CASE NOTES

One Small Step for Private Law Remedies, One Giant Leap for an Infant Court: Couch *Episode II*

BENEDICT TOMPKINS*

I INTRODUCTION

The decision of the Supreme Court in *Couch v Attorney-General* (*Couch*)[1] is of double significance: it is an assertive (re)clarification of the role and boundaries of exemplary damages for negligence, and it is the first time that the Court, only six years out of the parliamentary womb, has directly overruled a decision of the Privy Council on a New Zealand appeal.

In relation to both of these major issues,[2] the five separate judgments delivered are marked by varying degrees of divergence of judicial opinion. Although the pleadings in the case at hand meant that it had no bearing on the result, the split regarding exemplary damages is indicative of an area of law where polar views are supported by equally defensible and cogent arguments. On the one hand, exemplary damages are seen as an aberration; on the other, they are viewed as being consistent with underlying principles of (at least) tort law. Following *Couch*, for now at least, the former of those views, and the results that it entails for the flavour of negligence liability in this country, underlies the law in New Zealand.

II THE CASE

The latest decision arising out of William Bell's attack on the Panmure Returned Services Association (RSA) in December 2001 is in fact the fourth instalment in the litigation, and the second decision of the Supreme Court. The facts of the case are by now well-known. Bell was on parole following conviction for aggravated robbery and, while under the supervision and with the knowledge of his (junior) probation officer, was assigned to

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1 *Couch v Attorney-General* [2010] NZSC 27 [*Couch*].

2 The two other issues in the case, not examined below, were the effect of the statutory bar to proceedings in the Accident Compensation Act 2001 on the availability of exemplary damages for personal injury (to which all judges concluded that it was no obstacle), and the effect of s 86 of the State Sector Act 1988 and s 6(1) of the Crown Proceedings Act 1950 on Crown liability for acts of its employees (on which there was a difference of opinion, but one that did not affect the unanimous conclusion that the sections did not result in immunity to liability).

work at the RSA, a licensed premises. Ms Couch also worked at the club. Bell, accompanied by a shotgun, proceeded to rob the RSA, during which robbery he bludgeoned or shot four people present, killing three of them and leaving the fourth — Ms Couch — with serious injuries.

Ms Couch commenced proceedings against the Department of Corrections in negligence (a parallel claim in misfeasance in public office has since fallen away) in respect of the action of the probation officer (not that of Bell). The Court of Appeal held that the Probation Service owed no duty of care to Ms Couch, and thus her claim disclosed no cause of action.[3] This was overturned by the Supreme Court (subject to serious reservations about the quality of the pleadings),[4] but the appeal was adjourned for a further hearing on the matter of the availability of exemplary damages.

III THE EXISTING LAW ON EXEMPLARY DAMAGES

The law on exemplary damages for negligence was previously the subject of high-level judicial attention in the Court of Appeal and the Privy Council in *Bottrill v A*.[5] The Court of Appeal, by a majority of four to one (Thomas J dissenting), restricted the scope of exemplary damages to cases of intent or "conscious recklessness".[6] Justice Thomas, on the other hand, saw the sole criterion as that of "outrageousness".[7]

The Privy Council, in a three–two split decision, reversed the decision of the majority of the Court of Appeal, preferring the approach taken by Thomas J. "Never say never", said Lord Nicholls (writing for himself and Lords Hope and Rodger):[8]

> There may be the rare case where the defendant departed so far and so flagrantly from the ... standards of care, that his conduct satisfies [the test for exemplary damages] even though he was not consciously reckless.

Although counsel for Ms Couch indicated at the hearing that advertent conduct on the part of the Probation Service would be pleaded, the potentially significant cutting down of the scope of conduct giving rise to liability on

3 *Hobson v Attorney-General* [2007] 1 NZLR 374 (CA), Hammond J dissenting. The claim was in fact for $1.5 million damages for "pain and suffering", which were clearly compensatory and so came up against the statute bar (see at [152] and [162] per Chambers J), and for exemplary damages of $500.000. It is only the latter that is a live issue.

4 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725, noted by Donna-Maree Cross "Putting the Heat on Public Authorities: The Supreme Court Mandates a Shot at Accountability" (2008) 14 Auckland U L Rev 261.

5 *Bottrill v A* [2001] 3 NZLR 622 (CA) [*Bottrill* (CA)] and *Bottrill v A* [2002] UKPC 44, [2003] 2 NZLR 721 [*Bottrill* (PC)].

6 *Bottrill* (CA), above n 5, per Richardson P, Gault, Blanchard and Tipping JJ.

7 Ibid, at [77].

8 *Bottrill* (PC), above n 5, at [26].

the part of Crown put the difference between the two approaches firmly in issue. On the one hand, the position of Thomas J and the majority of the Board in *Bottrill* was in the mode of previous local authority giving broad effect to the "exemplary principle";[9] on the other hand, such a broad effect had been rejected by a majority of the Court of Appeal, and was consistent with the hostility (or at least extreme caution) with which modern English law views exemplary damages.[10] Before engaging with the exemplary question, however, the question of overruling the Privy Council in *Bottrill* had to be addressed.

IV OVERRULING THE PRIVY COUNCIL

The Chief Justice set a high bar for overruling: after confining it to the two circumstances of cases where "rigid adherence to precedent would lead to injustice in the particular case or would unduly restrict the proper development of the law to meet the needs of New Zealand society",[11] her Honour made it plain that what is not good enough is "a difference in intellectual preference".[12] Due to the absence of fresh arguments one way or the other, this was how the alternative approach that the case now stands for was characterised.

Reticence also informed the more substantial of the Chief Justice's reasons for not overruling in this case:[13] the undesirable (and often unforeseeable) consequences for the common law in making "[e]x cathedra statements about the organisation and limitation of jurisdiction" without "the discipline of facts".[14] Not only did this concern deserve weight in the context of the case itself — issues of vicarious liability and public accountability loomed (and still loom) large[15] — it also engages wider jurisprudential concerns regarding the appropriateness of the courts engaging in something approaching purely prospective and abstract law-making.

In contrast to that taken by the Chief Justice, the approach of the other judges was slightly more relaxed, in particular in the factors weighed in making the call. For example, of the series of factors from Australian jurisprudence outlined by Blanchard J,[16] one — that the decision was of a majority of the Board and overturning a majority of the Court of Appeal

9 See *Taylor v Beere* [1982] 1 NZLR 81 (CA) and *Donselaar v Donselaar* [1982] 1 NZLR 97 (CA).

10 See *Rookes v Barnard* [1964] AC 1129 (HL) and *Broome v Cassell & Co Ltd* [1972] AC 1027 (HL).

11 *Couch*, above n 1, at [32], echoing the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234 (HL).

12 *Couch*, above n 1, at [32].

13 The other, set out at [34], was the lack of any substance to a "floodgates argument put forward on the basis of impression".

14 Ibid, at [35] and [38].

15 Ibid, at [39]–[40].

16 Ibid, at [51].

— is merely incidental to the issue of its substantive foundation and effect as a legal doctrine. And another — the potential "inconvenience" of the decision in practice — held sway with his Honour even though all that was admitted was "the existence of a possibility".[17] Similarly, Tipping J mixed in factors extrinsic to the decision, such as the presence of a two-judge dissent and the unlikeliness of people ordering their affairs pursuant to it, with more substantive factors, such the effect of the accident compensation scheme on the policy calculus, going to its being "clearly wrong".[18] Furthermore, although his Honour echoed the Chief Justice's caution about overruling pursuant to intellectual preference,[19] the following observation suggests that the threshold that Tipping J actually saw himself faced with was somewhat lower than that of the Chief Justice:[20]

> It is the sort of issue of which it can reasonably be said that the outcome in the Privy Council could well have gone the other way if the Board had been differently constituted.

Despite these differences (perhaps the result of understandable subordination of the precedent issue to that of the substantive question in the case) the basic attitude was, however, one of deference: all judges recognised that the step of overruling the Privy Council on a New Zealand appeal was not one to be taken lightly.[21] And in any event, it is unlikely to be something with which the Supreme Court is faced again soon.

V EXEMPLARY DAMAGES

If the approaches of the two camps regarding overruling the Privy Council shade into each other somewhat, there is no such ambivalence regarding the split on exemplary damages. Two of the judges in the majority explicitly opined that exemplary damages, being punitive in nature and leading to undeserved windfalls on the part of claimants, are "anomalous" in private law.[22] As the Chief Justice implies, however, this is a label that depends entirely on one's prior conception of the functions of the law of torts and the role of exemplary damages in giving effect to them.[23] At this level of generality, therefore, the majority can perhaps be taken to have rejected an expansive view of the purposes of exemplary damages, if not of the law of

17 Ibid, at [69].

18 Ibid, at [105]–[108]. See also McGrath J at [212], also emphasising the split decision of the Privy Council.

19 Ibid, at [105].

20 Ibid, at [108].

21 Ibid, at [32] per Elias CJ, [51] per Blanchard J, [104] per Tipping J, [209] per McGrath J and (to a lesser extent) [251] per Wilson J.

22 Ibid, at [92], [111] and [178] per Tipping J, and [258] per Wilson J. McGrath J at [195] adverts to the argument, and does not seem to disapprove of it.

23 Ibid, at [1].

torts in general.[24] At the very least, the concept of quasi-criminalisation sat uneasily with the majority,[25] while on the other hand the Chief Justice was quite happy with "making an example of the defendant" sitting within the proper purview of torts.[26]

Having nevertheless rejected the "high ground" initially staked by the Attorney-General in arguing that exemplary damages should be confined to the intentional torts (a position not maintained at the hearing),[27] a criminal law-like concern with focusing on the state of mind of the defendant permeates the reasoning of the majority in rejecting simple "outrageousness" in favour of a test of subjective recklessness in respect of exemplary damages for negligence.[28] Indeed, McGrath J specifically couched the key element of the test in terms of a "mental element".[29]

This focus on state of mind flows from recognition that, given the lack of any compensatory orientation, it is the quality of the conduct as opposed to the extent of the loss that is the appropriate determinant. But as the Chief Justice forcibly argued,[30] such a conduct-focused approach does not necessitate a state of mind-focused approach: the fact that the "outrageous" conduct giving rise to exemplary damages can occur outside the confines of the elements of the cause of action, and so independently of consciousness of breach of a duty of care,[31] puts the lie to such a false necessity. Reference could also be made to the not insignificant areas of criminal liability whose mental requirements, namely gross negligence, negligence simpliciter, and strict and absolute liability, sit below that of subjective recklessness.

Other arguments proffered in support of the majority were more convincing. The need for an objectively certain test is a legitimate counterweight to the risk of "sap[ping] the vitality of the exemplary principle"[32] to a certain extent.[33] Justice Blanchard also gives compelling analysis of the effect of a purely outrageousness-based test on the insurance landscape,[34] and is the only judge to engage substantively with analysis of the interaction of the different tests for exemplary damages and the end of deterrence.[35] The case for a subjective test in relation to the latter is put convincingly in relation to individuals, but is unfortunately silent on

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24 Tipping J at [95] expressly rejects the wide gamut of purposes of exemplary damages set out in *Daniels v Thompson* [1998] 3 NZLR 22 (CA) and *Bottrill v A* [2001] 3 NZLR 622 (CA) per Thomas J, while admitting at [114] that such things as appeasement and vindication are "undoubtedly conventional underpinnings of tort law generally".

25 In particular with Blanchard J at [59].

26 Ibid, at [1].

27 Ibid, at [11].

28 See at [150] per Tipping J, [239] per McGrath J and [254] per Wilson J.

29 Ibid, at [239].

30 Ibid, at [23]–[27].

31 Ibid, at [26].

32 Ibid, at [4] per Elias CJ.

33 See Tipping J at [112] and [149] and McGrath J at [243].

34 Ibid, at [67].

35 Ibid, at [60]–[61].

deterrence in cases of 'systemic failure', where the behavioural effects that need to be considered may be quite different.

In the result, however, the preference of the majority did not make any difference in this appeal, and, as adverted to by several of the judges, is not likely to in many, if any, others.[36] Perhaps the last word on the issue should be given to minority of the Privy Council in *Bottrill*, and the very pragmatic recognition that gross negligence may well lead to an inference, even if not supported by direct evidence, of subjective advertence.[37] Accordingly, in cases of sufficiently outrageous, contumelious or high-handed conduct that truly calls out for an exemplary award, courts in the future may not in reality be constrained at all: the path taken may have been redirected by the Supreme Court, but the result in any given fact situation will likely remain unchanged.

VI CONCLUSION

Two general observations on the *Couch* decision are offered by way of conclusion. The marked contrast between the judgments regarding its two major areas of significance — exemplary damages and departing from New Zealand Privy Council precedent — is a fine example of the vitality given the common law by the institution of the strong dissenting judgment. Insofar as concerns could be expressed regarding a perceived waning of the occurrence of such judgments in New Zealand, this feature of the decision is very much to be welcomed.

In a more enduring vein, however, it is hoped that the position of the decision as something of a milestone along the road of New Zealand's judicial history is not forgotten. In 1904, Sir Robert Stout, then in the 6th of what would become a 26-year term as New Zealand's longest serving Chief Justice, responded to the suggestion that a colonial judiciary should not be elevated to the position of final appellate court because of potential lack of ability or learning in the following memorable way:[38]

> Did we ever see a child learning to walk? ... It tried, and tried again to go alone, and it had many falls before it succeeded. We cannot expect a young nation to be equal to one which has centuries of civilization behind it, and whose institutions are old and deemed sacred. But is the young nation never to go alone? Is it always to be under tutelage?

36 See Elias CJ at [24] and McGrath J at [230].

37 *Bottrill* (PC), above n 5, at [76] per Lords Hutton and Millett.

38 Robert Stout "Appellate Tribunals for the Colonies" (1904) 2 Commonwealth Law Review 3 at 7.

The Supreme Court's decision in *Couch*, as well as being of importance for its contribution to the common law of damages in New Zealand, should be remembered as a resounding response to this question, and, coming almost simultaneously with its settling into a permanent home, a sure indication that, 105 years after Sir Robert was advocating reform, the Court has come of age.

Judicial Bias: Saxmere Co Ltd v Wool Board Disestablishment Co Ltd

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I INTRODUCTION

A routine judicial appointment to the New Zealand Court of Appeal effective from February 2007 could, at that time, scarcely have been seen as the beginning of a series of legal and constitutional firsts. Yet, some three years later — having been elevated to the Supreme Court in the interim — Justice Bill Wilson has been mired in allegations of bias relating to his financial involvement with counsel appearing before him in the Court of Appeal. In *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* (*Saxmere (No 1)*) and *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* (*Saxmere (No 2)*), the Supreme Court confirmed the test for apparent bias, formed different conclusions on the facts as they emerged and took the highly unusual step of recalling one of its own judgments in the interests of justice.[1] One commentator has already labelled *Saxmere (No 1)* a "landmark" decision.[2] The *Saxmere* saga has seen the New Zealand Supreme Court pass judgement on one of its own members' conduct and has initiated the appointment of a Judicial Conduct Panel for the first time. Intense media interest and editorialising have compounded an already extraordinary event.[3] Although allegations of judicial bias are not unknown to the New Zealand legal system, the wider implications and subsequent developments arising from this case, traversed below, have elevated the *Saxmere* saga into a class of its own.

II *SAXMERE (NO 1)*

The Saxmere interests (Saxmere), which marketed Merino wool, sued the Wool Board Disestablishment Co Ltd (the Wool Board), successor to

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1 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 [*Saxmere (No 1)*]; *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 [*Saxmere (No 2)*].

2 Andrew Beck "Bias and Recall" [2010] NZLJ 97.

3 See for example Editorial "Judicial ethics" [2010] NZLJ 121; Phil Taylor "Pressure on judge to quit" *The New Zealand Herald* (New Zealand, 10 April 2010) <www.nzherald.co.nz>; Editorial "Judges should make business interests public" *The New Zealand Herald* (New Zealand, 3 May 2010) <www.nzherald.co.nz>.

the New Zealand Wool Board, for refusing to provide it with marketing subsidies. The High Court found that the Wool Board had acted negligently and breached its statutory duty.[4] The Court of Appeal, comprised of William Young P, Glazebrook and Wilson JJ, unanimously overturned the High Court decision.[5] Saxmere unsuccessfully applied for leave to appeal to the Supreme Court.[6] Having exhausted its substantive appeal options, Saxmere then appealed to the Supreme Court on the basis that the Wool Board's lead counsel in the Court of Appeal, Alan Galbraith QC (a senior member of the independent Bar), was in a long-standing friendship and financial relationship with Justice Wilson. Leave was granted to appeal to the Supreme Court on the question of bias.[7] The Supreme Court, comprised of its four permanent members and Anderson J,[8] unanimously rejected the appeal, failing to find a case for apparent bias.[9]

At issue for the Supreme Court was the correct legal test for determining apparent bias (as distinct from presumptive bias). The Court of Appeal had settled the conflicting authorities on apparent bias in 2007 in *Muir v Commissioner of Inland Revenue*, which harmonised the New Zealand law with that in Australia and the United Kingdom.[10] The two-stage test postulated in *Muir* requires the court to:[11]

> (a) establish the actual circumstances that have a direct bearing on the suggestion that the judge was or may be seen to be biased; and
> (b) ask whether these factual circumstances might lead a fair-minded lay observer to apprehend reasonably that the judge might not bring an impartial mind to the resolution of the instant case.

Blanchard J adopted this formulation in *Saxmere (No 1)*, while also endorsing the almost identical two-stage test from the leading Australian authority, *Ebner v Official Trustee in Bankruptcy*.[12]

McGrath J's detailed exposition of the tests for apparent bias throughout Commonwealth jurisdictions is instructive.[13] While the test is a "real possibility of bias" in England, and a "reasonable apprehension of bias" in Australia, the difference between these two formulations is semantic.[14]

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4 See *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* HC Wellington CIV-2003-485-2724, 6 December 2005.

5 *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2007] NZCA 349.

6 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2007] NZSC 88.

7 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2008] NZSC 94.

8 Sir Noel Anderson, who has retired as a full-time member of the Supreme Court, now sits from time to time as an acting judge.

9 See *Saxmere No 1*, above n 1.

10 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495.

11 Ibid, at [62] per Hammond J.

12 *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63, (2000) 205 CLR 337 [*Ebner*]. See *Saxmere (No 1)*, above n 1, at [3].

13 See *Saxmere (No 1)*, above n 1, at [55]–[94].

14 Ibid, at [76].

Like Blanchard J, McGrath J endorsed the test as formulated in *Ebner*, noting that establishing the mere existence of an association between counsel and a judge is, in itself, insufficient.[15] The crucial factor is a clearly articulated connection between the association or the circumstances that give rise to a concern about impartiality, and the reasonable apprehension of bias that the observer finds as a result.[16] While the test is one of a *possibility* of bias, rather than a *probability*, a vague unease or disquiet about the judge will not satisfy the threshold.[17] It is interesting to note that the Supreme Court of Canada's approach to judicial bias employs a presumption of impartiality; in *RDS v R*, L'Heureux-Dubé and McLachlin JJ noted that this presumption has "considerable weight".[18] A presumption of impartiality is not explicitly adopted in *Saxmere (No 1)*, but it is consistent with the burden of proof; the party alleging the circumstances that give rise to a reasonable apprehension of bias must prove this is the case.[19] While the 'fair-minded lay observer' might appear to be the ubiquitous reasonable person, the lay observer is a different creature. Blanchard J noted that the fair-minded lay observer is intelligent, capable of viewing matters objectively, neither unduly sensitive nor suspicious, a non-lawyer but nonetheless well-informed about the workings of the judicial system, and knowledgeable about the issues in the case and the facts which are said to give rise to apparent bias.[20] Tipping J stated that the lay observer is informed of all the relevant circumstances necessary to form a reasonable apprehension of bias, but cannot be expected to be "fully" informed of particular matters in respect of which an understanding requires legal expertise.[21]

A crucial factual question was whether Justice Wilson was "beholden" to Mr Galbraith as a result of their mutual business activities, which could have created unconscious bias on the part of Justice Wilson towards the party represented by Mr Galbraith.[22] The Judge and Mr Galbraith had long been personal friends, and jointly owned Rich Hill Limited (RHL), an investment vehicle for rural land thoroughbred horse breeding. Prior to the Court of Appeal hearing, Justice Wilson had orally disclosed the fact of his business relationship with Mr Galbraith to Saxmere's counsel, but not the extent of their activities.[23] Examining the facts as they were then known, Blanchard J concluded crucially that, on the evidence before the Court, there was nothing to indicate that Justice Wilson was indebted to counsel.[24] Accordingly, there was no link between either the personal friendship or the business association and Justice Wilson's ability to bring an impartial

15 Ibid, at [93].
16 Ibid.
17 Ibid, at [94].
18 *RDS v R* [1997] 3 SCR 484 at [32].
19 *Saxmere (No 1)*, above n 1, at [94].
20 Ibid, at [5].
21 Ibid, at [39] per Tipping J.
22 Ibid, at [25] per Blanchard J.
23 Ibid, at [17]–[18].
24 Ibid, at [25].

mind to the questions to be decided — that is, the second stage of the *Muir* test was not satisfied.[25] McGrath J agreed: there was no evidence to prove that the associations between Mr Galbraith and Justice Wilson would divert the judge from deciding the case on its merits.[26] While Justice Wilson's pre-hearing disclosure was less than exemplary, the lack of specificity in his disclosure did not support Saxmere's contention of apparent bias.[27] In separate judgments, Tipping, Gault and Anderson JJ concurred with the legal and factual conclusions of Blanchard and McGrath JJ.

III *SAXMERE* REDUX

With the legal test for apparent bias now consistent with other Commonwealth jurisdictions and no successful finding of apparent bias on the part of Justice Wilson, *Saxmere* appeared to have reached its dénouement. However, this was not to be. In the months following the first judgment, it transpired that the nature of Justice Wilson and Mr Galbraith's relationship was in fact more extensive than what Justice Wilson had previously intimated. On the basis of this revelation, Saxmere applied for recall of the first judgment.[28] At the time of *Saxmere (No 1)*, it appeared that Justice Wilson's financial involvement with Mr Galbraith in RHL was in the nature of a roughly equal partnership in a passive investment vehicle. However, further disclosures by Justice Wilson, following the first Supreme Court judgment, changed the situation. As at 31 March 2007, shortly before the disputed Court of Appeal hearing, the financial position of RHL was such that, due to Mr Galbraith advancing more funds to the company than Justice Wilson, there was an imbalance in their shareholder accounts.[29] The effect of this was that Justice Wilson was 'beholden' to Mr Galbraith to the amount of $74,249 (or $242,804, if the fact that Justice Wilson had not made any repayments of the company's bank loan for which he had assumed exclusive responsibility was taken into account).[30] The Supreme Court held that this imbalance was well above the level of indebtedness from Judge to counsel that could be regarded as "so minimal as to be immaterial".[31] Additionally, RHL was about to finalise a financed land purchase, which would require "mutual cooperation" between the Judge and Mr Galbraith to finance and complete the transaction.[32]

The recall of a judgment is itself remarkable. Under the High Court

25 Ibid, at [30].
26 Ibid, at [117] per McGrath J.
27 Ibid, at [33] and [114].
28 See *Saxmere (No 2)*, above n 1, at [1].
29 Ibid, at [16].
30 Ibid.
31 Ibid, at [17].
32 Ibid, at [18].

Rules, r 11.9, a judge may recall a judgment given orally or in writing, at any time before a formal record of it is drawn up and sealed. Although there is no statutory provision enabling the Supreme Court to recall its own judgment, the Court exercised its inherent power to do so without hesitation. The High Court Rules do not provide grounds justifying recall; accordingly, the courts have developed three main reasons for recall:[33]

(a) where there has been a legislative change or a new judicial decision of relevance and high authority since the hearing;
(b) where counsel failed to bring a legislative provision or authoritative decision of plain relevance to the Court's attention; or
(c) where, for some other very special reason, justice requires recall of the judgment.

The legal effect of a court recalling one of its own judgments is to render that judgment of no effect; a recall means that the judgment was never issued. What, then, is the effect of the recall of *Saxmere (No 1)* on the Supreme Court's clarification of the test for apparent bias in that judgment? In *Saxmere (No 2)* the Court stated that the judgment is to be read "in conjunction" with the recalled first judgment.[34] One commentator has expressed dissatisfaction with the fact that a decision of such significance only makes sense by reference to another judgment that is now a legal nullity, and issued by a differently comprised Supreme Court.[35] This concern notwithstanding, it appears for practical purposes that the clarification of the legal test in *Saxmere (No 1)* stands.

Applying the test for apparent bias, adopted in its first judgment, to the facts now known, the Court held that the true nature and extent of the financial relationship between Justice Wilson and Mr Galbraith *would* raise doubt in the mind of the informed lay observer as to whether the Judge would bring an impartial mind to the instant case.[36] If Justice Wilson had disclosed the more active nature and extent of the business relationship before the Court of Appeal hearing, a case of apparent bias would have been made out.[37] In light of the now-revealed actual nature of his Honour's relationship with Mr Galbraith, the Supreme Court was led to the inexorable conclusion that the threshold for apparent bias had been met. These circumstances constituted the "very special reason" why justice required recall of the Court's first judgment, and the setting aside of

33 *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (HC) at 633 per Wild CJ.
34 *Saxmere (No 2)*, above n 1, at [1].
35 Beck, above n 2, at 99.
36 *Saxmere (No 2)*, above n 1, at [18].
37 Ibid, at [19].

the orders made therein.[38] The substantive proceedings were reheard by a differently constituted Court of Appeal in June 2010.[39]

IV JUDICIAL CONDUCT COMMISSIONER

While the substantive *Saxmere* litigation has been re-litigated in the Court of Appeal, attention has turned to the investigation of Justice Wilson's conduct by the Judicial Conduct Commissioner (the Commissioner), and his recommendation to appoint a Judicial Conduct Panel (the Panel).[40] The Commissioner's preliminary investigation arose from three complaints: one from the Saxmere interests; one from an anonymous complainant; and another from former Court of Appeal and acting Supreme Court Justice, Sir Edmund Thomas.[41] The Commissioner, Sir David Gascoigne, concluded that aspects of Justice Wilson's conduct prior to the first Supreme Court judgment raised unresolved questions of fact; these related to the strict and prompt disclosure requirements, and the differing accounts of Justice Wilson and Mr Galbraith.[42] Furthermore, the extent to which Justice Wilson was responsible for the Supreme Court being under a "significant misapprehension" as to the nature and finances of RHL, at the time of its first judgment, is contestable.[43] Accordingly, a full inquiry into Justice Wilson's conduct was justified.[44]

If the Panel recommends that the Attorney-General should commence proceedings for the removal of Justice Wilson, this can only be done through a parliamentary process instigated by the Attorney-General.[45] The power to recommend parliamentary proceedings for removal of a judge is the Panel's only disciplinary power. Consequently, unlawful or inappropriate judicial action that does not warrant removal from office cannot be sanctioned in any meaningful way.[46] Harris suggests that being confronted with this process — a complaint to the Commissioner, direction from the Head of the Bench, and being required to explain their conduct — is likely sufficient to prompt introspection and behaviour modification by

38 Ibid.

39 *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* (CA784/2009, Hammond, Chambers, Ellen France JJ, hearing 30 June, 1 July 2010).

40 See Judith Collins "Judicial Conduct Panel to be appointed" (press release, 31 May 2010) <www.beehive.govt.nz>. Hon Judith Collins MP (Acting Attorney-General) assumed Attorney-General responsibilities in respect of the Commissioner and the Panel in this instance because Justice Wilson and the Attorney-General, Hon Christopher Finlayson MP, were partners in Bell Gully (Wellington) simultaneously during the 1990s.

41 Sir David Gascoigne *Decision of the Judicial Conduct Commissioner as to Three Complaints Concerning Justice Wilson* (2010) <www.jcc.govt.nz>.

42 Ibid, at [134].

43 Ibid.

44 Ibid, at [135].

45 Constitution Act 1986, s 23.

46 B V Harris "Remedies and Accountability for Unlawful Judicial Action in New Zealand: Could the Law be Tidier?" [2008] NZ Law Review 483 at 507.

the errant judge.[47] While this is most likely true, the aggrieved complainant may feel that such actions amount to no justice at all.

The Panel was due to conduct its inquiry, with a mandatory public hearing, in late 2010.[48] But in June 2010, in yet another unprecedented move, Justice Wilson's lawyers commenced judicial review of the Commissioner's recommendation to appoint a Panel under s 18 of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (the Act), on the ground that the Commissioner's recommendation was in error of law. The proceedings also sought judicial review of the Acting Attorney-General's decision to appoint a Panel under s 21 of the Act, on the basis that this decision was, consequently, also in error of law.[49] The exercise of the Commissioner's power to recommend the appointment of a Panel under s 18 of the Act is an exercise of a discretionary statutory power for the purposes of s 4 of the Judicature Amendment Act 1972.

V CONCLUSION

The *Saxmere* saga has seen many firsts for New Zealand's legal system, and has highlighted the often close connections between Bench and Bar. This phenomenon is unavoidable in a small country such as New Zealand. As the Supreme Court emphasised in *Saxmere (No 2)*, such relationships should not be discouraged per se. However, there must be vigilance where counsel in appellate cases are well-known to, or personally or financially connected with, members of the Bench. The *Saxmere* saga has arisen largely due to Justice Wilson's inadequate disclosures about his involvement with counsel with whom he had an ongoing business relationship. To borrow Hammond J's extrajudicial description of inadequate judicial disclosure in other cases, Justice Wilson's disclosures were arguably "so minimalist as to be misleading".[50] While judges are understandably reluctant to give litigants comprehensive disclosures with which the litigants may then attack them,[51] the overriding concern must be the integrity of litigation and the impartiality of the judiciary. As Hammond J has noted in another context, "[j]udges have a duty of candour here".[52]

Saxmere has drawn attention to the prevalence of personal and financial relationships between Bench and Bar, and the concomitant potential for allegations of judicial bias by unsuccessful litigants. Public confidence in the judiciary is contingent on judges being seen as absolutely

47 Ibid, at 508.

48 Mary Nixon "Notice of Hearing" (press release, 2010) <www.justice.govt.nz>.

49 See Phil Taylor "Judge challenges legality of inquiry into his conduct" *The New Zealand Herald* (New Zealand, 1 June 2010) <www.nzherald.co.nz>.

50 Grant Hammond *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, Oxford, 2009) at 90.

51 This concern is illustrated by *Churchill Group Holdings Ltd v Aral Property Holdings Ltd* [2010] NZCA 335.

52 Hammond, above n 51, at 90.

impartial and abiding by the highest ethical standards. Although the existence of conduct warranting the appointment of a Judicial Conduct Panel is lamentable, the Commissioner and Panel ensure that the judicial oath to "do right to all manner of people after the laws and usages of New Zealand without fear or favour, affection or ill will" is more than rhetoric.[53] Regardless of the outcome of the judicial review and Panel hearing, the events of the past year have shed much light on the law and process surrounding judicial bias.

VI POSTSCRIPT

Shortly before going to print, Justice Wilson succeeded in his judicial review of the Commissioner's recommendation to the Acting Attorney-General to appoint a Panel. While agreeing that Justice Wilson's alleged misconduct passed the threshold of conduct warranting further investigation, a full bench of the High Court held that the Commissioner's report recommending the appointment of a Panel was inadequate in the degree of specificity about the aspects of Justice Wilson's conduct into which the Panel was to inquire.[54] The Commissioner was instructed to revisit the complaints and specify the particular conduct that warrants investigation by the Panel in accordance with the requirements of the Act.[55] Once again, the *Saxmere* saga has taken another twist, shedding more light on the law and the necessarily exacting process that must be followed in these circumstances.

VII THE CLOSING CHAPTER?

Hours before the final draft of this journal was sent to the printers, Justice Wilson resigned. This would seem to be the closing chapter in this saga. No doubt, however, those in the legal community will muse over this series of events for many months. This saga's significance may only be fully realised with the passage of time.

53 Oaths and Declarations Act 1957, s 18.

54 *Wilson v Attorney-General & Ors* HC Wellington CIV-2010-485-001147, 28 September 2010.

55 Ibid, at [147].

Commerce Commission v Telecom Corp of New Zealand Ltd

RACHEL MCMASTER*

I INTRODUCTION

In *Commerce Commission v Telecom Corp of New Zealand Ltd* (*Telecom* (SC)),[1] the Supreme Court clarified New Zealand's position on abuse of market power. The case was closely followed by the profession, due to indications that the Court would use the opportunity to reform this area of competition law. In the event, however, Blanchard and Tipping JJ delivered a commercially sensitive judgment upholding existing New Zealand authorities. The counterfactual test is now confirmed as the correct approach to assessing allegations of market power under s 36 of the Commerce Act 1986.

II BACKGROUND

The case arose from events that took place in the early 1990s. Throughout that period, Telecom enjoyed significant competitive advantages as a result of its status as a newly privatised entity. The first firm to challenge Telecom's dominant position was Clear Communications Limited (Clear). In 1994, the two firms negotiated an interconnection agreement setting out the terms on which each could access the other's network. Under this agreement, whenever a customer of one party placed a call to the other, the originating provider incurred a 'termination' fee. Due to the size differential between the two firms, the sum Clear paid in such fees was initially much greater than that paid by Telecom.

This equilibrium was disrupted, however, by the growth of the dial-up internet market. Under a dial-up system, internet usage presents as a voice call. Given the nature of internet access, these calls were often long in duration. While Telecom continued to dominate the market for residential consumers during this period, Clear attracted a number of new Internet Service Providers (ISPs). When those ISPs sold internet time to Telecom consumers, this substantially increased both the volume and the duration of voice calls terminating on Clear's network. Telecom's termination bill rose

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1 *Commerce Commission v Telecom Corp of New Zealand Ltd* [2010] NZSC 111 [*Telecom* (SC)].

accordingly, and eventually came to surpass that paid by Clear. Telecom became increasingly concerned over these costs, and also over increased congestion on its network as a result of higher traffic.

In order to address these concerns, Telecom instituted what has become known as 'the 0867 package'. Under this arrangement Telecom introduced charges for consumer internet calls. These charges were avoidable, however, if consumers placed their calls on a new network — the 0867 network. This network was declared to be outside previous industry agreements and therefore not subject to termination charges. In the result, the 0867 network became very attractive to both consumers and ISPs. Clear lost the additional termination revenue it had received by hosting the ISPs.

The Commerce Commission alleged that Telecom's conduct in introducing the 0867 package constituted a violation of s 36 of the Commerce Act. Both the High Court[2] and the Court of Appeal[3] applied the counterfactual test, as they were bound to do by *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* (*Carter Holt*).[4] Each court concluded that Telecom's actions were not in breach of s 36.

III SECTION 36: ABUSE OF MARKET POWER

At the time of the above events, s 36 of the Commerce Act 1986 was as follows:

> (1) No person who has a dominant position in a market shall use that position for the purpose of —
>
> (a) Restricting the entry of any person into that or any other market; or
>
> (b) Preventing or deterring any person from engaging in competitive conduct in that or any other market; or
>
> (c) Eliminating any person from that or any other market.

2 *Commerce Commission v Telecom Corp of New Zealand Ltd* (2008) 12 TCLR 168 (HC).

3 *Commerce Commission v Telecom Corp of New Zealand Ltd* [2009] NZCA 338, (2009) 12 TCLR 457 [*Telecom* (CA)].

4 *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2004] UKPC 37, [2006] 1 NZLR 145 [*Carter Holt*].

This section was subsequently modified in 2001. The section now states that:

> (2) A person that has a *substantial degree of power* in a market *must not take advantage* of that power ... (emphasis added).

The remainder of the section remains substantially unchanged.

Prior to *Telecom* (SC), there was some uncertainty as to the effect of this alteration.[5] The Supreme Court expressly addressed this issue at [1]. The Court rejected the notion that either the change from "dominant" to "substantial" or from "use" to "advantageous use" materially affected the meaning of the section. Rather, the terms were deemed to be synonymous. From this it can be inferred that their Honours interpreted the legislative changes as being for the purposes of simplification and clarification only. While dealt with briefly, this constitutes an important point of judicial clarification.

IV INTERPRETATION OF SECTION 36

At issue in *Telecom* (SC) was the correct interpretation of the s 36 test. In brief, prior to this case, uncertainty had arisen as to the scope of the appropriate test (or tests) open to the courts in applying s 36. The situation was complicated by the existence of potentially conflicting Australian case law and by the lack of Supreme Court jurisprudence in the area of competition law.

The Counterfactual Test

A series of Australian and New Zealand cases had previously endorsed the 'counterfactual' test as the correct approach to identifying breaches of market power. Under this test, the court is tasked with considering whether the actions of a dominant firm would have been possible if the firm had not held market power. If this can be answered in the affirmative, it follows that the firm's dominance did not enable their act and therefore that liability under s 36 would be inappropriate.

The test is generally expressed as a comparison of the 'factual' with the 'counterfactual'. In assessing the 'counterfactual', the court must model a market in which the dominant firm is stripped of its market power. The degree to which this is both practical and possible has been the subject of much debate in case law and academia. *Telecom* (SC) canvassed these authorities in depth.

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5 See *Commerce Commission v Bay of Plenty Electricity Ltd* [2008] NZLJ 273 at [283]–[304].

New Zealand Authorities

Carter Holt constituted the previous New Zealand authority on the correct interpretation of s 36.[6] The case was significant as the Privy Council had rejected the reasoning that had been prevalent in the Court of Appeal and High Court. The alleged breach arose out of Carter Holt's decision to offer a 'two for one' deal to consumers on a new insulation product. The Commerce Commission claimed this constituted an abuse of market power, as it was calculated to drive Carter Holt's rival from the market. Both the High Court and Court of Appeal declined to follow the counterfactual test, adopting instead a broad 'common sense' test for s 36. Both courts concluded that Carter Holt's actions constituted a breach of s 36.

The Privy Council's judgment constituted a strong rejoinder to the lower courts. The importance of the counterfactual test was strongly emphasised. In particular, their Lordships stressed the fundamental importance of allowing those firms with market power to compete as far as this was possible without damaging the competitive process.[7] To this end, they held that the counterfactual test represented the best possible method of identifying the point at which aggressive competition becomes an abuse of market power. It should be noted, however, that the minority (comprising Lord Scott and Baroness Hale) rejected this approach as "wholly unreal", favouring in the alternative a broad "economic reality" test.[8]

Australian Authorities

The Australian authorities in this area have been the subject of debate. While the case law supports the counterfactual test, the application of this test has, at times, proved variable. In *Telecom* (SC), the Supreme Court addressed these authorities.

In both *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd*[9] and *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*,[10] the High Court of Australia endorsed the counterfactual test. New Zealand's Supreme Court favourably discussed the reasoning in each case. In particular, *Melway*'s note of caution regarding the danger of "proceed[ing] too quickly from a finding of anticompetitive purpose to a conclusion about taking advantage or use" found favour with their Honours.[11]

Australian authorities offer conflicting evidence, however, on the application of the counterfactual test. *NT Power Generation Pty Ltd v Power and Water Authority* adopted a 'direct observation' approach that appeared to give the courts scope to deviate from a 'strict' counterfactual

6 *Carter Holt*, above n 4.

7 Ibid, at [66].

8 Ibid, at [81].

9 *Queensland Wire Industries Pty Ltd v Broken Hill Pty Ltd* [1989] HCA, (1989) 167 CLR 177.

10 *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13, (2001) 205 CLR 1.

11 *Telecom* (SC), above n 1, at [19].

test.[12] Likewise, it is possible to interpret *Melway* as adopting a more relaxed 'material facilitation' test. These cases have led some, including the Commerce Commission in *Telecom* (SC), to argue that the courts should have flexibility in choosing which form of analysis is appropriate in the circumstances.

Underlying this line of cases is a more general concern that the counterfactual test is overly complicated and insufficiently grounded in commercial realities. Detractors claim that requiring courts to construct a hypothetical competitive market is both time-consuming and overly open to judicial interpretation. Allowing scope for alternative interpretations, it is argued, may go some way towards assuaging these concerns.

In *Telecom* (CA), Hammond J raised similar concerns. In that judgment, his Honour indicated his discontent in applying a test he deemed to be "distinctly unrealistic".[13] Given these Australian authorities, Hammond J's comments, and the dissenting judgment in *Carter Holt*, the Supreme Court's decision was the subject of anticipation.

Adoption by the Supreme Court

In *Telecom* (SC), the Court strongly endorsed the counterfactual test. Underlying the decision was a perceived need to provide "an approach which gives firms and their advisers a reasonable basis for predicting in advance"[14] the risks associated with their behaviour. This desire for certainty led the Court to reject the notion of multiple tests. Instead, Blanchard and Tipping JJ endorsed the standard counterfactual test as set out in *Carter Holt*.

V APPLICATION OF SECTION 36

The Supreme Court's application of the counterfactual test provides a clear model for future courts. Blanchard and Tipping JJ set out in detail the characteristics of a hypothetical non-dominant Telecom. This position is to be modelled "by stripping out or neutralising the features which gave rise to the dominance in the actual market".[15] Crucially, their Honours emphasised that those features of Telecom that did not give rise to dominance should not be altered in the hypothetical model. This observation is likely to go some way towards relieving the inherent unreality of the counterfactual process. The counterfactual model as expressed in *Telecom* (SC) does *not* require the creation of an entirely imaginary market; rather, future courts should

12 *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48, (2004) 219 CLR 90.

13 *Telecom* (CA), above n 3, at [47].

14 *Telecom* (SC), above n 1, at [30].

15 Ibid, at [38].

view themselves as tasked with stripping away those factors contributing to dominance and examining what remains.

The Supreme Court held that Telecom's dominance arose from its ownership of the underlying public switched telephone network (PSTN). In a hypothetically competitive market, it was held that at least one other non-dominant company would own a similar network. Thus, the appropriate counterfactual scenario was deemed to be one in which both Telecom and Clear held access to PSTN networks. The Court did not alter those features deemed not to contribute to market dominance, such as the existence of agreements regarding termination charges.

The Court then examined the capability of the hypothetical non-dominant Telecom to introduce the 0867 policy. While the advice of expert economists assisted with analysis of likely outcomes, the Court was careful to stress that the ultimate question is one of "rational commercial judgment".[16] Ultimately, the Commerce Commission was found not to have proved on the balance of probabilities that a non-dominant Telecom would not have instituted this policy. Therefore the Commission's appeal failed.

VI CONCLUSION

The counterfactual test is undoubtedly an imperfect measure. The inherent difficulty of basing analysis upon hypothetical markets is only exemplified by the complex commercial context of many competition cases. Nevertheless, the standard counterfactual test remains the best means of applying s 36. It must be remembered that the legislature intended only *abuses* of market power to be caught under that section. Only the counterfactual test provides a clear differentiation between aggressive competition and abuse. For this reason, to vary the counterfactual test would be to include uses of market power that fell short of that standard.

Concerns have been raised that the counterfactual test creates unduly high barriers to success for the Commerce Commission in s 36 cases. This matter is properly recognised as an issue of policy: it would be inappropriate for courts to extend a statutory provision merely because of perceived difficulties for the regulator. Given these concerns, however, it should be expected that this area of law will be subject to review in the near future.

16 Ibid, at [35].