspects more Palmer’s) are visible. The most obvious example of this is Part V, “Public Law Tools”. The section begins with an article by Palmer on alternative methods of public law<sup>4</sup> which makes some highly relevant points. Lawyers are prone to court-centred tunnel vision and should not blind themselves to the range of tools available to them and their clients. As the article points out, often what is desired in public law is a change in policy and usually the courts are not the most effective instruments through which to accomplish this (as is demonstrated by the cases *CREEDNZ Inc v Governor-General*<sup>5</sup> and *Ashby v Minister of Immigration*<sup>6</sup>). Part V is presented in order to correct this legal blindness. Material is presented on the Ombudsman (chapter twenty-six), the Official Information Act 1982 (chapter twenty-seven), the media (chapter twenty-eight), political parties (chapter twenty-nine) and regulatory power (chapter thirty).

What the authors intend to teach in Part V is how to use these new public law tools. This is reflected in the questions they ask. For instance: “[h]ow can lawyers use news to their clients’ best advantage?”, “[s]hould you speak for your client to the media or encourage your client to speak?” and “[s]hould lawyers write press releases or get public relations consultants to write them?”<sup>7</sup> These are all significant, weighty questions but the material provided gives very little guidance on answering them. The obvious rejoinder is that the authors are encouraging students to think for themselves. This is reasonable enough, but the level of thinking required is far beyond the scope of the material given (which is merely extracts from J.S. Mill and Palmer and a couple of articles on how journalists prepare a news-story) and one feels that this particular issue raises more questions than the authors consider. A significant question which is not asked, for example, is “is it proper for lawyers to manipulate public opinion through the media?” The authors discuss the practicalities of the media serving the law, however no attempt is made to consider the ethical basis of the relationship.

Another problem with Part V is the chapter on political parties. In his article “The New Public Law”<sup>8</sup> one of the questions which Palmer asks (expecting a

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3 At 50.

4 Palmer, “The New Public Law: Its Province and Function” (1992) 22 VUWLR 1.

5 [1981] 1 NZLR 172 (CA).

6 [1981] 1 NZLR 222 (CA).

7 All at 842.

8 *Supra* at note 4.

negative answer) is “do [lawyers] have available the constitutions of the political parties?”<sup>9</sup> Chapter twenty-nine rectifies this shortcoming. The constitutions of both the National and Labour parties are reproduced in full (all 128 and 267 sections respectively). It is somewhat surprising that students are expected to read them in their entirety. This is akin to teaching someone a language by giving them a dictionary. As with this whole section the idea behind the individual chapters is good but the execution is curious. Questions are asked concerning how policy is made by the two parties and what differences there are between them, and on how candidates are selected, but these only require the comparison of two or three sections, not entire constitutions.

Chen and Palmer’s particular conception of public law is further evidenced by their treatment of administrative law. Recognising that it is now a separate topic in its own right, administrative law (Part VI) forms something of an appendix to the book. A large part of this section comprises a case study of *Daganayasi v Minister of Immigration*<sup>10</sup> which reproduces a chain of letters and memoranda from doctors, civil servants, politicians, and lawyers. This is an interesting way of presenting the material which is generally unavailable to students and provides a more “human” perspective on the case. Considering the previous section, it appears that this particular presentation is intended to demonstrate the relevance of the new public law tools. If so, it is a point well made; however, one feels that in order to make it, administrative law has been brushed over somewhat. This is particularly noticeable when Chen and Palmer’s treatment of administrative law is compared with Joseph’s, for whom administrative law constitutes nearly a quarter of the text, with a chapter on each of Lord Diplock’s three heads of review in *Council of Civil Service Unions v Minister for the Civil Service*<sup>11</sup> (illegality, irrationality and procedural impropriety). Joseph’s treatment of administrative law is not as encyclopaedic as Taylor’s<sup>12</sup> but is more general in its approach and as a result more accessible.

Joseph’s *Constitutional and Administrative Law in New Zealand* is a thorough and clearly written text on New Zealand’s constitution, from colonisation to the New Zealand Bill of Rights Act 1990. Joseph identifies his audience as being predominantly students, but he claims that the book is possessed of a subject matter which is “amply rich enough to furnish insights and arguments of relevance for legal practitioners.”<sup>13</sup> This is an accurate assessment, although for the most part the book does not aim to present a list of legal principles which may arise in practice; rather it is a scholarly discussion of constitutional law, a discussion which inevitably turns at times to the philosophical.

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<sup>9</sup> Ibid, 11.

<sup>10</sup> [1980] 2 NZLR 130 (CA).

<sup>11</sup> [1985] AC 374 (HL).

<sup>12</sup> Taylor, *Judicial Review: A New Zealand Perspective* (1991).

<sup>13</sup> At v.



The book's general approach is based more on such discussion than on a declarative statement of the law. The format of chapters and sub-headings rather than paragraphs makes it a unified and flowing text, easy and pleasant to read. However, as the sub-headings are not numbered and the contents pages simply lists the twenty-six chapter headings it is often difficult to locate a desired topic – a significant and irritating shortcoming. A possible reason for this is that Joseph sees his book not so much as a reference text but as a commentary on New Zealand's constitutional heritage. It is intended to be read chapter by chapter rather than simply used to discover an isolated point of law. Constitutional law invites this more general style of writing as it is not readily broken down into discrete topics.

No criticism is implied when it is said that Joseph is a basic text. Constitutional law is the foundation on which legal knowledge is built. With this in mind Joseph assumes no legal background and sets out in readily comprehensible terms the issues involved in any particular area. Often this involves lengthy discussion of issues of historical and constitutional (but not necessarily legal) significance. An inevitable result is that from the practitioner's point of view much of the text will appear irrelevant. However, constitutional law is an historical discipline and cannot be fully understood without that context. Illustrative of this is Joseph's treatment of the vexed issue of parliamentary sovereignty and constitutional entrenchment (chapters fourteen and fifteen). Discussion begins with reference to Coke CJ in *Dr Bonham's Case*<sup>14</sup> which is contrasted with nineteenth century Diceyan positivism. This is followed by an historical analysis of the struggle between Parliament and the Stuart kings over taxation and concludes with a discussion of what the current legal position might be. However, after two chapters of in-depth review of authority and history conclusive answers are not provided and the topic remains open (although Joseph clearly subscribes to the "manner and form" school of constitutional entrenchment).

In an otherwise comprehensive and impressive work one complaint stands out, namely Joseph's treatment of what Chen and Palmer euphemistically term "the Maori Dimension".<sup>15</sup> In his discussion on the Treaty of Waitangi Joseph is perhaps guilty of spending too much time on where the law has been and not enough on where it stands at present and might go in the future. There appears to be some reticence on his part to make any particular argument. For example, in an examination of *New Zealand Maori Council v Attorney-General*<sup>16</sup> he states only what the judgment says and does not attempt any analysis or criticism; furthermore he refers to only one extra-judicial comment on the case and then only by footnote. What is missing is a discussion of more radical treatments of the Treaty<sup>17</sup> or even any reference to them. In contrast Chen and Palmer provide several sources and a

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<sup>14</sup> (1610) 8 Co Rep 113b; 77 ER 646.

<sup>15</sup> At 293.

<sup>16</sup> [1987] 1 NZLR 641 (CA).

<sup>17</sup> As is found, for example, in Kelsey, *A Question of Honour? Labour and the Treaty 1984-1989* (1990).

bibliography of Treaty writings. Given the dramatic shift in jurisprudential consciousness which has occurred in recent decades it is surprising (and disappointing) that a text on New Zealand's constitution should devote so little time to the Treaty.

One might also feel slightly cheated by Joseph's treatment of the New Zealand Bill of Rights Act 1990. He offers a general discussion of the procedural interaction of ss 3, 4, 5, 6 and 7, however no attempt is made to consider the substantive rights affirmed in the Act on account of its infancy at the book's publication and the consequent lack of a sufficient body of case law to examine.

These books are long overdue and fill what has been a large and surprising gap in New Zealand legal literature. In both Joseph and Chen and Palmer we have texts which recognise New Zealand's constitutional idiosyncracies and which, despite some shortcomings, should make a significant contribution to legal education. While Joseph will be most suitable for those seeking a broad overview of and commentary on New Zealand's constitution, Chen and Palmer, depending on its acceptance and use by individual lecturers, should form the basis of a stimulating and challenging, if not always ideally well-rounded, public law course.

*Thomas Biss*

**EMPLOYMENT LAW GUIDE.** Butterworths, Wellington, 1993. xx, 758, 46 and 20pp.

In the preface to this book, which covers the legal developments under the Employment Contracts Act 1991 (the "ECA"), the authors comment that:<sup>1</sup>

Whatever one's views as to its content, in style the [ECA] is brief (for a statute), logically organised and simply written.

The same could be said of the *Employment Law Guide*. Having been "prepared principally for students and teachers in courses relating to employment law and industrial relations",<sup>2</sup> brevity, logical organisation and a clear and concise writing style are necessarily important objectives. These objectives have been achieved primarily by the format of annotated legislation which gives the book its well-organised structure and makes referencing extremely quick and easy.

However, this format is not without its drawbacks. Despite (or because of) its inherent logic it may be seen as rather narrow and unrealistic. This is especially

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1 At vii.

2 Ibid.

evident in the annotations to sections whose ambit is unclear and seemingly complementary. For example, in a personal grievance action, remedies for future earnings may be awarded under both ss 40(1)(c) and 41.<sup>3</sup> In such a situation the relevant case and statute law is set out in both parts of the text dealing with the two sections in order to avoid the possible connections remaining unnoticed by a reader considering the commentary on just one of the sections. Repetition of issues is a drawback made inevitable by the book's format.

An acceptable compromise which has been reached is to combine the narrow approach of annotated legislation with commentaries which provide an overview of each part of the ECA. Topics covered include bargaining, personal grievances, freedom of association, enforcement of employment contracts, and strikes and lockouts. These commentaries serve as useful summaries of the nine parts of the ECA and will be of great assistance to student and teacher alike.

Of further assistance are the five appendices which together make up over a third of the book. These deal with such topics as the common law principles governing the contract of employment and the law relating to wages, unions and picketing. While in parts they tend to repeat sections of the main body of the book they do so probably for the sake of completeness and are, in any case, extremely thorough and comprehensive examinations.

A criticism which can be levelled at the book is that its content and approach is purely technical and comes at the expense of a more wide-ranging discussion of the policy issues behind and arising from the changes wrought by the ECA. While this is not necessarily a major shortcoming given the unsettled state of employment law and the uncertainties which the ECA itself seems to have created, any discussion of recent legal developments should arguably include a consideration of their social ramifications. Discussion is generally limited to comparing current statutory provisions with provisions of the now repealed Labour Relations Act 1987 and then apparently only for the purpose of determining the applicability of precedent for interpretation and application of the current provisions. Depending upon the importance placed on such discussion in different employment law courses, this shortcoming may or may not detract from the book's appeal to students and teachers, to whom it is primarily directed.

On balance one can safely conclude that the *Employment Law Guide* has fulfilled its aim of providing "an up to date summary of legal developments under the [ECA]".<sup>4</sup> However, it is unfortunate that its technical merits are not complemented by a discussion of the policy issues relating to employment law.

Michael-John Loza

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3 However see now *Telecom South Ltd v Post Office Union (Inc)* [1992] 1 NZLR 275 (CA).

4 At vii.

**FAMILY LAW POLICY IN NEW ZEALAND**, Henaghan and Atkin (Editors). Oxford University Press, Auckland, 1992. xiii and 311pp.

Although there is a considerable literature on family law in New Zealand, much of it ignores the underlying factors which motivate the development of the law. This compilation of ten essays which approaches the subject from a specific policy perspective thus fills a significant gap in family law scholarship.

In the foreword Sir Ivor Richardson indicates the book's general approach:<sup>1</sup>

The various chapters usefully place the [family] legislation ... and particular family law topics in their historical, economic, and social setting.

Readers interested in the assumptions and values which underlie family law will find the essays particularly rewarding; however the book will be useful in a practical as well as purely academic context. If people are aware of the policies behind the law, they will be better informed about the direction in which family law is heading. Furthermore, a discussion about policy considerations is essentially a discussion about the intention of Parliament, invaluable for those in the legal profession. *G v G*<sup>2</sup> is an interesting example of the importance of understanding policy considerations in family law. In that case an applicant for a non-molestation order was the mother of the respondent, her son. The question at issue was whether the phrase "living together in the same household" contained in the Domestic Protection Act 1982<sup>3</sup> was wide enough "to include relationships such as parent and child".<sup>4</sup> After a careful examination of the authorities McGechan J found that it was not. The conclusion may have been different if his Honour had interpreted the section purposively, for it is clear that such a situation was intended to be covered by the statute.<sup>5</sup>

One of the strengths of the book is that the authors are not only lawyers. Social workers, anthropologists and pediatricians have also made valuable contributions. This is important because in an area as subjective as policy it is useful to have a multidisciplinary approach. Since the essays are strongly based upon the values and experiences of the writers, the reader should be prepared to challenge the conclusions drawn. The book does not seek to provide definitive answers to the questions raised but rather aims to determine the issues and provide informed commentary on them. Furthermore, each author has canvassed a wide range of references before drawing his or her conclusion. Since the content is by nature quite subjective the large bibliography allows the work to be seen as more of an authority on the issues it discusses.

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1 At ix.

2 (1988) 4 NZFLR 492.

3 Section 4.

4 *Supra* at note 2, at 497.

5 At 34.

The authors have all provided a probing and thoughtful analysis of the policies important in family law and it is heartening to see that many of the subjects dealt with are controversial. Matters discussed include the rights of same sex couples, surrogacy, abortion and de facto relationships. The chapters are devoted to the main areas of family law, such as financial support, family protection and matrimonial property, and each offer thought-provoking conclusions about the current law.

The book begins with an introduction to family law and definitions of the family unit. Interesting comparisons are drawn between the current "New Right" economic policies and how the government chooses to define the family unit. By drawing this comparison the authors of chapter one make the point that family law reflects the wider social, political and economic values of the time.

New Zealand family law text books frequently omit reference to Maori. This book attempts to redress the imbalance by including an essay on family law policy from a Maori perspective. The essay (chapter two) illustrates important differences between Maori and Pakeha culture and the effect these differences have had on the Maori family. There is also a well structured and detailed analysis of seven leading family law statutes from a Maori point of view; and the authors' conclusions reveal the extent to which the law has recognised – or rather failed to recognise – the Maori culture.

Arguably, however, there is room for further cultural analysis in the book, for New Zealand is no longer merely a bicultural nation. The family values of other cultural groups are becoming increasingly more important in our society and it may have been interesting to include a discussion of the significance of some of these values.

Also of merit is chapter four, "Protecting the Family". The chapter is divided into two parts. The first part severely criticises the way in which the Children, Young Persons, and Their Families Act 1989 operates with respect to child rights, however the criticisms are not adequately backed up. For example, the comment that the Act evolved due to pressure from certain groups is not substantiated and overlooks the influence of the general community during drafting. The second part of the chapter takes a new approach to domestic violence, comparing the rights of adults under domestic protection legislation with the rights of children. The authors' argument is that too often under the present structure it is the children who are being ignored. It is of note, however, that since this chapter was written there has been some important academic writing on the subject of domestic violence, for example the Busch report.<sup>6</sup> This indicates how quickly a book such as this can become of lesser authority.

It is encouraging to see the rights of children being discussed, for that is an area in which academic writing is lacking. In addition to the discussion in chapter four,

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6 Busch, Robertson & Lapsley, *Domestic Violence and the Justice System: a Study of Breaches of Protection Orders* (1992).

Bill Atkin's essay "Financial Support: the Bureaucratization of Personal Responsibility" (chapter five) considers the financial responsibility of parents under the Child Support Act 1991. Furthermore, in chapter three, "Legally Rearranging Families", Mark Henaghan discusses the vulnerability of the child where there are problems of family disunity. However, although Henaghan offers an insightful examination of the Family Court process his emphasis is on the adults in the process rather than the child, and whilst he discusses controversial issues, for example the imbalance of the negotiation process, he fails to note the problems of inequality of power with respect to a dispute between children and adults.

A feature of this collection of essays is that not only does each chapter fulfil its purpose of providing a critique of existing family law policies, but also alternatives and reforms are recommended where necessary. The reviewer was impressed by the commitment shown by the authors to put forward positive suggestions for reform; unfortunately, however, at times the tendency to criticise strongly outweighs comments in support of the positive aspects already present in the system. A notable example of this is the somewhat one-sided assessment of the Children, Young Persons, and Their Families Act 1989 in chapter two. The reader may therefore finish the book without a recognition that there are elements of the present family law structure which do provide consistency and fairness.

An important theme which runs throughout these essays is that there is no coherent family law policy. Rather, the writers suggest that family law develops in an ad hoc manner, depending upon the needs and values within society. As a result family law has a tendency to change rapidly, which means that this book will not be the last word on family law policy. Nevertheless it is refreshing to see such a comprehensive text on policy considerations, and for those who read it, it will provide an invaluable understanding about why family law has developed as it has, and how it may develop in the future.

*Marcus D. Hinkley*

**FREEDOM OF INFORMATION IN NEW ZEALAND**, by Ian Eagles, Michael Taggart and Grant Liddell. Oxford University Press, Auckland, 1992. lxiv and 661pp.

Since it came into effect, the Official Information Act 1982 (the "OIA" or "the Act") has had a major impact on the openness of official decision-making and action in New Zealand. This book, which comprehensively reviews the workings of the Act, is long overdue and should establish itself as the standard text on the OIA. The reason for its long genesis is quickly apparent: this is not an "introduction" to freedom of information. The authors have covered the key provisions

of the OIA in exhaustive detail and at great length. It is directed more at those who wish to use the Act than those who wish to familiarise themselves with it. To this end the authors have tried to anticipate any and all of the issues which may arise from the operation of the OIA. Whether they have succeeded or indeed gone too far is likely to become apparent only with extensive use of the book. However, they appear to have left no stone unturned.

Since s 4 of the Act creates a presumption that “information shall be made available unless there is good reason for withholding it”, the greater part of *Freedom of Information in New Zealand* is devoted to the “good reasons” for withholding information, namely the criteria set out in ss 6 and 9. When discussing the exemptions individually the authors consider any interpretation issues, try to identify the nature of the interest protected by the exemption and present their analysis of the extent to which that interest is or should be protected. They also provide useful discussions of the exemptions generally and of the “public interest” balancing required by s 9. As one might expect, the authors are supportive of an expansive freedom of information regime and give well reasoned arguments for adopting a strict interpretation of the exemptions.

It is perhaps a credit to the drafting and administration of the Act that there is very little New Zealand authority (case law or Ombudsman’s reports) relating to many of the exemptions. The book therefore relies to a considerable extent on comprehensive citation of authority from other jurisdictions (particularly the United States) and contexts other than freedom of information. This approach works better for some exemptions than others. The discussions of the s 9 exemptions are for the most part supported by relevant authority and should be reliable guides to the approach adopted by the Ombudsman or the courts in balancing the protected interest against the “public interest” in access to information. On the other hand, the treatment of the s 6 exemptions and some aspects of the s 9 exemptions, where the authors can cite little or no authority directly relevant to the freedom of information context, is necessarily speculative. For example, it is difficult to justify the length at which “security, defence and international relations” (chapter five) and “maintaining the law” (chapter six) are discussed. The chapters on mechanics of access and the role of the Ombudsman and the courts are on more secure ground as there is sufficient New Zealand case law to support the arguments made.

The authors have performed a valuable service by bringing together (in chapter sixteen) other legislation affecting access to official information. It is unfortunate, therefore, that the book falls victim to bad timing. The enactment of the Privacy Act 1993, as the authors prospectively acknowledge in their preface, introduces new procedures for the access of individuals to personal information. However, since Part IV of that Act duplicates many of the exemptions of the OIA, much of the material in *Freedom of Information in New Zealand* will remain useful to Privacy Act applications. The OIA will continue to apply to corporate bodies seeking access to personal information.

The book's major fault is its lack of user-friendliness, particularly for readers unfamiliar with the details of the Act. Despite its close reliance on the statutory provisions of the OIA, readers have to search hard to find many of the relevant provisions set out: reproducing the entire Act by way of appendix would have been convenient. Furthermore, although the book's chief merit is its detail, this at times forces the reader to wade through pages of (often hypothetical) discussion to find answers to relatively simple queries. The introductory chapters fail to give a clear overview of the purpose, structure and working of the Act; for instance, one would have expected an explanation of the distinction between personal and other information (instead one has to wait until chapter seventeen). The book would also have benefited from a more substantial discussion of the constitutional significance of the Act. A number of these shortcomings are perhaps symptomatic of a lack of editorial finishing which also manifests itself in the occasional missing footnote, errors in the page citations in the table of legislation and misleading section headings.

In summary, *Freedom of Information in New Zealand* will be an indispensable reference tool for anyone using or advising on the use of the OIA, but a little further effort could have made it more easily accessible and useful for readers coming to it with no background in the area.

Scott Mataga

**CRIME AND DEVIANCE**, by Greg Newbold. Oxford University Press, Auckland, 1992. 8 and 158pp.

Greg Newbold prefaces his book by noting that in New Zealand scholarship there is a dearth of information concerning crime and deviance.<sup>1</sup> Analysing crime from a sociological perspective, and in only 158 pages, Newbold goes a long way to alleviating this dearth.

*Crime and Deviance* addresses a broad spectrum of New Zealand criminology. It is divided into seven chapters, within which the author provides sociological explanations of serious crime and outlines their statutory proscriptions. He also provides much relevant detail, showing recent trends in New Zealand deviance and supplying a mass of current statistics, occasionally enlivened with personal anecdote and Kiwi vernacular.

Newbold explains the book's approach in chapter one. It is written in accordance

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<sup>1</sup> At 7.



with “mainstream [as opposed to Marxist] deviance theory”.<sup>2</sup> This acknowledges:<sup>3</sup>

[T]hat the creation of norms and the identification of deviance have nothing to do with inherent morality. As activities fundamental to social control and the maintenance of social order, law-making and law enforcement are seen as political processes.

Consequently, modern deviance theory takes a “relativistic” stance, arguing that whether or not an activity is condemned depends on the subjective viewpoints of the condemners.<sup>4</sup> The question which arises here is not why people commit deviant acts but why society makes them deviant in the first place.<sup>5</sup> Deviance is therefore “the obverse of social control: it is what happens when control mechanisms fail”.<sup>6</sup>

The analysis of “crime” as a social construct is especially evident in chapter six, “Drugs”. The author notes that New Zealand drug laws originated largely because of international prejudices and hysteria directed not at particular substances but at various minority user groups. Examples given are the Chinese (opium), Hispanics and Blacks (marijuana) and Hippies (LSD). In sociology this process can be termed “status domination”.<sup>7</sup> The prevalence of “status domination” in drug laws is apparent from the numerous harmful yet legal drugs available (for example, tobacco, alcohol and pharmaceuticals) which are controlled by the dominant power interests in society:<sup>8</sup>

[D]rug use which is unacceptable is determined less by logic than by power, money, and culture. It is not science which dictates the acceptability of one compound over another, but ideology.

In this context, marijuana and heroin dealer Terry Clarke is contrasted with beer baron Douglas Myers.

Chapter six also provides a good example of the inconsistent fervour with which Newbold writes. Whereas the chapters on emerging ideas about deviance, and women and deviance at times seem laboured, here he is in rampant form. The chapter begins with a nonsensical parable about four blind men evaluating the separate parts of an elephant. Their inability to comprehend the multi-faceted nature of the beast, Newbold professes, reflects the complexity and diversity of drugs, although just how it does so is unclear. At times the author’s colourful examples appear to come at the expense of a more balanced consideration of drug-related problems. For example, there is little reference to the devastations of hard drug taking or the depravity of drug dealers.

Chapter five examines the major types of violent crime (assault, robbery,

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2 At 18.

3 Ibid.

4 At 9.

5 At 7.

6 At 9.

7 At 122.

8 At 131.

homicide and rape) and explains them pursuant to the Crimes Act 1961. Here Newbold acknowledges that despite media persuasions, encountering violence in New Zealand is still comparatively unlikely:<sup>9</sup>

New Zealanders are more likely to be run over or drowned than murdered.

However, despite such assurances, violence is defined sociologically as “normal”: it exists in all societies.<sup>10</sup> Discussing “normality” in this context introduces the curious and specialised use of sociological nomenclature. For example, rape, as a “usual” behavioural trait, is identifiable “not so much [as] a *deviant* act [but] as an act of *overconformity*”.<sup>11</sup> Normal gender relationships, which emphasise male aggressiveness, domination, and forcefulness, are seen to take “exaggerated” forms.<sup>12</sup> It is emphasised, however, that such acts nowadays are mostly unacceptable, exceptions being times of warfare and traditional Christian marriage.

A minor criticism which can be made of *Crime and Deviance*, and which is especially appropriate after reading the “Violence” chapter, is that Newbold repeats and stretches some “causal” connections. For instance, the oil shocks of the early seventies, it seems, are still answerable for some domestic, narcotic and property crimes. Furthermore, the abundant use (in chapter two) of class conspiracy theories, which acknowledge that the powerful do in fact control society, borders on the paranoid.

In addition to rationalising “crime and deviance”, this book also locates the incidence of deviance in New Zealand. Examples set out and explained include a section on homosexuality and the associated law reform, and the beginnings of prostitution in New Zealand:<sup>13</sup>

Late eighteenth century sealers and seafarers paid Maori women for sexual services, and periodically paid their menfolk as well .... By the 1890s ... 8 per cent of ... [women aged between 15 and 40] living in Auckland, were estimated to be supporting themselves by prostitution.

Trends in New Zealand deviant behaviour are also explained. Newbold notes that the increased incidence of sexual abuse is most likely “a function of higher reporting”, citing, as a good illustration, the seventy-two per cent increase of reports in Napier following the murder of Teresa Cormack.<sup>14</sup>

Newbold links recent increases in violence with expanding urban unemployment: forty-five per cent of unemployed live in our four main cities.<sup>15</sup> Here he points out that the pursuit of laissez-faire economics inevitably breeds winners and

9 At 82.

10 At 83.

11 At 96. The author cites Russell, *The Politics of Rape* (1975).

12 At 96.

13 At 74.

14 At 65.

15 At 101.

losers. One result is the increase in ad hoc violence which stems from the “depressed urban sectors ... where conventional morality is weak”.<sup>16</sup>

Also of note is chapter three, “Women and Deviance”, in which the author examines statistical differences between the sexes in relation to deviant behaviour. Discrepancies are set out in terms of the types of crime committed and judicial treatment of offenders. They are then explained in terms of traditional gender roles:<sup>17</sup>

If violence is required, it is the man’s job. Women expect, sometimes demand, that men use violence, for example, to retrieve their property if it is stolen, or to restore their honour if they are offended .... Where financial crimes are involved, women may be aware of the activities of their men and they may encourage and consciously benefit from their gains.

It is apparent that Newbold is writing for a broad-minded audience. He uses and explains colloquial deviance speak, describing, among other things, “wolves” and “hocks”,<sup>18</sup> “closet queens”,<sup>19</sup> “rap parlours”<sup>20</sup> and “kicking ass”.<sup>21</sup> Despite the international flavour of much of this jargon, the book’s focus remains, for the most part, firmly fixed on New Zealand. In one typically quirky anecdote, Newbold describes an incident in a New York bar in 1990. Praising the comparable safety of New Zealand, he was interrupted by a television report of the Aramoana massacre.<sup>22</sup>

In sum, *Crime and Deviance* covers a vast amount of material – statistical and ideological – in condensed form. It contains excellent references and would provide an invaluable introduction to criminological research; furthermore, like any sociologically-oriented text, its suggestions and theories invite criticism and discussion. The issues covered are wide-ranging, such that the reader, whatever his or her bent, is guaranteed to find something of interest.

Grant Williams

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<sup>16</sup> At 101-102.

<sup>17</sup> At 57-58.

<sup>18</sup> At 71.

<sup>19</sup> Ibid.

<sup>20</sup> At 77.

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<sup>22</sup> At 82.

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# **INTRODUCTION**

**Dame Augusta Wallace**  
**(retired District Court Judge)**

To celebrate the centenary of Women's Suffrage in New Zealand the Auckland University Law Review is producing this symposium of articles on issues relating to Women and the Law.

For me, it is an honour to be invited to write this introduction. The range of topics indicates the many areas in which, in 1993, law impacts upon women and vice versa. It brought to my mind the fact that until the Married Women's Property Act of 1884 such women had no right to own property. Husband and wife were regarded as one entity represented by the husband. It is wise to remember that fact when assessing the progress, advancement and recognition of women's rights in New Zealand over the past 100 years.

I accept that there still remain areas where full equality has yet to evolve or be achieved. In my own professional life I took the simple minded view that no barriers existed, either in practice or on the Bench, and I found this to be so. Nevertheless, I was always ready to challenge perceived barriers on behalf of clients and by application of law and logic usually achieved success.

It is forty years since I graduated from the Auckland Law School and so I belong to the earlier generation of law students for whom academic education was more limited than it is now. During the working hours of the day we toiled in law offices serving our practical apprenticeship. We attended lectures in the early morning and the evening to learn the law. Our learning in Law School was of much more limited range and depth than that of the modern student as is evidenced by the contributions to this symposium. However our practical apprenticeship taught us to apply the law to the realities of human problems. It is for that reason that in my years of practice and later on the Bench I was always aware of progressive social changes and of the need for the law to recognise those changes and to adapt to meet them. It is perhaps elementary to say so, but the law represents the rules by which a society is regulated. As the needs and aspirations of a society change so must the law adapt or alter.

In essence, that is what the contributions to this symposium address.

I congratulate the contributors and express admiration and some envy at the breadth and depth of their thoughts and writing.



# **Paid in Full?**

## **An Analysis of Pay Equity in New Zealand**

Rochelle Hume

*Winner of the Inaugural Law Review Symposium Prize for 1993*

### **I: INTRODUCTION**

It is undeniable that a wage gap exists between men and women.<sup>1</sup> This can be partially attributed to the systematic and historic devaluation of “women’s work”, and subsequent gender segregation in employment. There is ample evidence of such devaluation in Western society.<sup>2</sup> As a result, those involved in occupations traditionally performed by women are paid less, not because the work is inherently worth less, but simply because the position has traditionally been filled by women.

Although this is discrimination, it is not the direct, intentional discrimination outlawed by equal pay and equal employment opportunity legislation. Indeed, such legislation ignores the issue of job segregation and undervaluation of women’s work, focusing instead on individual opportunity. A good example of this is provided by the Human Rights Commission Act 1977 which forbids advertising for job applicants on the basis of sex.<sup>3</sup>

This article focuses on a different method of reducing the wage gap; the implementation of pay equity, also known as “comparable worth” or “equal pay for work of equal value”. It is acknowledged that pay equity cannot be a complete answer to gender discrimination in employment, and if implemented will only be useful if included in a package of equal opportunity and anti-discrimination legislation.<sup>4</sup>

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1 See New Zealand Working Group on Equal Employment Opportunities and Equal Pay, *Toward Employment Equity* (1988).

2 See for example, Reiter (ed), *Toward an Anthropology of Women* (1975).

3 Section 32. See also Equal Pay Act 1972.

4 Supra at note 1.



Pay equity schemes require employers to institute equal remuneration for different jobs that are comparable in worth, but are filled by women and men respectively. Widely accepted job evaluation techniques<sup>5</sup> are used to ensure that employees are paid what they have always been worth to that employer. Thus, pay equity schemes are not affirmative action programmes.

## II: CHALLENGES TO PAY EQUITY

Pay equity schemes take many forms,<sup>6</sup> yet there is a consistent pattern. A job traditionally filled by women is compared with a similar job traditionally filled by men. If, after evaluation by a mutually acceptable job evaluation scheme, the jobs are considered to be of comparable value, any differential in remuneration which cannot be explained by reference to gender-neutral criteria, such as supply and demand, is removed on the basis that it is discriminatory. In most pay equity schemes the incumbents compared work for the same employer, or at the very least work in the same industry, but this does not have to be the case.

There has been a substantial amount of debate surrounding the pay equity issue, both in academic journals and the media. It is important to correct some of the misconceptions surrounding pay equity. A serious objection to the implementation of pay equity systems is based on the possible consequences of this type of market regulation. Courts in the United States have asserted that employers must be free to set wages in reliance on the free market.<sup>7</sup> Furthermore, Smith contends that the wage gap is merely due to supply and demand, and therefore does not warrant intervention by pay equity schemes.<sup>8</sup> This argument ignores the potentially discriminatory nature of market forces.<sup>9</sup> Indeed, when the wage setting system is inherently discriminatory, it is clear that discrimination cannot be eliminated without effecting a change in the system. In addition, free market principles have not always escaped government intervention. Examples include the Minimum Wage Act 1983. Consequently, while the implementation of pay equity is necessary to end discrimination, economic arguments demonstrate that the implementation of any scheme must proceed very carefully, and incorporate economic considerations.

Thus, the potential impact of judicial or legislative interference in wage setting on the economy is important. For example, one fear expressed in submissions to the New Zealand Working Group on Equal Employment Opportunities and Equal

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5 Burton, *Women's Worth: Pay Equity and Job Evaluation in Australia* (1987) 1-25.

6 A good discussion of the possible shapes of pay equity schemes can be found in Szyszczak, "Pay Inequalities and Equal Value Claims" (1985) 48 MLR 149.

7 *Lemons v City and County of Denver* 620 F 2d 228 (10th Cir 1980); *Christensen v State of Iowa* 563 F 2d 353 (8th Cir 1977).

8 Smith, "The EEOC's Bold Foray Into Job Evaluation" *Fortune*, 11 Sep 1978, 58, cited in Brown, Baumann & Melnick, "Equal Pay For Jobs of Comparable Worth: An Analysis of the Rhetoric" (1986) 21 Harv CR-CL LR 127, 134.

9 That is, that undervaluation of women's work has led to current supply and demand discrepancies.

Pay was that if employers are forced to pay more for workers, they may either close down or resort to redundancies.<sup>10</sup> This is not a new argument. Under New Zealand's previous industrial relations regime it appeared in many wage raising exercises, but was usually rejected. It seems spurious to argue that employers should not be compelled to end discrimination because they cannot afford to pay an equitable wage. Nevertheless, economic realities cannot be ignored. Legislation can be harmful where its impact has not been fully assessed.

Some have argued that the fact that female occupations are paid less does not mean sex discrimination is occurring. For example, Mincer and Polachek<sup>11</sup> argue that women's lower wages reflect smaller "investments" in education and experience. Therefore, were it not for these individual choices, the employment market would be gender-neutral.

Such theories do not account for the fact that pay equity does not concern discrimination in job access.<sup>12</sup> Thus, a pay equity claimant will already have established that the job requires equivalent qualifications, experience and skills to that of the male comparator. Nevertheless, he or she is still being paid less. If the two jobs are equivalent in all other areas, any remaining wage gap cannot be attributable to the lower investments in human capital<sup>13</sup> claimed by Mincer and Polachek.

Finally, it has been argued that comparable worth is "a fallacious notion that apples are equal to oranges and that prices for both should be the same".<sup>14</sup> The language is impressive but ignores the fact that although a job evaluation scheme is by no means entirely objective, it is a detailed, systematic and, perhaps more importantly, long-established tool used to determine the worth of those jobs to the employer. Such schemes have been described as "a wholly rational hierarchy ... on the basis of relative worth to the employer".<sup>15</sup>

### III: JOB EVALUATION SCHEMES

The most appropriate type of job evaluation scheme in the pay equity context is the "consensus-capturing" method. This utilises "position descriptions" which describe the skills, responsibility, working conditions and experience required for the job.<sup>16</sup> The position description is evaluated by a panel which includes union representatives, employer representatives and some workers who occupy or have occupied the position being evaluated. Number values are ascribed to factors such as "know-how", responsibility and working conditions. A pay equity claim does

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<sup>10</sup> *Supra* at note 1, at 13.

<sup>11</sup> "Family Investments in Human Capital: Earnings of Women" (1974) 82 *J Pol Econ* 76, cited in Brown, Baumann & Melnick, *supra* at note 8, at 135.

<sup>12</sup> Brown, Baumann & Melnick, *ibid*.

<sup>13</sup> *Supra* at note 11, cited in Brown, Baumann & Melnick, *ibid*, at 135.

<sup>14</sup> Smith, *supra* at note 8, at 142.

<sup>15</sup> *Supra* at note 8, at 133.

<sup>16</sup> There may be variations on this. For job evaluations generally see Burton, *supra* at note 5, at 1-25.

not become possible unless two jobs are evaluated as being of equal worth to the employer. The theory of job evaluation is that it provides an objective measure for determining the worth of jobs to employers.

However, in *Women's Worth*,<sup>17</sup> Burton demonstrates that job evaluation techniques include an element of subjectivity. She provides the example of the Hay Associates, who specialise in job evaluations using the consensus-capturing method. They discovered prejudice creeping into the writing of position descriptions, including reference to office personnel who "only typed". This insinuated that little skill was required. Skills such as knowledge of medical spelling, re-drafting of letters and general spelling checks were ignored.<sup>18</sup>

There is another particularly noticeable stereotype emerging in relation to the description of childcare. The failure to recognise childcare as a skill assumes that it is "natural" for women to look after children. The necessity for one year of training at a Technical Institute, in addition to ongoing training and the acceptance of a huge responsibility for the next generation, is overlooked in assessing the low remuneration awarded to childcare workers.

Thus, it is clear that an element of subjectivity will influence the evaluation of any differences. Nevertheless, it appears that any inaccuracies in job evaluation will not favour low status positions. Indeed, although such schemes can be inaccurate, they can be carefully checked and balanced. In summary, the implementation of job evaluation schemes is not perfect. Nevertheless, such schemes are an improvement on the current wage-setting environment which is based on discriminatory market values and tainted perceptions of the status of women's work.

#### IV: PAY EQUITY AND THE LAW

Pay equity claims are either framed under equal pay legislation,<sup>19</sup> human or civil rights legislation,<sup>20</sup> international obligations<sup>21</sup> or specific pay equity legislation.<sup>22</sup>

Many claims are originally framed under equal pay legislation. Such claims are generally unsuccessful, due to statutory requirements that equal pay be awarded for men and women performing the same or substantially similar work.<sup>23</sup> The theory of pay equity acknowledges job segregation, whereas that of equal pay legislation generally does not.

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<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> For example, *New Zealand Clerical Administrative IAOW v Farmers Trading Co* [1986] ACJ 203 was a pay equity claim framed under the Equal Pay Act 1972.

<sup>20</sup> For example, in the United States, *County of Washington v Gunther* 452 US 68 (1981) was a claim under Title VII of the Civil Rights Act 1964.

<sup>21</sup> For example, in the United Kingdom and other European Community countries, Article 1 of Council Directive 75/117/EEC, under Article 119 of the Treaty of Rome 1957 has led to municipal legislation requiring equal pay for work of equal value.

<sup>22</sup> See Pay Equity Act 1987 (Ontario).

<sup>23</sup> See also US Equal Pay Act 1963, 29 USCA § 206(d); s 2A Equal Pay Act 1972 (NZ).

*New Zealand Clerical IAOW v Farmers Trading Co*<sup>24</sup> illustrates the inability of the Equal Pay Act 1972 to redress pay equity concerns. In that case, members of the clerical union challenged the registration of their award on the ground that the proposed remuneration was less than awards of comparable worth in industries predominantly filled by male workers. It was alleged that the reason for this was that the clerical workers' union is predominantly filled by women. The Court, while accepting that the Equal Pay Act was still in force, refused to accept that such a claim was within its jurisdiction, stating:<sup>25</sup>

It is our clear view that while the Equal Pay Act 1972 is available pursuant to sections 10, 3(3) and 6(8) to enforce amendment in any proposed award of rates of remuneration to ensure that there is no element of differentiation in that proposed award between male employees and female employees based on the sex of the employees, it is acknowledged that there is no such differentiation in the present case.

The Court concluded that the choice of the Act as a vehicle to remedy pay inequity was an error in law, and declared that it had no jurisdiction to address the issue raised.

According to this interpretation of the Act, the difficulties caused by job segregation cannot be addressed. This is due to the fact that under a pay equity claim the comparator must do "the same or similar work" to the extent that he is covered by the same industrial award. Under the Equal Pay Act, the claimant must show that there is a differentiation in the remuneration of one job based on that individual employee's sex. Pay equity is less concerned with specific individual cases of sex discrimination. It instead concentrates on the historical devaluation of an occupation because of its association with women.

The Human Rights Commission Act 1977 prohibits discrimination in employment on the basis of sex, marital status, religious or ethical belief, or age.<sup>26</sup> However, in passing the Act, Parliament neatly avoided controversy regarding pay equity by inserting the "equal work" standard into s 15(1)(b) of the Act. Section 15(1)(b) outlaws refusing or omitting to offer or afford any person the same rights relating to employment as are made available for persons:

[O]f the same or substantially similar qualifications employed in the same or substantially similar circumstances.

The Human Rights Commission Act, like the Equal Pay Act, emphasises direct discrimination. Section 38(8) provides that an unintentional breach of the Act is no defence to civil proceedings under that provision. Nevertheless, the Act still focuses on fines or civil actions against *individuals* where complainants have proved a specific instance of direct discrimination on the basis of gender. For example, s 15(1) states that it "shall be unlawful to refuse or omit to offer the same terms of employment ... by reason of the sex, marital status, religious or ethical belief or age of that person."

<sup>24</sup> *Supra* at note 19.

<sup>25</sup> *Ibid*, 207.

<sup>26</sup> Section 15.

This requirement is fatal to pay equity claims, as they are intended to remedy unconscious, unintentional biases which pervade wage-setting systems and supposedly neutral market forces. The issue of indirect discrimination is important, and s 27 of the Human Rights Commission Act appears, *prima facie*, to provide some redress. It establishes the offence of “discrimination by subterfuge”. This is defined as follows:

Where a requirement or condition which is not apparently in contravention of any provision of this Part of this Act ... *has the effect* of giving preference to a person of a particular colour, race, ethnic or national origin, sex, marital status, or religious or ethical belief, or age. [Emphasis added]

This definition appears to describe the conditions in which pay equity claims may be brought. The words “not apparently in contravention of any provision of ... this Act” mean that even if the s 15(1)(b) equal work standard were not met, which would establish that the employer has not directly committed an offence, the practice may still be illegal under s 27.

However, the next phrase requires that the existing preference must be illegal under Part II. No other provision makes inequitable pay rates across industries illegal. Furthermore, s 27 provides employers with the opportunity to plead financial necessity by establishing “good reasons” for their practice and demonstrating that the practice is not a subterfuge designed to avoid compliance with the Act.

Thus, the Act emphasises direct discrimination and the requirement that an accused employer prove that he or she did not intentionally subvert the Act to avoid liability under s 27. This indicates that the provision was not intended to remedy inherent biases in wage-setting which lead to inequitable wage rates. It appears that s 27 has little to offer pay equity claimants.

If pay equity is to be implemented, either new legislation must be enacted, or society must wait until equal opportunity legislation eradicates discrimination and equitable rates are paid. If the second option is adopted, pay equity will be very slow in developing, if it develops at all. Legislation therefore appears to be the most effective method of implementation. The Working Group on Equal Employment Opportunities and Equal Pay also reached this conclusion.<sup>27</sup> That Group proposed the Employment Equity Act 1990. This Act was duly passed by the Labour Government in July 1990 but swiftly repealed by the National Government in December the same year by the Labour Relations Amendment (No 2) Act 1990.

However, the implementation of pay equity in New Zealand is no longer as simple as merely re-passing the Employment Equity Act in its 1990 form. The Employment Equity Act was based on the regulation of awards,<sup>28</sup> and relied on the existence of a strictly controlled bargaining arena. The Employment Contracts Act 1991 significantly altered New Zealand’s industrial bargaining environment

<sup>27</sup> Supra at note 1, at 22.

<sup>28</sup> Supra at note 1, at 16: “Although recent reforms to the wage fixing system are designed to decentralise that system, the national award is likely to retain its importance in the medium term in setting wages and conditions in low paid female intensive industries.”

through deregulation. It also rendered any legislation based on the Employment Equity Act unworkable. Sections 55 to 68 of the Employment Equity Act illustrate its reliance on the award system in implementing pay equity. Under s 56 a pay equity claim could form part of the dispute of interest between the union and employers. There was provision in ss 57 to 64 for the dispute to be referred to the Arbitration Commission for determination by way of final offer arbitration, and s 65 provided for the adjustments resulting from a successful claim to be incorporated in subsequent awards.

The change is likely to have a detrimental effect on the fight to end wage disparity. Australia and New Zealand have traditionally controlled employment bargaining strictly. Statistically, these two countries have considerably smaller wage gaps than Great Britain, Canada and the United States, where the employment environment has always been somewhat more deregulated.<sup>29</sup>

The Employment Contracts Act aims to "promote an efficient labour market".<sup>30</sup> This will not empower lower-paid, lower-status groups of workers, which include a disproportionate number of women. The Act seeks to promote labour efficiency by removing compulsory unionism. In Britain, where there is no compulsory unionism, women are less likely to be unionised than men.<sup>31</sup> Unions generally increase bargaining power and therefore wages. De-unionisation is likely to have a detrimental effect on wage disparity. The fact that women's occupations tend to be low-paid and low-status reduces their negotiating power in such a "free" bargaining environment. Lower-paid workers who are not perceived as occupying valuable positions have less to bargain with and very little which they can afford to lose.

This is particularly pertinent following the Employment Court's decision in *Adams v Alliance Textiles NZ Ltd*.<sup>32</sup> It was held that even if employees engage the union to bargain as an agent,<sup>33</sup> the employer can still offer greater remuneration to employees who disassociate themselves from the union. This decision further disempowers low-paid workers who must eschew the protection of the union in order to obtain a better rate of pay. Without union membership, the possibility of instituting court action is simply not an economic reality for many workers. Even if female occupations remain unionised, a decrease in membership is the inevitable result of voluntary unionism. This is likely to further deplete union resources. There are also practical problems. For example, many women's occupations are in small enterprises and are isolated. It is virtually impossible for such unions as the Service Workers Union to obtain the authority necessary to represent their workers. It is also difficult to actually represent such workers in ongoing negotiations.

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29 See Thornton, "Reply to Linda Dickens' 'Road Blocks on the Route to Equality'" (1991) 18 Melb U L Rev 298.

30 From the Long Title of the Act.

31 Dickens, "Road Blocks on the Route to Equality: The Failure of Sex Discrimination Legislation in Britain" (1991) 18 Melb U L Rev 277, 281.

32 [1992] 1 ERNZ 982.

33 See s 10 Employment Contracts Act 1991.

Another practical consideration is the difficulty of establishing a male comparator for the purpose of job evaluation schemes. The now repealed Labour Relations Act 1987 operated in a national award system of wage-setting. This allowed for the possibility that the award for a predominantly female occupation could be compared with the award of a predominantly male occupation. A pay equity claimant had a very good chance of establishing a suitable comparator in order to demonstrate the inequities of the present wage-setting order. In a deregulated industrial relations arena, bargaining often occurs on an enterprise by enterprise basis. In the United States<sup>34</sup> and Britain<sup>35</sup> this means that a male comparator must be chosen from within that enterprise.<sup>36</sup> This may be difficult due to the extent of job segregation. Indeed, even if a male works in a female dominated enterprise, his remuneration may also be depressed because the position is identified as a female occupation.

There are also problems for very small enterprises with less than ten employees<sup>37</sup> as it is difficult to find a suitable comparator, and difficult to prove that any pay differentiation includes discriminatory factors. The number of employees is not high enough to provide statistically significant results. This is particularly relevant in the New Zealand context as the number of small enterprises with less than five employees is rising significantly, while the number of enterprises with over one hundred employees, where pay equity can most effectively be implemented, is decreasing.<sup>38</sup>

These are some of the more specific difficulties for pay equity caused by the Employment Contracts Act, and should be understood in the context of the more general observation that a "freer" bargaining environment almost inevitably means less power for the weak and more power for the strong, and results in a larger wage disparity.<sup>39</sup> The approach of the Employment Equity Act of allowing voluntary implementation of pay equity at the choice of the employer, thus leaving the option open for specific claims to be brought, is no longer appropriate under the Employment Contracts Act.

The question now becomes which system is appropriate for implementing pay equity in the new industrial relations environment. Considering the difficulties confronted without specific pay equity legislation in both New Zealand and the United States, it seems that a pay equity statute is the most likely method of

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34 See Brown, Baumann & Melnick, *supra* at note 8, at 140.

35 See Szyszczak, *supra* at note 6, at 153.

36 See Szyszczak, *ibid*, on whether a comparator ought to be chosen from another industry: "It could be argued that it might confuse issues of national labour market structure with intentions of individual employers."

37 This is recognised in the Pay Equity Act 1987 (Ontario), where, under Part III, compulsions to implement pay equity in the private sector exist only if there are more than nine employees.

38 Department of Statistics, "NZ Businesses by Size 1987-1991", in *New Zealand Social Trends: Work* 42.

39 Sayers, "Women, the Employment Contracts Act, and Labour Flexibility", in Harbridge (ed) *Employment Contracts: New Zealand Experiences* (1993) 210, 214-215.

implementing pay equity. For an appropriate model from a bargaining environment similar to that which exists in New Zealand under the Employment Contracts Act, one could look to the Ontario Pay Equity Act 1987. The Ontario industrial relations system is similar in many respects to New Zealand's. It is characterised by enterprise-based bargaining. Unions, where they exist, represent all of the workers in one workplace, rather than all of the workers in one occupation from a particular geographical area.<sup>40</sup> This appears to be the approach which will be adopted in New Zealand.

The Ontario Pay Equity Act provides for the compulsory implementation of pay equity schemes for all public and private sector employers who employ more than nine workers. The New Zealand Working Group on Equal Pay rejected the notion of a compulsory scheme under the previous industrial relations statute. However, with the new aggressive bargaining tactics utilised by employers<sup>41</sup> and sanctioned by the Employment Contracts Act, it is evident that compulsory implementation has become the more appropriate option.

Aside from the compulsory element itself, the Ontario Pay Equity Act provides some useful models to help overcome practical problems. Section 6(2) provides that if no suitable male comparator can be found, a male job class which performs work of a lesser value can be used as a comparator if its remuneration is higher. Section 8 of the Act provides for "allowable differences" – giving employers the opportunity to show that differences in remuneration between an employee in a male job class and an employee in a female job class are due to genuine gender-neutral reasons.

One concern with the Act is that s 8(2) tends to be inconsistent with a recognition of the history of powerlessness associated with female job classes. It states that:

After pay equity has been achieved in an establishment, this Act does not apply so as to prevent differences in compensation between a female job class and a male job class if the employer is able to show that the difference is the result of differences in bargaining strength.

This section seems to assume that the implementation of pay equity will immediately empower those in low-status job classes, resulting in an "level playing field" in the bargaining arena. However, although it may be a legitimate concern to reduce interference in the free-bargaining system, the implementation of pay equity will only produce an equal playing field over time, and with the appropriate equal employment opportunity legislation and education. This provision ignores these two factors.

However, the Act is instructive in so far as it attempts to use methods which are gender-neutral in evaluating job worth.<sup>42</sup> It recognises the discrimination inherent in the subjective process of job evaluation, which can instil devaluation of

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40 As was the case in New Zealand under the Labour Relations Act 1987 and its predecessors.

41 See *Adams v Alliance Textiles NZ Ltd*, supra at note 32.

42 Section 13(2)(a) of the Act instructs employers to describe the gender-neutral comparison system used for evaluating job worth.



women's job classes into the wage-setting process. Nevertheless, by requiring a gender-neutral wage-setting system, the legislature may be asking the impossible. It would perhaps be more beneficial to enable any job evaluation process to be challenged by a claimant or official on the basis that discriminatory values were incorporated into it. Other useful elements in the Act are the use of a specialist agency and review officer to administer the requirements of the legislation.<sup>43</sup> The educative function of such an agency would be particularly essential in the context of a compulsory scheme where many employers throughout the country are being compelled to participate in the scheme. The use of a phase-in period before implementation is probably necessary in order to allow for the possibility of financial difficulties of employers who in some cases may be facing heavily increased wage bills. The Act allows for a phase-in period of up to five years.<sup>44</sup>

Although other countries have seen a necessity for reducing the wage gap by introducing pay equity legislation, it is likely to be a very long time before such reform is introduced in New Zealand, if it is introduced at all. This is due to the ideologically-driven policies of the present government, New Zealand's current economic conditions, and the existence of the Employment Contracts Act. In the meantime, without pay equity, the wage gap is likely to continue. Even the New Zealand Bill of Rights Act 1990 is of no assistance. It is clear from s 3 that the Act only applies to acts of the legislative, executive, or judicial branches of the New Zealand government or any person or body in the performance of any public function, power, or duty conferred or imposed by or pursuant to law. As such, any claim under the Bill of Rights could only be brought by a public employee, a class of persons declining in number due to privatisation of the state sector.

#### IV: CONCLUSION

There exists in New Zealand, as in many countries, a wage disparity between the sexes which is detrimental to women. This appears to be partially the result of an historical devaluation of women's work, rather than a reflection of the inherent worth of the work itself. Pay equity claims are an attempt to remedy this disparity by attacking the heart of its cause – the discriminatory values indirectly entering the wage-setting process of women's work, which lead to lower wages than the inherent worth of the work would dictate. Job evaluation schemes are an integral part of the identification of inequitable pay rates, and of the identification of a comparator performing work of equal value to provide a guide of more appropriate wages.

The purported objectivity of job evaluation schemes has been attacked, and rightly so as the process involves subjective decision-making at virtually every step. However, the process also has much merit, particularly as the subjective nature, once identified, can be controlled, and the process is more likely to lead to

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<sup>43</sup> Sections 24 and 27.

<sup>44</sup> Section 10(d).

equitable pay rates than are market forces steeped in indirectly discriminatory values.

In New Zealand, there is currently no legislation allowing low-paid workers to bring pay equity claims, as the previous Employment Equity Act had a very short life. The Human Rights Commission Act and Equal Pay Act are of little value in implementing pay equity, and even the New Zealand Bill of Rights Act would provide little hope for a successful pay equity claim. Furthermore, with the introduction of the Employment Contracts Act in 1991 the chances of pay equity being implemented have been reduced further. The Act is likely to have a significantly negative effect on wage disparity. It also makes implementation of pay equity more difficult should Parliament ever wish to pass another pay equity statute. Nevertheless, the Ontario Pay Equity Act provides a model for how pay equity can be implemented in a harsh bargaining environment as exists in New Zealand under the Employment Contracts Act.

In conclusion, pay equity in New Zealand under current legislation is not a reality. Given the right political environment however, there are models available on which to develop equitable pay levels, and a fairer deal for New Zealand women.